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THE
Southwestern Reporter.
VOLUME X.

GOEBEL v. PUGH.

(*Court of Appeals of Kentucky.* December 15, 1888.)

TRIAL—VERDICT—DIRECTIONS AS TO FORM.

In ejectment, the jury having rendered a verdict for "the amount or quantity of ground claimed," it is proper to direct plaintiff's attorney to formulate the verdict, setting out the land by metes and bounds; the same being signed by the foreman, read to the jury, and declared by them to be their verdict.

Appeal from circuit court, Kenton county; W. E. AUTHUR, Judge.

Ejectment by John B. Pugh against Michael Goebel. Judgment for plaintiff, and defendant appeals.

O'Hara & Bryan, for appellant. *Hallam & Meyers* and *Simmons & Schmidt*, for appellee.

BENNETT, J. The appellee brought an action of ejectment, in the Kenton circuit court, against the appellant, to recover a strip of ground lying in the city of Covington, about 21 inches wide and 50 feet long. The appellee did not rely upon a paper title deducible from the commonwealth, but relied upon an adverse possession under his deed of 15 years, as perfecting his title to said land. The jury having found for the appellee, and the court having overruled the appellant's motion for a new trial, and having rendered judgment in conformity to the verdict of the jury, the appellant has appealed to this court.

The appellant and appellee own adjoining lots, Nos. 3 and 4; the appellant owning the former, and the appellee the latter. The appellee's contention, which the jury sustained, is that the appellant, M. Goebel, in 1882, removed the division fence between them about 21 inches over on the appellee's land, and thereafter held and claimed said strip as his own. The appellant contends, which contention the jury rejected, that the removal of the fence to its location was upon the true dividing line between himself and the appellee. The appellee, A. J. Francis, ——— Pearce, M. Schreck, Mrs. Stronk, Joe Pugh, Ben Pugh, Mr. Stronk, Mr. Logennan, Edward Pugh, Daniel Pearce, Mr. Frety, Mr. Barnes, and Mr. Perkins prove one or more of the following facts: That the appellee purchased his lot in 1844, and shortly thereafter took possession of it; that in said year he and ——— Pearce, the owner of the lot now owned by the appellant, agreed upon the dividing line, and that the north side of the house is on said dividing line as was thus agreed upon; that a division fence was built shortly after said agreement upon the line agreed on by the appellee and said Pearce; that the appellee held the possession of his lot,

and claimed it as his own, for more than 15 years next before the removal of the fence, up to said fence; that the north wall of appellant's house was on said line, and the fence ran straight from the corner of the house to the stone wall, which the appellee built on his land; that about two feet of the south end of the wall had been removed in the last few years; that in 1876 the appellee swore, in a case between him and Gabker, that the north wall of his house was on the division line between him and the appellee. Each of the foregoing facts is sworn to positively by one or more of the above-named witnesses. The appellant and a few other witnesses swear to facts which, if uncontradicted, would establish the line at the place contended for by the appellant. The appellant also swears that he and the appellee, in 1882, agreed that the true line was at the place contended for by him, and he, pursuant to said agreement, and with the consent of the appellee, removed the fence, and set it where it now is. The appellee flatly contradicts this statement. The jury, after hearing the evidence, found for the appellee. We think that their finding was in accordance with the weight of the evidence. The exceptions taken to the instructions given at the instance of the appellee, are, as we understand, not seriously urged here; for the counsel for the appellant doubtless regard them, as we do, as a full and fair exposition of the law as applicable to the facts proven by the appellee. The same may be said in reference to the instructions given at the instance of the appellant.

The written verdict of the jury was: "We, the jury, find for the plaintiff the amount or quantity of ground claimed." The court, against the objections and exceptions of the appellant, directed the attorney for the appellee to formulate the verdict of the jury, which the counsel did by setting forth in writing the land in controversy by metes and bounds, which was signed by the foreman and read to the jury, and the jury thereupon declared it to be their verdict. It is not contended that the verdict, as formulated by the attorney, embraced more or less land than was embraced by the verdict of the jury; and the formulation occurred in open court, and in the presence of the jury, and they sanctioned it in open court. It is to be presumed that they, as intelligent men, understood whether or not the verdict as formulated included more or less land than they intended the appellee to recover; and, if it did, they, as honest men, would not sanction it. Also, if the court had received their verdict as it was originally returned, and admitted to record, it will not be questioned that by any satisfactory *indicia* contained in the record fixing the boundary of the land in dispute, and in accordance with which it appeared that the jury acted in fixing the quantity that the party was entitled to recover, the court could have formulated said verdict in the judgment. Instead, however, the court directed the attorney to formulate it by satisfactory *indicia* contained in the record, in the presence of the jury, which formulation was sanctioned by the jury as having been done in accordance with their finding. We think that either way of formulating the verdict is equivalent to the other; the difference, if any, being in favor of the latter, as it has the express sanction of the jury, and either way is valid. The judgment is affirmed.

CITY OF NEWPORT v. RINGO'S EX'X.

(Court of Appeals of Kentucky. December 6, 1888.)

1. TAXATION—ERRONEOUS—RECOVERY OF TAX PAID UNDER MISTAKE.

Taxes paid under the belief that the assessment and collection were legal, when in fact they were unauthorized by law, may be recovered back.

2. MUNICIPAL CORPORATION—TAXATION—CHOSES IN ACTION.

Under act Ky. Feb. 17, 1874, § 7, amending the charter of the city of Newport, and conferring power upon the city "to cause to be annually levied, collected, and paid into the city treasury an *ad valorem* tax on the real, personal, and mixed estate within the limits of said city subject to taxation by the city under the laws of the

state," the city may assess and collect taxes on choses in action on non-residents, and stock in corporations existing elsewhere, the title to which is in a resident of the city.

Appeal from circuit court, Campbell county; W. E. AUTHUR, Judge.

Action by William Ringo's executrix against the city of Newport to recover taxes paid to defendant on its demand in ignorance of the fact that defendant had no right to levy or collect said tax. Judgment for plaintiff. Defendant appeals.

E. W. Hawkins, for appellant. C. J. Helm, for appellees.

HOLT, J. The appellee sues to recover taxes paid by her to the appellant upon its demand, the assessment and collection of which she avers were unauthorized by law, but not then known to be so by her. The property upon which they were assessed consisted of choses in action upon non-residents of the city, and stocks in corporations existing elsewhere. The city charter, by way of compulsion, provides a penalty for default of payment by a certain time. It is too well settled in this state to need the citation of authority, that if money be paid through a clear mistake of law or fact, essentially affecting the rights of the parties, and which in law or conscience was not payable, and should not be retained by the party receiving it, it may be recovered. Both law and sound morality so dictate. Especially should this be the rule as to illegal taxation. The tax-payer has no voice in the imposition of the burden. He has the right to presume that the taxing power has been lawfully exercised. He should not be required to know more than those in authority over him, nor should he suffer loss by complying with what he *bona fide* believes to be his duty as a good citizen. Upon the contrary, he should be prompted to its ready performance by refunding to him any illegal exaction, paid by him in ignorance of its illegality; and certainly in such a case, if he be subject to a penalty for non-payment, his compliance under a belief of its legality, and without awaiting a resort to judicial proceedings, should not be regarded in law as so far voluntary as to affect his right of recovery.

The appellee having the right to sue, the first question to be considered is whether the city had the power to assess and collect these taxes. If so, it is decisive of the case, and consideration of the other questions presented is unnecessary. The act of February 17, 1874, revisory and amendatory of its charter, provides: "Sec. 7. Said board shall also have power to cause to be annually levied, collected, and paid into the city treasury an *ad valorem* tax on the real, personal, and mixed estate within the limits of said city, subject to taxation by the city, under the laws of the state, except as hereinafter provided. Said tax shall not exceed two dollars on each one hundred dollars valuation, at a fair cash value upon every class or description of property." "Sec. 32. He [the assessor] shall, as soon as practicable after the 10th day of January in each year, in a fair and impartial manner, assess at a fair cash value all property in said city subject to taxation under the provisions of this charter and the laws of the state." It is contended by the appellee that the term "personal estate" does not embrace property such as was assessed in this instance, but must be confined in its operation to such as is visible. The justice or policy of the grant of power, whether thus confined or not, is not for our consideration. We are to determine what power the legislature has in fact seen proper to confer. If the charter does embrace such property, then the fact that it speaks of such as is "within the limits of said city" does not exempt this property from taxation, because the title was in the appellee, who resided in the city, thus fixing its legal *situs* there. Property of this character follows the person of the creditor, and its locality in law is his domicile. *Mobilia sequenter personam*. The counsel for the appellee claims that his view is supported by the cases of *Johnson v. City of Lexington*, 14 B. Mon. 521; *City of Covington v. Powell*, 2 Metc. (Ky.) 226, and *City of Louisville*

v. *Henning*, 1 Bush, 381. In the first-named case it was held that the power "to assess, levy, and collect taxes on such real and personal estate as they may designate," did not embrace money, debts, and choses in action belonging to the inhabitants of the city of Lexington. Its charter was passed in 1831. Taxation of such property through what is known as the "equalization law" was first adopted in 1837; and the court in its opinion says: "It cannot, therefore, be presumed that the state then intended to confer on the city authorities a power of taxation which it did not itself exercise." The same interpretation was, however, subsequently given to a like clause in the charter of the city of Covington in the second case named; and was again reaffirmed in the case last cited as to a substantially similar provision in the charter of the city of Louisville; so that, if the charter now in question merely gave the power "to assess, levy, and collect taxes on such real and personal estate" as the city council might direct, and said nothing further, we should feel bound to follow the rule established by the cases above cited. The intention of the law-making power must be regarded in construing a statute. It is to be gathered from the entire act. All of its language must be taken into consideration.

It is also proper to regard the law existing at the time of its passage. The act of 1860, amending the charter of the appellant, provided: "The city council has power to levy and provide for the collection of *ad valorem* taxes for general city purposes upon all real estate and slaves in the city, and *ad valorem* or specific taxes upon all personal property in the city, as well as money or choses in action belonging to the inhabitants." It is unnecessary to determine whether this act was repealed by the one passed in February, 1874, or not, owing to the conclusion we have reached as to the power conferred by the latter; but if, as the appellee contends, it was, then it seems unlikely that the legislature would in the subsequent legislation have released money, debts, and choses in action from taxation. Undoubtedly the city would have objected to it. Many thousands of dollars of the property of its citizens were, of course, so invested; and the power to tax it would have involved a serious diminution of its revenue. Moreover, in such an event, while the poor man would be taxable upon his little visible personal property, his more wealthy neighbor, who might be able to keep his means invested in stocks and bonds, would as to it go untaxed. Do the provisions of the act of 1874 then embrace property of the last-named description? In the first place, it is noticeable that the law uses the word "estate," which is ordinarily one of broad meaning. It is true, it is sometimes used in a limited sense, as in case of an execution, which by its direction is to be levied on the defendant's estate, and yet choses in action cannot be reached thereunder, and that it was the term used in the city charters that were under consideration in the cases above cited; but it is merely one of other *indicia* of the legislative intent contained in the act now under consideration. It also, with a seeming view of embracing all property save such as might be exempt from taxation, provides for a tax upon "real, personal, and mixed estate." Terms more comprehensive in meaning, as generally understood, could hardly have been found. It would perhaps have been impossible to have been more explicit without enumerating specifically each and every subject of taxation. Not only, however, does it give the power to tax real, personal, and mixed estate, but it includes all that is "subject to taxation by the city, under the laws of the state;" and in section 32, *supra*, relating to the assessor, it is provided that he shall assess "all property in said city subject to taxation under the provisions of this charter and the laws of the state." When this statute was enacted, choses in action and money were taxable, at least *sub modo*, under the equalization law. It is urged, however, that if it had in this instance been intended to embrace them, provisions would have been made for the deduction by the tax-payer of his indebtedness, as was then allowed under the state law.

This, however, is not to be presumed. In fact, the present state law does not permit it. Nor is this all. Section 7 further says: "Said tax shall not exceed two dollars on each one hundred dollars valuation, at a fair cash value, upon every class or description of property." All of these provisions, when considered together, clearly distinguish this case from those above cited, and manifest, to our mind, that it was the legislative intention to still leave the city the power to tax such property as that now under consideration, and that the act in question should be so construed. The judgment is therefore reversed, with directions to dismiss the petition.

BRADLEY v. BURGESS.

(Court of Appeals of Kentucky. December 8, 1888.)

LIMITATION OF ACTIONS—DISABILITY—RUNNING OF STATUTE.

Plaintiff's right of action for the recovery of her interest in land, which she claims by inheritance, accrues when a vendee to whom she has joined with her husband in conveying the title in fee-simple enters into possession, claiming title, and her recovery is barred by Gen. St. Ky. c. 71, art. 1, § 4, limiting, even to persons laboring under disability, the right to sue for recovery of real property to 30 years, when such adverse holding is continued for nearly 40 years notwithstanding plaintiff was under the disability of coverture during the entire period.

Appeal from circuit court, Fleming county; A. E. COLE, Judge.

Ejectment by Nancy Bradley against J. B. Burgess. Plaintiff claimed the land in controversy by inheritance from her father, Henry Walker, who died in 1833, the owner of it. Defendant pleaded the 30-years statute of limitation in bar of plaintiff's action, alleging that he and his vendors had held the land in controversy for more than 30 years, claiming under deeds from Nancy Bradley and the other heirs of Henry Walker. Plaintiff appeals from a judgment for defendant.

W. P. Ross, for appellant. W. A. Sudduth, for appellee.

LEWIS, C. J. In January, 1878, her husband having died a few years before, appellant instituted this action to recover of appellee an undivided tenth of a tract of land containing about 102 acres, of which her father, Henry Walker, died the owner, in 1833. In 1834, under an order of the county court of Fleming county, where it lies, an allotment of dower and division between his children were made of the land, though no deeds of partition appear to have been executed. In 1836 a deed was made by Darius Bradley and his wife, Nancy Bradley, the appellant, purporting to convey to John Bright an undivided tenth of the tract. About the same time, Bright purchased the interests of five other of the children of Henry Walker, and Fitzgerald acquired the interests of the remaining four; and from them, by conveyances which seem to have been regularly made, appellee obtained the title and possession of the entire tract.

The evidence shows that at the time this action was commenced appellee and those under whom he holds had the previous actual continuance possession of the whole tract, claiming by purchase from the heirs of Henry Walker, for about 40 years; and the first, and we think only, question necessary to consider is whether section 4, art. 1, c. 71, Gen. St., applies to this case. It is as follows: "The period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time at which the right to bring the action first accrued to the plaintiff, or the person through whom he claims, by reason of any death, or the existence or continuance of any disability whatever." It appears that in the division of the land between the children of Henry Walker, the lot which should have been given to appellant was set apart in the name of her husband by the county court commissioners, who stated in their report it had been

sold to John Bright. Although appellant, as well as her husband, was a party to, signed, and acknowledged the deed made to Bright in 1836, it is now contended her title was not conveyed thereby. But we do not deem it necessary to determine whether it was or not effectual to pass her title, nor whether she is now estopped by the proceeding in the county court, to which she was a party, to question the title of appellant; for if the interest which her husband undertook to convey, and by the terms of the deed did convey, was the absolute title, and not merely his life-estate, and John Bright acquired possession, and claimed such title in virtue of the deed, her right to bring an action for the recovery of her interest in the land, in the meaning of the statute, then accrued, and could not be extended beyond 30 years from that time, although she then labored under the disability of coverture, and so continued during that entire period. *Medlock v. Suter*, 80 Ky. 101; *Mantle v. Beal*, 82 Ky. 122. That by the terms of the deed, and according to the manifest intention of the parties to it, the fee-simple title was conveyed, or attempted to be conveyed, clearly appears; and it also appears John Bright soon thereafter took possession, and he and his vendees thereafter held and claimed the land as absolute owners, which, as heretofore held by this court, was an adverse holding, and afforded appellant a cause of action when he first so entered and claimed. And as the section quoted was clearly intended to prescribe the period of 30 years as the limit beyond which the right to bring an action for the recovery of real property should not be extended, even to a person laboring under disability when the cause first accrued, it follows appellant is barred of recovery in this action. Judgment affirmed.

GREEN & B. R. NAV. CO. v. CHESAPEAKE, O. & S. W. R. CO.

(Court of Appeals of Kentucky. December 11, 1888.)

1. NAVIGABLE WATERS—LINE OF NAVIGATION—OBSTRUCTION BY BRIDGES—LEASE.

The state of Kentucky improved the Green and Barren rivers by means of locks and dams, but by act March 9, 1868, the legislature incorporated the G. & B. R. N. Co., and leased to it the G. and B. "river line of navigation," together with the grounds, tools, machinery, etc., appurtenant thereto, requiring it to keep "said line of navigation in good repair," and to permit boats to navigate the rivers on payment of a certain toll. *Held*, that the locks, dams, and other improvements were what constituted the line of navigation, and that the grant of a license to a railroad company to build bridges so as not unreasonably to obstruct navigation, does not impair the rights of the navigation company under the lease.

2. SAME—OBSTRUCTIONS—CONSTITUTIONAL LAW—INTERSTATE COMMERCE.

The Green and Barren rivers being entirely within the state, and there being no interfering act of congress, the grant of a license to make reasonable obstructions to navigation in the repair of bridges is not invalid as being in conflict with the power of congress to regulate commerce between the states.

3. SAME—DAMNUM ABSQUE INJURIA.

The railroad company gave notice to the navigation company that it would between certain dates repair its bridge. The season was one in which the river was sometimes obstructed by ice, and the work was done without delay. *Held* that, though the obstruction might have been entirely avoided by an unusual and expensive course, there was no unreasonable obstruction to navigation, and that the harm suffered by the navigation company was *damnum absque injuria*.

Appeal from Louisville law and equity court; W. O. HARRIS, Judge.

Action by the Green & Barren River Navigation Company against the Chesapeake, Ohio & Southwestern Railroad Company, for damages for obstructing Green river. Judgment for defendant, and plaintiff appeals.

Wright & McElroy and *Alex. P. Humphrey*, for appellant. *John Mason Brown* and *George M. Davie*, for appellee.

HOLT, J. The legislature of Kentucky chartered the Memphis, Paducah & Northern Railroad Company on March 25, 1878. It also incorporated the Chesapeake, Ohio & Southwestern Railroad Company on January 19, 1882. The last-named corporation was at the time of its creation the owner of so

much of the first-named road as had then been constructed from Memphis, Tenn., to Paducah, Ky.; and its charter conferred upon it certain powers and privileges that had been granted to the Memphis, Paducah & Northern Railroad Company. The charter provision of the last-named corporation, which was, by reference to it in the appellee's charter, made a part of it, and which is material to the proper consideration of the questions now presented, is as follows: "Sec. 19. The board may provide for the construction of telegraph lines, workshops, warehouses, bridges, (so as not unreasonably to obstruct the navigation of any navigable stream,) and other buildings and erections, and for conducting them, and such other operations as may be necessary and convenient to the most efficient operation of the railroad of the company for the common carriage of freights and passengers." Prior to 1883 the appellee's road had in conformity to its charter been extended from Paducah northward to Louisville; and as a part of this extension, and under its legislative grant, the company had erected across the Green river, at Rockport in this state, a bridge, with a revolving or draw span, so as to admit of the passage of boats and other craft navigating the river. In November, 1883, it became necessary to replace this draw-span with a new and more improved one; and to this end the appellee caused notice to be published that it would close the channel of the river under the span from December 5 to about December 31, 1883. It also had notice of its intention to do so served upon the appellant, the Green & Barren River Navigation Company, a lessee from the state under an act approved March 9, 1868, of the locks, dams, and other improvements erected by it upon Green and Barren rivers, and the owner of a line of steamboats plying upon these waters between Bowling Green, in this state, and Evansville, Ind. There is no complaint of want of proper notice. Accordingly the railroad company, over the protest of the navigation company, closed the draw-span by the erection of false work under it, and it thus remained until January 22, 1884, a period of 47 days. No unnecessary time was consumed, however, in the erection of the work, and during 15 of the 47 days navigation was prevented upon the appellant's line by ice in the Ohio river. The lower court in its finding of facts found that the obstruction of navigation might have been altogether avoided by throwing open the draw-span, and erecting the false work along the river bank, upon the edge of which the draw pier stood. Doubtless this would have been possible; but it would not only not have served the railroad, but have been an unusual mode of erecting such structures, requiring more time for its completion, and involving 50 per cent., or at least a much greater, cost. While the navigation was thus obstructed the navigation company continued the operation of its line, save when prevented by ice, by running one of its boats upon the upper and the other upon the lower end of it, and by transferring its passengers and freight from one boat to the other over the deck of a barge anchored under the bridge. It brought this action to recover damages consequent upon the obstruction. The lower court found that it caused one of the appellant's boats to remain idle and partially manned at Rockport during the closing of the span, at an expense of \$1,585.25. We fail to understand why this was either a necessary or a reasonable result. The bridge was not far from the middle point upon its line of navigation. It seems to us that one boat could have been constantly plying between the bridge and one end of the line, and the other between the bridge and the other end, the two meeting at the bridge, thus avoiding the detention of one boat at the bridge while the other went from it to the other end of the line and returned. As it was a finding of fact, however, we will regard it as well founded. The judge below also found that a reasonable rent of the barge, etc., was \$1,551, thus fixing the entire damage at something over \$3,000; but he dismissed the claim upon the ground that the legislative grant to the railroad company to make the improvement was valid, and that it in doing so had kept within its terms.

The Green and Barren rivers are navigable streams, and entirely within the boundary of this state. They are public highways by nature or of common right. They exist by common law, and the public can only be deprived of their free use by legislation. Although they are national as well as state highways, and besides serving the purposes of internal commerce also facilitate commerce between the states, yet it is well settled that in the absence of legislation under that clause of the constitution of the United States giving to congress the power to regulate commerce between the states, a state has plenary power over a navigable stream altogether within its borders. In such a case, until congress intervenes, the legislature of the state is sovereign. It may, as to such a stream, and in the absence of national legislation, enact a law which incidentally may have a material influence upon commerce between the states. Such a river is not outside of state jurisdiction so long as congress does not interfere. The mere grant of the power to the national legislature to regulate commerce between the states is not *per se* an inhibition upon state legislation as to a navigable river entirely within its boundary. It is quite proper that it should in such a case regulate its internal commerce as a part of its internal police. The supreme court of the United States, speaking upon this subject in the case of *Hamilton v. Railroad Co.*, 119 U. S. 280, 7 Sup. Ct. Rep. 207, said: "As has often been said by this court, bridges are merely connecting links of turnpikes, streets, and railroads; and the commerce over them may be much greater than that on the streams which they cross. A break in the line of railroad communication from the want of a bridge may produce much greater inconvenience to the public than the obstruction to navigation caused by a bridge with proper draws. In such cases the local authority can best determine which of the two modes of transportation shall be favored, and how far either should be made subservient to the other." We regard it as now settled beyond question that a state legislature may at least authorize the building of a bridge or other structure tending to obstruct the navigation of a navigable river, which is altogether within its own boundary; and it is only when congress, by virtue of the constitutional provision, acts as to such obstructions that its will must be obeyed so far as may be necessary to insure free navigation. *Willson v. Marsh Co.*, 2 Pet. 245; *Cardwell v. Bridge Co.*, 113 U. S. 205, 5 Sup. Ct. Rep. 423; *Transportation Co. v. Chicago*, 99 U. S. 635; *Hamilton v. Railroad Co.*, *supra*. In fact, many of the cases hold that the obstruction may go to the extent of entirely destroying the navigation of the stream.

The appellant contends, however, that it stands in a different attitude from the general public as to the right of the state to obstruct Green river, or to authorize it to be done by the building or repairing of a bridge. It insists that the legislature had no right, after making, and during the continuance of the 30-years lease to it, to pass any law repealing or abridging the privileges conferred by it, because to do so would impair the obligation of the contract; and that the state cannot obstruct its navigable streams, or authorize it to be done, if congress has legislated as to it under the commerce clause, or if to do so would violate a contract made by the state with an individual or a corporation. It becomes necessary, therefore, to ascertain what rights the appellant did in fact acquire by its lease. The rights of the parties to this controversy are not to be determined by the relative importance of river or railroad transportation to the commerce of the country. We have no right to compare benefits, or contrast injuries. Whether one, and, if so, which one, is to be subservient to the other, is a question addressed to the legislature, and not to the judiciary. Prior to March 9, 1868, the state had improved the navigation of Green and Barren rivers by means of locks and dams, and tolls were charged for their use. The money thus realized proved inadequate to maintain and operate the improvements, and the enterprise was a losing one to the state. The legislature, by an act of the date last named, incorporated the appellant,

and, in the language of the second section of the act, leased to it the "Green and Barren River line of navigation, and their tributaries, together with the grounds, houses, water-works, rents, profits, tools, machinery, implements, and appurtenances, and all the franchises thereunto belonging or appertaining." The act requires the company to keep "the line of navigation" in repair, and to permit all water-craft to navigate the rivers upon the payment of certain rates of toll prescribed by it. The constitutionality of this act, and the validity of the lease based upon it, were maintained by this court in the two cases of *McReynolds v. Smallhouse*, 8 Bush, 447, and *Sinking Fund v. Navigation Co.*, 79 Ky. 78. What, then, was the extent of the property right thus acquired by the appellant? Manifestly it did not confer upon it an exclusive right of navigation. It was not a lease of the rivers themselves. The company did not during the term of the lease acquire such a right in them as it would have obtained under a lease of a canal or turnpike. The public had a natural right to use them before the state improved them. They were not the subjects of private ownership. The company acquired no exclusive right of fishing in them, or using the water for motive or irrigating purposes. What, then, was intended by the expression "line of navigation," as used in the act? The history of the matter, and the existing circumstances, will serve to explain it. The rivers themselves were navigable streams, open to public use by common right. The state had, however, erected locks and dams, and other subsidiary improvements. Tolls were being charged for their use, by the state, when the lease was made. These improvements belonged to it, and not to the public by any common right. They constitute its line of navigation; and it leased what belonged to it in its corporate capacity, as distinguished from what was subject to public use under common right. Properly speaking, these improvements were all the state had to lease; and although the grant should be construed strictly, yet a fair interpretation of the act of the legislature confines its operation to the property of the state. The fourth section requires the company "to use due diligence in keeping up said line of navigation in good repair." These words certainly refer to the improvements only, and aid us in reaching a conclusion as to what was meant by the words, "the line of navigation." The company acquired no peculiar right in the navigation of these rivers under its lease. As to it the appellant occupied the same attitude as the general public; and as none of the improvements have been injured or interfered with, and as the license to bridge the river was valid against the public, it results that the appellant cannot complain if the appellee in repairing its bridge has kept within the grant. It is not a case of two interfering franchises, because the contract between the state and the navigation company invested the latter with the exclusive proprietorship, during the lease, of the improvements only, and not the navigation of the river. This court, in effect, so held in the case of *Navigation Co. v. Palmer*, 83 Ky. 646, and it is unnecessary to consider the question of the power of the state to barter away the control of its navigable streams, which is a part of its internal police power, because it has not attempted to do so in this instance. It is reasonable to suppose that the parties so understood the contract. If the bridge had not been constructed when the lease was made, then the acquiescence of the appellant in its construction under legislative grant, and the knowledge that it would necessarily need repair, shows how it regarded the contract. Upon the other hand, if it had already been constructed, then the company knew that its repair and renewal would follow as a duty to the traveling public, and as necessary to its convenience and safety; and it is unreasonable to suppose that the parties intended to enter into a contract forbidding such repair.

The work was done at a season of the year when it was likely to interfere with navigation the least. Ample notice was given that it would be done, and it was done as expeditiously as possible. In fact it is not claimed that

there was any unreasonable delay, or that the obstruction continued longer than was necessary. It is plain that nothing was done negligently or wantonly, but that the appellee acted in good faith, and with proper precaution. While it was possible to have opened the draw and constructed the new one upon the edge of the river, and thus have avoided all obstruction to navigation, yet the railroad company was not required to take an unusual course in constructing its improvement, and one which would involve unreasonable delay and expense. It was done in such a manner as "not unreasonably to obstruct the navigation," and the appellee is entitled to the protection of the rule of *damnum absque injuria*. Judgment affirmed.

PHALAN v LOUISVILLE SAFETY VAULT & TRUST CO. et al.

(Court of Appeals of Kentucky. December 18, 1888.)

1. PARTITION—PLACE OF SUIT—LAND IN DIFFERENT COUNTIES.

Carroll's Code Ky. § 66, provides that a suit for partition must be instituted in the jurisdiction in which the ancestor lived at his death. Bullitt's Code, § 62, provides that actions concerning real property must be brought in the county in which the subject of the action, or some part thereof, is situated. *Held*, that an action by guardians for sale of land descending to their wards and the widow, for division of the proceeds and reinvestment, is properly brought in the county in which the father, from whom the land descended, died, and in which only a portion of it is situated.

2. GUARDIAN AND WARD—BOND—TRUST COMPANY AS GUARDIAN.

Under 2 Acts Ky. 1883-84, p. 280, providing that the capital of the Louisville Safety Vault & Trust Company shall be taken and considered as the surety required by law for the faithful performance of its duties, and other security shall not be required upon its appointment to any of the offices or duties to be assumed by it, in a proceeding by it as guardian of infants for sale of their land and reinvestment, if the bond required by statute in such cases is necessary, one given by the company in the name of the president is sufficient.

Appeal from Louisville chancery court; I. W. EDWARDS, Chancellor.

Action by the Louisville Safety Vault & Trust Company, as guardian of Eliza Sutfield, against its ward and the widow and other children of O. T. Sutfield, deceased, for a sale of all the lands of the decedent, and for a reinvestment of the proceeds. The lands lie in the city of Louisville, and in the counties of Hardin, Henry, and Oldham. Sale ordered, and Maurice Phalan became the purchaser of the land situated in Henry county. Phalan excepted to the report of the sale, but his exceptions were overruled, and he appeals.

Wm. Carroll, for appellant. John C. Russell, J. C. Dodd, and Dodd & Grubbs, for appellees.

PRYOR, J. The statutory guardian of Eliza Sutfield filed its petition against its ward, Eliza, and her infant sister, Florence, and her statutory guardian, John H. Leathers, the widow and two adult children of the decedent, all of whom are made defendants, asking the sale of two tracts of land owned jointly by the defendants, lying in Henry, Oldham, and Hardin counties, and the sale of some city lots in Louisville, for the purposes of reinvestment, alleging that the sale of all the property will redound greatly to the interest of its ward. The adult heirs and the widow file an answer, in which they consent to the sale, and ask a division of the proceeds; the widow agreeing to accept the value of her dower in money, and joining in the prayer of the petition. Leathers, the guardian of Florence, both being served with process, filed his answer, asking a sale of the entire property for the benefit of his ward, and an investment of the proceeds so as to produce an income. His ward, Florence, is not made a defendant to his pleading, but is a defendant to the original action. The testimony in this case makes out a much stronger reason for selling the property than is alleged in the petition. It appears that the decedent and ancestor of these parties owned an estate valued about \$120,000, with an indebtedness of \$40,000; that liens existed on some of the prop-

erty for the purchase money; that the family dwelling in Louisville was worth about \$20,000, and no sufficient income to keep it up and maintain the family. Under such circumstances, the widow and adult heirs consenting, it was proper to sell the land in Henry and Hardin counties, and make other investments that would produce an income and prove more beneficial to the parties in interest. The object is to sell and reinvest the money, and this is expressly authorized by subsection 5, § 489, Civil Code. It is said, however, that Leathers, the guardian of Florence, failed to make her a defendant, and, although a defendant to the original petition filed by the guardian of her sister, Eliza, it was necessary that Florence should be made a defendant to the answer of her guardian, who consents to the sale. Section 490 of the Code authorizes a sale where the property cannot be divided without materially impairing its value or the value of the plaintiff's interest therein. Here is a joint interest, where it is evident that a sale is for the benefit of all, not only to pay the debts, but to afford an income, as well as to divide the proceeds of the sale between those interested. The widow and the two adult children all ask for the sale, and both of the infants are before the court. Should the chancellor, under the circumstances, make such an allotment as would compel the widow to retain the dwelling, and with the balance of the estate pay off the indebtedness, leaving nothing upon which to support the children? The adults are entitled to a division of the land. The suit for partition must have been instituted in Louisville, where the father lived at his death, under an express provision of the Code. Section 66, Carroll's Code. Now, no division can be had without impairing the value of the interest of the children. It is so alleged by the guardian of Eliza, and that fact established by the proof. Such being the case, it was proper for the court, under sections 489 and 490 of the Code, to sell the property, and make investments for the infant defendants.

The only question is: Had the chancery court of Louisville jurisdiction of the entire realty, with the power to sell the land in Henry county (a part being in Oldham?) We think the subject of the action was the division of the proceeds of the land between the heirs on the ground that no allotment in kind could be made without impairing the value of each interest; that no step could have been taken in but one jurisdiction, so as to give complete relief. In that jurisdiction the ancestor died, the children all lived, and much of the real estate was located. It was the jurisdiction to order the partition, and none other could have made the allotment. If so, we perceive no reason why the petition was not properly instituted in the Louisville chancery court, setting forth the fact that no division could be made without impairing the value of the property, and asking a sale for reinvestment. The Code (Bullitt's Code, § 62) provides, concerning real property, that "actions must be brought in the county in which the subject of the action, or some part thereof, is situated." Now, the subject of the action here is the partition of the land or its proceeds between these heirs; or rather, a sale, as no division could be had without impairing the value of each child's interest, a part of the subject of the action being within the jurisdiction in which the relief is sought by the plaintiff against others equally interested. The jurisdiction was properly entertained, and it was not necessary for this guardian to have instituted separate suits in Hardin, Henry, and Jefferson counties, alleging the same state of facts in order to a division of the estate. This case is different from enforcing a mortgage lien, or bringing an action of ejectment for the recovery of real estate, or the ordinary sales of infants' real estate.

It is objected by the appellant that no bond was executed by the guardian of the infants, as required by the statute. A bond was executed by Leathers as the guardian of Florence, with sureties, and a bond was executed by the Louisville Safety Vault & Trust Company, the guardian of Eliza, under a provision of its charter that provides: "The capital of said company shall be

taken and considered as the surety required by law for the faithful performance of its duties, and other security shall not be required upon its appointment to any of the offices or duties mentioned herein." 2 Acts 1883-84, p. 280. Now, if the bond is good executed by its president alone, as guardian, when he qualifies, it should be held good as to all the duties required or permitted to be performed by the guardian on account of his appointment. The company or corporation has appeared and executed its bond in the name of the president, as required by the statute authorizing the sale of infants' real estate; its capital stock is bound, and the legislature having seen proper to invest the corporation with this power, and deeming the capital stock safer than individual security, we cannot interfere with the judgment on that account. Besides, in a case like this, as held in *Kendall v. Briggs*, 81 Ky. 119, no bond was necessary, but, if it was, the bond was executed. The judgment below, overruling the exceptions to the commissioner's report, is affirmed.

BATTLE v. STATE and five other cases.

(*Supreme Court of Arkansas*. December 1, 1888.)

INTOXICATING LIQUORS—ILLEGAL SALES—PROHIBITED DISTRICTS—SALES BY DRUGGIST.

Act Ark. March 21, 1881, § 1, provides that when the county court on a prescribed petition has prohibited sales of liquor within a radius of three miles from a designated point, it shall be unlawful for any person to vend or give away liquors of any kind. Section 3 provides that the act shall not prevent the prescribing or furnishing of alcoholic stimulants by a regular practicing physician to the sick under his charge, when he may deem it necessary; but before he shall be authorized to do so, "in order to protect himself from the penalty of this act," he shall file an affidavit, etc. *Held*, that the legislature intended to intrust no one in the prohibited districts with the right to furnish liquors but the physician who has complied with the law; and a druggist who supplies liquor on the prescription of such a physician, violates the law.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

Prosecutions for selling intoxicating liquors in districts prohibited under the provisions of act March 21, 1881, known as the "Three-Mile Act." Defendants were convicted, and appeal.

George W. Murphy, for appellants. *Daniel W. Jones*, Atty. Gen., for appellee.

COCKRILL, C. J. These six appeals from convictions for violation of the liquor laws have been submitted together, as involving similar questions. Some of the convictions were had under the general license law, and some under the three-mile local option law. All the defendants are druggists, and each sold whisky to his customers, on the prescription or requisition of a practicing physician that it was for a sick person under his charge. The physician in each case had made and filed the oath hereinafter mentioned, as the law prescribes. The question presented is the correctness of the defendant's contention that it was the intention of the legislature, as expressed in the third section of the act of March 21, 1881, known as the "Three-Mile Law," to authorize druggists to sell any kind of ardent spirits on the prescription of a physician who had qualified himself to prescribe alcoholic and vinous liquors for the sick, by compliance with the requirements of the act. It is the settled construction of our license law that no one without a license can lawfully sell any of the prohibited liquors or concoctions mentioned in the act; not even a druggist when selling as medicine in good faith upon the prescription of a practicing physician. *Woods v. State*, 36 Ark. 36; *Flower v. State*, 39 Ark. 209; *State v. Butcher*, 40 Ark. 362; *Chew v. State*, 43 Ark. 361. The presumption is that in licensed districts ardent spirits needed for medical purposes can be procured from a licensed dealer, (*Woods v. State*, *supra*.) and the intention of the license act is to confine the traffic to such persons.

The terms of the act prohibit a sale by any unlicensed person "for any purpose whatever;" no exceptive provision being made in favor of the druggist, or for medical purposes. The legislative intent, like that expressed in the similar statute of Illinois and of other states, has therefore been considered too manifest for the courts to ingraft any exception upon the statute. *Wright v. People*, 101 Ill. 126; Bish. St. Cr. § 1026, note 6. This was the construction placed upon it prior to the enactment of the three-mile law, and that that act did not alter it was decided in *Chew v. State*, *supra*.

The question remains: Does the three-mile law intend to exempt druggists selling ardent spirits as medicine upon the prescription of a physician within the prohibited district from the penalties imposed by it? The first section of that act is to the effect that when the county court upon a prescribed petition has prohibited sales within a radius of three miles of a designated point, "it shall be unlawful for any person to vend or give away any spirituous, vinous, or intoxicating liquors of any kind," etc., within the district described in the order. Now, the value of spirituous liquors in the treatment of diseases is, perhaps, universally recognized. But as no license can be had in the prohibited district, if no one can lawfully sell or give them away, their use as a medicine would practically be lost. But the intention of the legislature not to bring about that state of things is manifested by the third section of the three-mile law, which is as follows: "This act shall not be construed as prohibiting the use of wine for sacramental purposes, or to prevent the prescribing and furnishing of alcoholic stimulants by a regular practicing physician to the sick under his charge when he may deem the same necessary; but before such physician shall be authorized to prescribe and furnish such alcoholic stimulants, in order to protect himself from the penalty of this act he shall file in the office of the county clerk in the county in which he resides an affidavit, which shall be in the following form, to-wit: 'I, ———, do solemnly swear or affirm that I am a regularly practicing physician, and that I will not prescribe or furnish any vinous or alcoholic stimulants to any one except it be, in my judgment, a necessity in the treatment of the disease with which he shall be at the time afflicted.'" Here provision is made for furnishing alcoholic stimulants to the sick. But by whom may such a stimulant be furnished? The act limits its protection to the physician who prescribes it. Its language is to the effect that he may "prescribe and furnish" alcoholic stimulants, but that "in order to protect (not another, but) himself from the penalty of the act" he shall make and file an oath that he will not prescribe or furnish it unless he believes it to be a necessity. Where these statutory provisions and limitations prevail, says Mr. Bishop, "they must in reason, and, it is believed, on authority, be accepted as the measure of the right to make such sales, so that no further right can be superinduced by interpretation." Bish. St. Cr. § 1019. The legislature has selected the physician as the only person to be intrusted in a prohibition district with what they deem a dangerous agency, liable to abuse, and the courts are not authorized to extend the privilege by construction to the druggist or any one else. This was the construction given the act in *Chew v. State*, *supra*. In the earlier case of *State v. Bailey* in the same volume, (page 150,) which is relied upon by appellants, the question was not directly ruled. It was objected to the indictment in that case that it did not negative the fact that the defendant was a druggist selling for medical purposes only; and it was held that the exceptions in the statute, not being in the enacting clause, needed not to be noticed in the indictment. The meaning of the exception was not declared. *Chew's Case*, *supra*, was a conviction of a druggist for selling whisky without a license, although the sale was on the prescription of a physician, as in these cases, and in a prohibited district. As the act of March 26, 1883, makes a guilty sale in a prohibited district punishable under either the license or the three-mile law, it is not probable that it was the legislative intent to make a given case violative of

one act, and not of the other. *Chew's Case* is conclusive of these. Some of the defendants were indicted under the statute making it an offense to be interested in the sale of liquor. There was no proof to distinguish their cases from those of *Robinson v. State*, 38 Ark. 641, and others following it. See *Bish. St. Cr. § 1024; Com. v. Nichols*, 10 Metc. 259. Affirmed.

FORD v. STATE.

(*Supreme Court of Arkansas. December 1, 1888.*)

HIGHWAYS—WORK ON ROADS—FAILURE TO ATTEND—NOTICE.

In a prosecution under Mansf. Dig. Ark. § 5907, for neglecting to attend at the time and place designated by the road overseer to work on a public road, in obedience to the overseer's warning, without having furnished a substitute or paid a money consideration, it was error to charge that defendant was entitled to three days' notice of such time and place, but that he might waive his right by attending in obedience to a shorter notice, since, if there was not three days' notice, or if defendant attended, he was innocent of the crime charged.

Appeal from circuit court, St. Francis county; M. T. SANDERS, Judge.

Prosecution under Mansf. Dig. § 5907, providing that "if any person subject to road duty shall have had at least three days' actual notice according to this act, and failed or neglected to pay for the full time he is lawfully warned to work, shall refuse or neglect to attend by himself or substitute to the acceptance of the overseer by whom he shall have been lawfully warned on the day and at the time and place directed by said overseer; or, having attended, shall refuse to obey the directions of said overseer, or shall spend so much of the time which he is lawfully warned to work in idleness or inattention to the duties assigned him, or behaves himself in such a manner as disturbs, annoys, or has a tendency to hinder others from working, he shall be fined for every such offense or willful neglect, not less than ten nor more than twenty-five dollars." Defendant was convicted, and appeals.

N. W. Norton, for appellant. Daniel W. Jones, Atty. Gen., for appellee.

COCKRILL, C. J. The charge against the defendant was that, being subject to road duty, he neglected to attend at the time and place designated by the road overseer to work on a public road in obedience to the overseer's warning to do so; that he failed to furnish a substitute, and neglected to pay a money consideration for his failure. See Mansf. Dig. § 5907. The court charged the jury that the defendant was entitled to three days' notice of the time and place he was required to attend, but that, if he attended in obedience to a notice of less duration, this might be taken as a waiver of sufficient notice. This appears to have been the whole charge to the jury. It was inapplicable to the allegations of the indictment. The offense alleged was a failure to attend to work the road at a time and place designated. If three days had not intervened between the giving of the notice and the time designated for attendance, or if the defendant appeared in obedience to the overseer's warning, the offense was not committed. If he appeared upon an insufficient warning, and submitted himself to the domination of the overseer, and thereafter neglected his duty as a road-hand, the insufficiency of the warning would be no defense to a prosecution, under a subsequent clause of the same section of the statute, to punish him for such neglect. But the defendant was indicted under the first clause, for a failure to attend the road working in obedience to the overseer's warning, and if in fact he did attend in obedience thereto, he was not guilty as charged. Reverse the judgment, and remand the cause for further proceedings.

PENZEL *et al.* v. BROOKMIRE *et al.*

(Supreme Court of Arkansas. December 1, 1888.)

MORTGAGES—FORECLOSURE—DISTRIBUTION OF ASSETS.

Where a mortgage is given to secure several notes, without any stipulation as to priority, and the notes are assigned to different persons, the assignees are all entitled to share *pro rata* in the proceeds of foreclosure.

Appeal from circuit court, Yell county; G. S. CUNNINGHAM, Judge.

Hall & Carter, for appellants. *Jacoway & Jacoway* and *W. A. Nolen*, for appellees.

BATTLE, J. On the 16th of March, 1885, James Quigel executed to West Bros. three promissory notes,—one for \$150, due on the 16th of June, 1885; one for \$125, due on the 16th of August, 1885; and the other for \$116, due on the 16th of November, 1885,—and at the same time executed a mortgage to secure their payment. On the 17th of March, 1885, West Bros. transferred the note for \$150 to Charles F. Penzel; and thereafter transferred the one, for \$125 to H. Friedlander & Son, as a collateral to secure a debt, and the one for \$116 to Brookmire, Rankin & Scudder. After the maturity of the first two notes, Penzel took possession of a part of the mortgaged property, and sold the same, with the consent of all parties concerned, at private sale, for \$216, on a credit, of which \$50 have been collected. The mortgage contained no stipulation as to the order in which the notes should be paid. It is not alleged in the pleadings, and was not claimed in the court below, and is not insisted here, that there was any agreement between the mortgagees and any one of their assignees as to the order of precedence each note should take, or that there were any special equities arising out of the assignments. There is no issue of that kind in the case. Appellants insist that Penzel should be first paid out of the property mortgaged, because he is the holder of the note first falling due and first assigned; and appellees insist that the proceeds should be paid ratably upon the notes, without regard to the order in which they fell due or were assigned. The only question here is, which of these contentions is correct? In the absence of such a stipulation, or agreement, or special equities, the authorities are not agreed as to how the proceeds of the sale of property, mortgaged to secure the payment of several notes, and sold under the mortgage, shall be appropriated, when the notes secured mature at different times, have been assigned to different persons, and the proceeds are not sufficient to pay all of them. One class holds that the notes shall be paid in the order of their assignment, (*McClintic v. Wise*, 25 Grat. 448; *Cullum v. Erwin*, 4 Ala. 452; *Griggsby v. Hair*, 25 Ala. 327; *Waterman v. Hunt*, 2 R. I. 298;) another that the notes should take precedence in the order of their maturity, (*Mitchell v. Ladew*, 86 Mo. 526, 530; *Sargent v. Howe*, 21 Ill. 148; *Vansant v. Allmon*, 23 Ill. 30; *Koester v. Burke*, 81 Ill. 436; *Bank v. Tweedy*, 8 Blackf. 447; *Doss v. Ditmars*, 70 Ind. 451; *Bank v. Bank*, 9 Wis. 57, 64; *McVay v. Bloodgood*, 9 Port. (Ala.) 547; *Richardson v. McKim*, 20 Kan. 346, 350; *Hinds v. Mooers*, 11 Iowa, 211; *Walker v. Schreiber*, 47 Iowa, 529; *Wilson v. Hayward*, 6 Fla. 171, 190; *Kyle v. Thompson*, 11 Ohio St. 616; *Winters v. Bank*, 33 Ohio St. 250;) and a third class, that the proceeds should be applied *pro rata* in part payment of the several notes, irrespective of their dates of maturity or assignment, (*Donley v. Hays*, 17 Serg. & R. 400, 404; *Cowden's Appeal*, 1 Pa. St. 278; *Mohler's Appeal*, 5 Pa. St. 418, 420; *Perry's Appeal*, 22 Pa. St. 43, 45; *Grattan v. Wiggins*, 23 Cal. 16; *Dixon v. Clayville*, 44 Md. 575, 578; *English v. Carney*, 25 Mich. 178, 181; *McCurdy v. Clark*, 27 Mich. 445, 448; *Parker v. Meroer*, 6 How. (Miss.) 320, 324; *Cage v. Iler*, 5 Smedes & M. 410; *Pugh v. Holt*, 27 Miss. 461; *Andrews v. Hobgood*, 1 Lea, 698; *Bank v. Beard*, 49 Tex. 863; *Delespine v. Campbell*, 52 Tex. 4; *Wilson v. Eigenbrodt*, 30 Minn. 4, 13 N. W. Rep. 907.) The authorities which hold

that the notes should be paid in the order in which they were assigned, do so upon the ground that the debt secured was the principal, and the mortgage an accessory, and that the transfer of a part of the debt carried with it the assignment of so much of the lien created by the mortgage as is necessary to pay the part assigned, as effectually as it existed in the mortgage, and that no second assignment can divest the first assignee of his lien and preference. The courts adhering to the doctrine that the notes should be paid in the order of their maturity, say that the debt is the principal thing, and the mortgage to secure it is only an incident; that the assignment of the debt passes the mortgage, without being referred to in the assignment; that "the assignee of the debt takes the security by the assignment, in the same condition, and to the same extent, it was held by the payee, at the time of the assignment, as a security for the debt assigned, and succeeds under it to all the rights of the assignor;" that the assignor, the payee, in the absence of a stipulation to the contrary, had the right to foreclose the mortgage, when default should be made in the payment of the notes first falling due, and as each one should fall due, and satisfy them out of the proceeds in the order of their maturity, so far as the proceeds would extend, although there should not be enough to pay all; and that, therefore, inasmuch as the assignee, by the assignment of any one of the notes, succeeded to the rights which his assignor had, he has the right, in the event there is not enough to pay all, to be paid out of the mortgaged property, so far as it will extend, according to the order in which his note stands in line of maturity with the others secured by the mortgage; and that "the different installments in a mortgage, when secured by corresponding notes, may be regarded as so many successive mortgages, each having priority according to its time of becoming payable."

The reasons assigned for the two doctrines first mentioned are not convincing. While the notes were in the hands of the mortgagee there could be no priority of liens. He was not bound to foreclose when default was made in the payment of the note first falling due. He could have waited until all became due, and then, if the mortgage empowered him to sell when default should be made in the payment of any one of the notes, have sold the property, and appropriated the proceeds of the sale, if the mortgage did not forbid, to the payment of any of the notes, if there were not more than enough for that purpose. *Saunders v. McCarthy*, 8 Allen, 42; *Allen v. Kimball*, 23 Pick. 473; *Mathews v. Switzler*, 46 Mo. 301. If he appropriated the proceeds to the payment of the note first falling due, it thereby attained a preference through the act of the mortgagee, and so might have the second or last in the same manner. The mortgagee being the owner of all the notes, unrestricted by the mortgage, can give the preference in the appropriation of the proceeds to either of them by virtue of his ownership and control over the entire mortgage debt; and the question of preference or right to priority in payment out of the proceeds can only arise when there is a diversity in the ownership of the debt secured. Hence the assignment of one of the notes could not, *ipso facto*, carry with it the right to be paid in preference to the other notes because the mortgagee had the right to appropriate the proceeds of the sale of the property mortgaged to its payment; for the condition on which the mortgagee could have exercised the power does not exist in the case of the assignee of one of the notes; and for the same reason it follows that the assignee of the note first falling due is not entitled to preference because the mortgagee could have given preference in the appropriation of payments when he owned all the notes. The comparison of a mortgage given to secure several notes to successive mortgages given to secure each one of them, does not support the doctrine it is made to prove. To make the cases analogous the mortgages to secure each note must bear the same date, and be executed, delivered, filed for record, and recorded at the same time, and the property mortgaged must be the same. In the latter case, the mortgages would be concurrent; neither

one would have preference over the others, and all would have equal claims to be paid ratably out of the property mortgaged. If one should be transferred to a third party, it would not thereby become paramount to the others, but all would stand on an equality. Hence the comparison does not sustain the doctrine that the notes, while in the hands of different persons, are entitled to priority of payment according to the order in which they mature.

We do not think that either of the doctrines laid down by the two classes of decisions first mentioned is sustained by reason or equity. The notes are secured by one mortgage, executed for the equal benefit of all. It does not provide that one note shall be preferred to the others, but secures all equally, or *pro rata*. The legal title to the property mortgaged is conveyed and held for the benefit of all. The rights and interests acquired in the property begin with the date of the mortgage, and not from the maturity or assignment of the notes, or the time when the cause of action arises. There can be no priority of rights in favor of one against the others, as the mortgage is one. The simple assignment of the notes does not change the mortgage, and make it any less security for any of the notes than it was before the assignment. The mortgage security, in following the transfer of the notes as an incident, does not pass by the assignment any further than it was an incident at the time the transfer was made. The holders of the notes, therefore, stand *æquale jure*, and consequently are entitled to participate ratably in the fund derived from the security, if there be not enough to pay all. The decree is affirmed.

STATE v. OAKLEY.

(Supreme Court of Arkansas. December 1, 1888.)

LARCENY—INDICTMENT—DESCRIPTION OF PROPERTY.

An indictment for larceny, describing the property alleged to be stolen as "two ten-dollar bills of United States currency," is fatally vague and uncertain.¹

Appeal from circuit court, Dallas county; C. D. WOOD, Judge.

Dan. W. Jones, Atty. Gen., for appellant. R. C. Fuller, for appellee.

BATTLE, J. Appellee was indicted in the Dallas circuit court for larceny. The property charged to be stolen is described in the indictment as "two ten-dollar bills of United States currency." Is this description sufficient? In an indictment for larceny, as a general rule, the property taken should be described specifically by the name usually appropriated to it, to distinguish it from other property, or by a description sufficient to show the particular kind or species of property alleged to be stolen. It has been adjudged that the description of property stolen as "one pound of meat" was insufficient, because the term "meat" "applies, not only to the flesh of all animals used for food, but, in a general sense, to all kinds of provisions." For a like reason, the description, "two ten-dollar bills of United States currency," in this case, is too indefinite; for United States currency includes the gold and silver coin of the United States, the notes issued by the banks organized under the laws of the United States, the treasury notes, commonly known as greenbacks, and the certificates of deposit, generally called gold and silver certificates, issued by the United States. While it is certain that the property charged to be stolen is not gold or silver, it cannot be ascertained from the indictment what was meant, further than that it was paper currency of the United States. The indictment is not aided

¹ An information for robbery which describes the property as "twenty-five dollars in money," without any allegation of its value, or any excuse for want of greater particularity, is fatally defective. *State v. Segermond*, (Kan.) 19 Pac. Rep. 370. An indictment for robbery, which charges the taking of a certain sum, "lawful money of the United States," is not defective because not alleging that such money was personal property. *People v. Riley*, (Cal.) 16 Pac. Rep. 544. See note, *Id.*, as to the sufficiency of indictments in general.

by the statute; for nowhere is the stealing of United States currency *eo nomine* declared by the statutes of this state to be a public offense. The description is too general, too broad, and too vague and uncertain, and is fatally defective. *Leftwich v. Com.*, 20 Grat. 716, 720; *Boyle v. State*, 37 Tex. 360; *Martinez v. State*, 41 Tex. 164; *Merrill v. State*, 45 Miss. 651; *Barton v. State*, 29 Ark. 68; *State v. Ward*, 48 Ark. 36, 2 S. W. Rep. 191; *State v. Longbottoms*, 11 Humph. 39; *State v. Morey*, 2 Wis. 494; 2 Bish. Crim. Proc. (3d Ed.) §§ 700, 705, 731, 732. Judgment affirmed.

DOTSON v. STATE.

(*Supreme Court of Arkansas*. December 8, 1888.)

1. LARCENY—BY BAILEE—INDICTMENT—DESCRIPTION OF PROPERTY.

One who is intrusted with a horse to sell, with the intention that he shall give the money received to the owner, is a bailee, within the statute of Arkansas; Mansf. Dig. § 1640, providing that, if any carrier or other bailee shall embezzle or convert to his own use any money, etc., which shall have come into his possession or been placed in his care, he shall be deemed guilty of larceny, although he shall not break, etc.; but, the proof being that he received a check which he collected entirely in paper currency, an indictment charging him with the conversion of certain paper currency, and certain pieces of gold, and in another count with the conversion of the check, does not sufficiently describe the money converted, and, there being no embezzlement of the check, no conviction can be had.

2. SAME—INTENT.

An instruction that, if defendant converted the money, the jury would be authorized to infer the criminal intent, is proper.

Appeal from circuit court, Sebastian county; J. S. LITTLE, Judge.

Indictment of Lewis Dotson for embezzlement of the money received on sale of a horse belonging to O. M. Bourland. Defendant was convicted, and appeals.

T. C. Humphrey, for appellant. *D. W. Jones*, Atty. Gen., for appellee.

BATTLE, J. O. M. Bourland delivered a horse to appellant to sell for him. Appellant sold the horse for \$125, and received the money, but failed to deliver it to Bourland. On account of this failure he was indicted for embezzlement. The indictment charges as follows: "The said Lewis Dotson, on the 15th day of January, 1888, in the county and district aforesaid, then being a bailee of one O. M. Bourland to sell a certain horse, the property of said O. M. Bourland, of the value of one hundred and twenty-five dollars, and as such bailee having received said horse into his care, custody, and charge, and then as such bailee sold the horse for the sum of one hundred and twenty-five dollars, and having received said money into his hands as such bailee, which said money was described as follows: Ten bills of the paper currency of the United States of America of the denomination and value of ten dollars each, twenty bills of the paper currency of the United States of America of the denomination and value of five dollars each, six bills of the paper currency of the United States of America of the denomination and value of twenty dollars each, six pieces of the current gold coin of the United States of America of the denomination and value of twenty dollars each,—did then and there willfully and unlawfully inake way with, embezzle, and convert to his own use the money described aforesaid, the property of said O. M. Bourland, without his consent so to do, against the peace and dignity of the state of Arkansas." It also charges that he received a check for \$125, and willfully, feloniously, and unlawfully embezzled, made way with, and converted it to his own use, without the consent of Bourland. He demurred to the indictment, and the court overruled his demurrer, and he was tried and convicted. Should he have been convicted? The statute under which he was indicted reads as follows: "If any carrier or other bailee shall embezzle or convert to his own use, or make way with or secrete, with intent to embezzle or convert to his own use, any

money, goods, rights in action, property, effects, or valuable security, which shall have come to his possession, or have been delivered to him, or placed under his care or custody, such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, shall be deemed guilty of larceny, and on conviction shall be punished as in cases of larceny." Mansf. Dig. § 1640. The term "bailee," when used in statutes declaring what acts of embezzlement shall constitute a public offense, is not to be understood, says Mr. Wharton, "in its large, but in its limited, sense, as including simply those bailees who are authorized to keep, to transfer, or to deliver, and who receive the goods first *bona fide*, and then fraudulently convert." "When it does not appear that any fiduciary duty is imposed on the defendant to restore the specific goods of which the alleged bailment is composed, a bailment under the statute is not constituted, though it is otherwise when a specific thing, whether money, securities, or goods, is received in trust, and then appropriated." 1 Whart. Crim. Law, (9th Ed.) § 1055; *Krause v. Com.*, 93 Pa. St. 418; *Watson v. State*, 70 Ala. 13. By 24 & 25 Vict. c. 96, § 3, it is provided that "whoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or to the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny." In *Reg. v. Aden*, 12 Cox, Crim. Cas. 512, KELLY, C. B., in delivering the opinion of the court, said: "In this case, a sum of money was placed in the hands of a boatman for the purpose of purchasing coals for the prosecutor from a colliery company, which coals the prisoner was to pay for with the money so placed in his hands by the prosecutor. The prisoner did not buy any coals, but paid away part of the money in satisfaction of a debt owing by him to the colliery company, and failed to procure the coals. This was a clear case of larceny of money intrusted to the prisoner as a bailee, within 24 & 25 Vict. c. 96, § 3." In *Reg. v. Hassall*, 8 Cox, Crim. Cas. 491, the defendant was a treasurer of a money club, and in his official capacity received small weekly payments from each member, "and had authority, with the secretary's consent, to lend the club-money to members." Under the rules of the club, a periodical division of the money among the members was required to be made. He was indicted for larceny of moneys paid to him by the members of the club, under the fourth section of 20 & 21 Vict. c. 54, which provided: "If any person, being a bailee of any property, shall fraudulently take or convert the same to his own use, or the use of any person other than the owner thereof, although he shall not break bulk, or otherwise determine the bailment, he shall be guilty of larceny." The court held a conviction under the indictment could not be sustained. The court said "that the word 'bailment' must be interpreted according to its ordinary legal acceptance. Understood in that sense, bailment relates to something in the hands of the bailee which is to be returned *in specie*, and does not apply to the case of money in the hands of a party who is not under obligation to return it in precisely the identical coins which he originally received." In *Reg. v. Bunkall*, 9 Cox, Crim. Cas. 419, "the prisoner was intrusted with money to buy coals, and bring them home to the prosecutor, for remuneration, with the prisoner's own horse and cart. The prisoner having purchased the coals, and loaded them, on his way home abstracted part, with intent to convert it, and to deprive his master of the same." He was indicted for and convicted of larceny as a bailee under 20 & 21 Vict. c. 54, § 4. In *Reg. v. De Banks*, 15 Cox, Crim. Cas. 450, the indictment charged, "that the prisoner, as a servant of the prosecutor, received a sum of money, and fraudulently embezzled and appropriated it, and so did steal the money." The evidence was: "The prisoner, not being otherwise in the service of the prosecutor, was employed by him merely to take care of a horse for a few days, and afterwards to sell it;" and that he sold it, and received the money. The prosecutor, as he could not go himself, sent his wife

to receive the money from the prisoner. She pressed him for the money, and he absconded with it, and appropriated it to his own use. The court held that he was a bailee of the money, and could be convicted of larceny. Lord COLERIDGE, C. J., said: "I think the effect of the evidence is that he was to sell the mare, and receive the money for the prosecutor; that is, he was to hand over the money, when he received it, to the prosecutor or his agent, as and when he received it. * * * She demanded it, and he appropriated it to his own use; and it appears to me that, under these circumstances, the case comes directly within the statute; that the prisoner fraudulently converted the money to his own use; and that, therefore, he was properly convicted." GROVE, J., said: "Was he a bailee of the money for the prosecutor? I think he was, and not the less so because the prosecutor had not himself given him the money."

According to these authorities, appellant was a bailee of the money he received for the horse, in the sense that term is used in the statute under which he was indicted, if it was expressly or impliedly understood that he should deliver the identical proceeds of the sale to Bourland. If it was the intention of the parties that appellant should hand the money received for the horse to Bourland, then he was liable as bailee, under the statute, for the unlawful conversion of it. The evidence adduced at the trial proves that he sold the horse for \$125, and received a check on a bank for the amount. He collected the check in the paper currency of the United States, and received no part of it in gold. It is obvious that he could not be held liable, under these circumstances, for embezzling the check; for it was only a means to enable him to collect the purchase money, and it was in the line of his duty to Bourland to collect it. As the paper currency alleged to have been converted is not sufficiently described in the indictment, he should not have been convicted of unlawfully converting it. There was no evidence of his having received gold coin. He ought not, therefore, to have been convicted under the indictment. It was held by this court, at its present term, in *State v. Oakley*, ante, 17, that it was not sufficient, in an indictment for larceny, to describe the property stolen as "two ten-dollar bills in the currency of the United States," and that a demurrer to the indictment in that case was properly sustained on that account. It has also been held by this court in *State v. Thompson*, 42 Ark. 517, that an indictment for embezzlement must describe the money embezzled as specifically as in larceny. As it is obvious that a new indictment against the appellant will have to be found and returned by a grand jury before he can be lawfully convicted of the offense charged, it is unnecessary to say anything further as to the indictment.

The court below instructed the jury "that, if they found from the evidence that the defendant converted the money, alleged in the indictment to have been embezzled, to his own use, the jury would be authorized to infer the criminal intent, and this rule would apply to a case where the money had been gambled off by defendant." It is urged that this instruction was erroneous, because it was calculated to mislead the jury. But we think not. The effect of it was to tell the jury that the conversion was a circumstance from which they might infer a criminal intent. Understood in that way, it is correct; for, in the absence of evidence to the contrary, it is presumed he intended the natural consequences of his acts. Of course, in considering the intent of the appellant, the jury ought to have taken into consideration the conversion, and all other evidence which tended to prove it. Reversed, and remanded for a new trial.

EDMONSON v. STATE.

(Supreme Court of Arkansas. December 8, 1888.)

CRIMINAL LAW—EVIDENCE—ACCOMPLICES—CORROBORATION.

Mansf. Dig. Ark. §§ 1507, 1510, define an accessory after the fact as one who, with knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the offenders: "provided, that persons standing to the accused in the relation of * * * husband and wife shall not be deemed accessories after the fact, unless they resist the lawful arrest of such offenders." Defendant was convicted of burglary on the testimony of L., an accomplice, corroborated by the testimony of L.'s wife, who knew that the crime was to be committed, though she protested strenuously against it, and also knew that defendant and L. had committed it. *Held*, that she was not an accessory before the fact, at common law, and that her concealment of the offense was for the purpose of protecting her husband, within the meaning of the statute, and she was therefore not a statutory accomplice, and hence her corroborating evidence was sufficient to convict.

Appeal from circuit court, Yell county; G. S. CUNNINGHAM, Judge.
J. P. Byers, for appellant. Dan. W. Jones, Atty. Gen., for appellee.

PER CURIAM. The appellant was convicted of burglary. There was no objection or exception of any kind to any ruling of the court at the trial, except in refusing to grant the accused a new trial. The several grounds set up in the motion for a new trial all go to the same question, viz., is the proof sufficient to sustain the verdict? It is not pretended that the offense was not committed. The county treasurer's safe had been blown open, and several thousand dollars of the county funds stolen. The defendant's complicity in the crime was directly testified to by Mike Landers, an avowed accomplice, and also by Landers' wife, who, it was contended, was also an accomplice; but as the statute prohibits a conviction on the testimony of an accomplice unless corroborated by other evidence tending to connect the accused with the offense charged, (Mansf. Dig. § 2259,) and as the corroboration required by the statute cannot be supplied by a second accomplice, the question is whether there was any evidence outside of that of an accomplice leading to the inference that the appellant was implicated in the burglary. If Mrs. Landers was not an accomplice, we need not look beyond her testimony to implicate the appellant. To ascertain her relation to the crime it is not necessary to state the particulars further than as they tend to connect her with a knowledge of it. The prisoner was her husband's step-brother, and was an inmate of her house for several weeks before and after the burglary was committed. He opened the project to Landers to rob the safe. The plan proposed was that they should ascertain when the funds raised by taxation would be deposited in the county's safe, get an expert to aid them, open the safe, and divide the spoils. Landers hesitated, and the prisoner ventured to broach the subject to his wife. She protested against it, wept, and portrayed the disgrace the act would bring upon her and her children; but a promise that she would not tell unless forced to do so, if the burglary was committed, was finally extorted from her. The expert came, the safe was robbed, and her husband received a share of the stolen money. Mrs. Landers made no disclosure of what she knew until her husband was arrested for the offense, and turned state's witness. Whether she knew who was concerned in the commission of the offense, or whether it had been committed at all prior to that time, is not disclosed positively by the bill of exceptions. It is certain that Landers was concerned in the commission of the offense. The prisoner was at his house on the evening of the burglary, and took breakfast there the next morning. These facts, taken in connection with Mrs. Landers' statement that he had informed her a short time before of his intention to commit the deed, had a tendency to show that he was connected with the commission of the offense, and the jury was authorized to take it as sufficient corroboration of Landers' testimony, unless she was also an accomplice.

Whether she was an accomplice or not was a mixed question of law and fact, and the jury's determination of the fact against the prisoner is final, unless the testimony shows conclusively that she was an accomplice. *Melton v. State*, 43 Ark. 367; *Com. v. Ford*, 111 Mass. 394, 395. It is not pretended that Mrs. Landers advised or encouraged the perpetration of the offense; and the bare fact of concealing information that a felony is likely to be committed has never been considered sufficient to make one an accessory before the fact. 2 Hawk. P. C. c. 29, § 23; *Rosc. Crim. Ev.* *183. She did not, therefore, participate in the commission of the crime, and for that reason she would not, perhaps, have been regarded as an accomplice at common law within the rule requiring corroboration. *Rex v. Hargrave*, 5 Car. & P. 170; *Allen v. State*, 74 Ga. 769; *Miller v. Com.*, 78 Ky. 22. But the word "accomplice," as used in the statute requiring corroboration, has been construed by this court to include an accessory after the fact. *Polk v. State*, 36 Ark. 126; *Carroll v. State*, 45 Ark. 539; *Hudspeth v. State*, 50 Ark.—, 9 S. W. Rep. 1. The jury have found, in effect, however, that Mrs. Landers was not an accessory after the fact, and the question is, does the evidence warrant the finding? "An accessory after the fact," as defined by the statute, "is a person who, after full knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the person charged with or found guilty of the crime: * * * provided that persons standing to the accused in the relation of parent, child, brother, sister, husband, or wife shall not be deemed accessories after the fact, unless they resist the lawful arrest of such offenders." *Mansf. Dig.* §§ 1507, 1510. It is only for a failure to discover the crime that there is room to contend that Mrs. Landers became accessory to it. This would have been no more than misprision of felony, and a misdemeanor at common law. Whatever else may be the intent of the statute, it is certain it does not compel the wife to become informer against her husband. He was *particeps criminis* with Edmonson in this case. If the evidence of his guilt was so interwoven with that of Edmonson's criminality that she could not inform against one without implicating the other, the statute would not visit her with the criminality of the offense for failing to do so. Her concealment of the crime would not, in that event, be attributable to the intent to shield Edmonson, which was necessary to make her his accomplice. *Melton v. State*, 43 Ark. 371. She furnished the required corroborative testimony, and the judgment is affirmed.

MOORE v. STATE.

(Supreme Court of Arkansas. December 15, 1888.)

1. CRIMINAL LAW—APPEAL—RECORD—FAILURE TO PLEAD.

Under *Mansf. Dig. Ark.* § 2468, providing that the supreme court shall reverse no judgment in misdemeanor cases, except for errors apparent on the record to the prejudice of appellant, it is no ground for reversal that the record fails to show that a plea was entered by defendant, defendant having submitted to a trial as under a plea of not guilty.

2. SAME—MATTERS NOT APPARENT OF RECORD.

The court cannot say that there was error in sustaining a demurrer to the plea, when the plea is not in the record.

3. SAME—EVIDENCE—DOCUMENTARY—DOCKET ENTRY.

There is no error in excluding a paper which purports to be a justice's docket entry, but is not a certified copy, and is unaccompanied by any offer to prove its genuineness.

Appeal from circuit court, Polk county; RUFUS B. HEARN, Judge.
Appellant, *in pro. per.* Dan. W. Jones, Atty. Gen., for the State.

COCKRILL, C. J. The appellant was indicted for assault with intent to murder. There was a *nol. pros.* as to the felony, when he interposed a plea of former conviction. A demurrer to the plea was sustained, and that is as-

signed here as error. But there is no plea in the record, and therefore nothing from which we can draw the deduction that the court erred in sustaining the demurrer. Upon the call of the indictment for trial, a jury was waived, and the cause submitted by consent to the court. There was incontestible proof of the assault, and the defendant, to meet it, offered in evidence what purported to be the docket entry of a justice of the peace, imposing a fine on him for an assault upon the person named in the indictment. It was not a certified copy from the justice's record, nor was it accompanied by an offer to prove its genuineness. Error cannot be laid to the rejection of the proposed evidence.

But it is said the judgment should be reversed because the record fails to disclose that a plea was entered by the defendant. It is not essential that a defendant should enter a plea to the indictment. A plea of not guilty may be entered by the court for him, if he declines to plead; and if the court treats the cause at issue without a formal entry of the plea, and he acquiesces in the court's action by availing himself of every privilege that could be accorded him under the plea, no substantial right has been affected, but only an irregularity of the most technical character has been countenanced. Where the objection is technical, and the thing complained of might have been obviated by the mere mention at the time the irregularity occurred, and it has been productive of no injury, it would be inconsistent with the intelligence that ought to govern the whole course of judicial proceedings, to arrest the judgment on account of it. Indeed, we are commanded by the statute, which regulates the practice on appeal in misdemeanors, to reverse no judgment except for errors apparent on the record to the prejudice of the appellant. Mansf. Dig. § 2468. No prejudice has resulted from the failure to enter a formal plea in this case. The appellant voluntarily submitted to the trial, and precisely the same proceedings were had as if he had formally entered a plea of not guilty. The cause was treated by both parties as though the issue was made on the plea of not guilty. The formal plea was thereby waived. See *State v. Ward*, 48 Ark. 39, 2 S. W. Rep. 191; *State v. Hayes*, 67 Iowa, 27, 24 N. W. Rep. 575; *State v. Cassidy*, 12 Kan. 550; *Ransom v. State*, 49 Ark. 176, 4 N. W. Rep. 658. The judgment was for a simple assault, and it is affirmed.

RUBLE v. STATE.

(*Supreme Court of Arkansas*. December 15, 1888.)

CRIMINAL LAW—APPEAL—RECORD—FAILURE TO SWEAR JURY—PRESUMPTION.

In a misdemeanor case, it is no ground for reversal that the record fails to show that the jury, which was of the regular panel, was specially sworn, since it is presumed that the general oath of the term was administered to them, and the special oath may be waived by defendant's failure to object at the time.

Appeal from circuit court, Boone county; R. H. POWELL, Judge.

Crumpp & Watkins, for appellant. *Dan W. Jones*, Atty. Gen., for the State.

COCKRILL, C. J. This is a conviction for an illegal sale of spirituous liquors. The only error assigned for reversal is that the record fails to show that the jury was specially sworn to try the case. The record recites that the defendant "for plea saith that he is not guilty as charged, to which plea the state joins issue, and to try said issue comes a jury of ten of the regular panel, by consent of parties, and, after hearing the evidence," etc., return a verdict of guilty. The jury was composed of the regular panel. The presumption is that the general oath for the term had been administered to them. It is to the effect that they will well and truly try each and all of the issues, inquisitions, and other matters submitted to them as jurors at that term of court.

But in a criminal prosecution the accused has the right to have the special oath prescribed by section 2248 of Mansfield's Digest administered to the jury. It was so determined in *Chiles v. State*, 45 Ark. 143, and the judgment of conviction of a misdemeanor was reversed in that case because the court refused to grant a new trial based upon the ground that the jury composed of the regular panel had not been specially sworn. In this case there was no motion for a new trial on that ground, and no objection to going to trial without the administration of the special oath. It is error to deprive a defendant of the right to have the jury sworn specially, but objections to the form of the oath under which a jury tries a cause are likened to objections to the panel, or to the qualification of jurors, which are considered waived unless made when the jurors are offered. *Thomp. & M. Juries*, § 288; *Proff. Jury*, § 203; *State v. Wilson*, 36 La. Ann. 864; *State v. Schlager*, 19 Iowa, 169. The objection to the incompetency of jurors, made after verdict, avails nothing, even in a capital offense, unless it is shown to have been unknown to the party objecting, and that by proper inquiry it could not have been known before the jurors were sworn. *Casat v. State*, 40 Ark. 511; *Werner v. State*, 44 Ark. 122. While the court has adhered to a very strict rule in requiring the records in prosecutions for felony to show that the jury was properly sworn, it has never ruled, in a misdemeanor, that he may not waive the right. A prosecution for a misdemeanor is nearly assimilated by the statute to the trial of a civil action. The jury is selected, and challenges allowed, as in civil cases. The trial may take place in the defendant's absence. He may waive a jury, or, by his consent, be tried by a less number than 12, (*Warwick v. State*, 47 Ark. 568, 2 S. W. Rep. 335,) if the offense is punishable by fine alone. The court may set aside a verdict of acquittal, and this court is prohibited from reversing a judgment of conviction for any error or irregularity which does not prejudice the accused. *Moore v. State*, ante, 22. If the defendant in such a prosecution should expressly waive the right to have the special oath administered to the jury, his consent would estop him from assigning the neglect as error. *Volenti non fit injuria*. Why should he not be held to an implied waiver when the circumstances justify it? In a prosecution for felony, a prisoner may waive many rights without expressly announcing that he does so. See *Ransom v. State*, 49 Ark. 176, 4 S. W. Rep. 658; *Johnson v. State*, 43 Ark. 391. In *State v. Wilson*, supra, the supreme court of Louisiana say: "Even if the oath were defective in form, advantage cannot be taken of it in a motion for new trial. Objection should have been made at the time it was administered. It seemed to have been good enough, in the opinion of the prisoner, for the purpose of acquittal, and he cannot take the chances of a favorable verdict, withhold objections that should have been made on the instant, and remit the disclosure of them to the close of the trial." See, too, *State v. Schlager*, supra. Both cases were prosecutions for felony. In *Thompson & Merriam on Juries* it is said: "A favorite ground of objection to the regularity of proceedings in criminal cases is that the jury were not sworn according to law. When a form of oath is prescribed by statute, that and none other can be administered. Nor in a criminal proceeding will it suffice that the oath prescribed by statute for jurors in civil cases was administered. Such an oath generally differs in terms from that prescribed for jurors in criminal cases, and is in other respects inappropriate in a criminal trial. But after verdict it is too late to object for the first time to the form of the oath administered." Section 288. In New York the statute required the jury to be specially sworn in each case. The panel had been sworn generally at the commencement of the term for all cases, but the 12 jurors selected to try the case of *Hardenburgh v. Crary*, were not sworn especially to try that case. The supreme court, where the case was determined, adhered to the above rule, and were of opinion that it was applicable to criminal cases and civil cases alike. 15 How. Pr. 309. The rule exacts of a defendant in a

criminal case only that degree of fairness and frankness that ought to characterize the conduct of every judicial proceeding. It certainly applies in trials for misdemeanors. Affirmed.

HERRON v. STATE.

(*Supreme Court of Arkansas. December 15, 1888.*)

INTOXICATING LIQUORS—ILLEGAL SALE—IN PROHIBITED DISTRICT.

A contract to sell an agreed quantity of liquor, accompanied by payment, made within three miles of a church, the vendor having no liquor within that distance, but having a stock at a neighboring town, where he was a licensed dealer, it being agreed that he should take the liquor from his stock, and deliver it to the express company, to be carried to the vendee at the place where the contract was made, the latter to pay the charges, is not within Mansf. Dig. Ark. § 4524, prohibiting the sale of liquor within three miles from a church.

Appeal from circuit court, Monroe county; M. T. SANDERS, Judge.

This was a prosecution against Martin Herron before a justice of the peace for selling whisky within three miles from the Methodist Church in Brinkley, in Monroe county, under section 4524, Mansf. Dig. The appellant was convicted, and appealed to the circuit court, where he was again convicted, and fined, and appealed to this court. The case was tried upon an agreed statement of the facts, in substance as follows: The appellant was a licensed liquor dealer, doing business at Newport, in Jackson county, more than three miles distant from the Methodist Church at Brinkley; that on the —— day of May, 1887, he was in Brinkley, soliciting orders for whisky; that he then and there accepted an order from one Mays for one-half gallon of whisky, for which Mays then paid him in cash \$1.50; that the whisky was at the time in barrels, unappropriated, in Newport; that the appellant had no whisky in Brinkley; that it was agreed at the time that the appellant should cause the whisky to be measured out in Newport, put into a jug, and addressed to Mays, and deposited in the office of the Southern Express Company at Newport, to be transported to Brinkley, and delivered to Mays, he paying the charges for transportation,—all of which was done. It was agreed that the sale of whisky was regularly prohibited within three miles of the Methodist Church at Brinkley by order of the county court of Monroe county. This agreed statement was made a part of the record. A jury was waived, and the case submitted to the court. The court found that the sale was at Brinkley, and reduced its findings to writing. The appellant was convicted. He moved for a new trial, because the finding of the court was contrary to the evidence. This was overruled, and he excepted, and appealed, filed his bill of exceptions setting out the motion, and the conclusions of fact.

D. W. Jones, Atty. Gen., for the State. *Franklin Boswell*, for appellant.

COCKRILL, C. J., (*after stating the facts as above.*) The question in this case is whether the sale of a half gallon of whisky, for which the appellant is prosecuted, was made at Newport, in Jackson county, or at Brinkley, in Monroe county. The prosecution is for a sale at the latter place, where the three-mile law was in force, and, if the sale was made there, the conviction is right. But an executory contract to sell is not punishable under the three-mile law. *State v. Carl*, 43 Ark. 353; *Berger v. State*, 50 Ark. —, 6 S. W. Rep. 15. "I cannot construe a penal statute which punishes a sale," says Judge CURTIS in *Sortwell v. Hughes*, 1 Curt. 244, "so broadly as to hold that it applies to a mere executory contract for a sale. In my judgment, it extends only to executed sales by which the property passes from the vendor to the vendee." Such, in effect, is the judgment of this court in the cases above cited, and in *Oil Co. v. Boyett*, 44 Ark. 230. See, too, *Boothby v. Plaisted*, 51 N. H. 436; *Sar Becker v. State*, 65 Wis. 171, 26 N. W. Rep. 541; *Garbracht v. Com.*, 96 Pa. St. 449; *Frank v. Hoey*, 128 Mass. 263. The quantity

and the price were the only particulars agreed upon by the parties at Brinkley. It remained for the vendor, after his return to Newport, to fix upon the specific liquor to answer the order, to separate it from a larger quantity, and forward it in accordance with the agreement. There is no room to presume that it was the intention of the parties to the contract of sale that the buyer of the half gallon of whisky should become a joint owner of the entire stock held by the firm of which the appellant was a member at Newport. The intention was only to confer several title to a half gallon thereafter to be appropriated to the contract of sale by the seller. Any whisky in stock would answer the contract, and, until it was actually appropriated, the title remained in the firm, and the sale was incomplete. *Cases supra*. *Hare*, Cont. 415; *Benj. Sales*, § 352 *et seq.*, and notes; *Upham v. Dodd*, 24 Ark. 545; *Beller v. Block*, 19 Ark. 566; *Hires v. Hurff*, 17 Amer. Law Reg. 11, and notes. But the appropriation of the liquor to the contract was made at Newport, and, as there was not a complete sale until that was done, the sale was made at that place, and not in the prohibited district.

The circuit judge found specially that the express company to which the whisky was delivered was the agent of the seller, and that as such it delivered the liquor to the purchaser in Brinkley, in pursuance of the contract to sell made by the parties at that place. If such an inference were warranted by the agreed statement of facts upon which the cause was tried, the judgment would be sustained by the decisions in *Berger's Case*, 50 Ark. —, 6 S. W. Rep. 15, and *Yowell's Case*, 41 Ark. 355. But delivery to a carrier is delivery to the consignee, when made in pursuance of an order or agreement to ship. *State v. Carl*, *Berger v. State*, and other cases *supra*; *Burton v. Baird*, 44 Ark. 556. We see no circumstance in this case, as there was in *Berger's Case*, *supra*, from which to draw the conclusion of a different intention. Reverse the judgment and remand the cause.

ADAMS *et al.* v. BURNS.

(*Supreme Court of Missouri*. November 26, 1898.)

TRUST—RESULTING TRUST—EVIDENCE—LACHES.

A creditor, on taking a conveyance from his debtor, agreed to reconvey if the debt should be paid, and, the debtor having died without payment, conveyed to defendant, who was then the debtor's lessee of the land, for a sum considerably exceeding the amount of the debt, making no mention of his promise to reconvey. Interested witnesses testified that the debtor and defendant stated that the debtor had leased the land to defendant on his promise to pay the debt. Defendant's claim of title, though known to complainants, the debtor's heirs, was unquestioned for 18 years. *Held* not sufficient evidence to establish a resulting trust.

Error to circuit court, Saline county; JOHN P. STROTHER, Judge.

Suit by Nancy K. Adams and others against James Burns, to have defendant declared a trustee of certain lands. Plaintiffs bring error from a judgment for defendant, and an order denying a new trial.

Verby & Vance, for plaintiffs in error. *Boyd & Seebree*, for defendant in error.

BLACK, J. Some of the plaintiffs are the brothers and sisters, and others are the heirs of deceased brothers and sisters, of John King. The substantial allegations of the petition are that John King owned the 80 acres of land in suit; that prior to 1860 he was indebted to John W. Bryant in the sum of \$400; that he conveyed the land to Bryant by a deed which was unconditional on its face, but in fact made to secure the said debt; that in 1861 John King rented the land to the defendant for four years, and the defendant agreed to pay the rent to Bryant in discharge of the debt owing by King to Bryant, and defendant went into possession of the land as such tenant; that defendant paid the rents to Bryant, and took a deed to himself. King is dead, and the claim is that there is a resulting trust in favor of the plaintiffs; and the prayer is that

defendant be divested of the title. The evidence shows that Bryant loaned King \$100, and perhaps something in addition, in 1855, to be used in entering the land, it would seem. King failed to pay the debt, and in 1858 conveyed the land to Bryant, who sold it to Burns in November, 1862, for \$612.10. In April, 1866, Bryant made a deed to Burns pursuant to a title-bond made at the date of the sale. The defendant Burns was the step-father of King, and leased the land from King for the years 1860 and 1861, but did not move on the land until after the death of King. King died in March, 1862. The evidence offered to establish the trust is as follows: "*John W. Bryant*. King was not able to pay me, and he made me a deed. I told him if he paid me the money he could have the land. He did not come, and I sold to Burns. The deed was not intended to be a mortgage. I sold the land to Burns without reference to the debt of King. Don't know whether Burns knew the fact about the King debt to me or not." "*Wilburn Zans*. I was called on by King and Burns to witness a contract. King said he had leased the land to Burns for four years from 1861, and that for the rent Burns was to pay the Bryant debt, about \$400. Both men told me that in the latter part of 1860. Burns then had the land under contract, which expired in 1861." "*Mrs. Zans*. Burns told me he and my brother John King were going to make a contract by which Burns was to pay the Bryant debt for four years' rent. I cannot state the contract. Was not called upon to witness it. My husband was present." "*Wm. Aken*. I think I heard Burns say that when he first went on the land he leased it from King; that he found out King did not own it, and he bought it of Bryant." There is some other evidence, but it is not of any value on the real question in this case.

The trust in this case, if any there is, arises out of a contract between King and Burns by which the latter agreed to pay off the Bryant debt for the use of the land for four years; and the question is whether such a contract has been sufficiently established. These resulting trusts must not be declared upon doubtful evidence, or even upon a mere preponderance of evidence. There should be no room for a reasonable doubt as to the facts relied upon to establish the trust. This is the rule declared in the case of *Johnson v. Quarles*, 46 Mo. 424, and it has been again and again approved in subsequent cases. That the deed from King to Bryant might have been declared a mortgage, by timely proceedings, may be taken as established. The evidence of Zans as to the terms of the alleged contract between King and Burns finds some support in the fact that Burns was then the tenant of King. He says, too, that he was called upon to witness the contract. On the other hand, Zans and his wife are interested parties to this suit, and Burns, by reason of the death of King, is an incompetent witness as to matters relating to the alleged contract. The evidence of Bryant shows that he sold the land to Burns without any reference to the promise he had made to King. The amount paid by Burns for the land is much in excess of the amount mentioned, which it is said he was to pay by way of rents for the land. The agreement, it is true, is stated in such a form as to give it flexibility enough to cover the amount actually paid; but such a method of renting lands is very unusual. From the date of the deed to Burns to the commencement of this suit, a period of 18 years, he has been in the actual possession of the land, accounting to no one for the use thereof, and Mrs. Zans says she knew he claimed full title thereto; yet during all this time the plaintiffs set up no claim to the land. This continued assertion of title on the part of Burns, and non-action on the part of plaintiffs, is a very effectual denial of the existence of any such contract as is now sought to be established. Proof of the alleged contract rests alone on reported conversations, and the contract is not established, as it should be, according to the rule before stated. The judgment is affirmed.

RAY, J., absent. The other judges concur.

STATE v. HILL.

(Supreme Court of Missouri. November 26, 1888.)

1. CRIMINAL LAW—EVIDENCE OF VENUE.

On trial for larceny of mules, testimony of the owner that at the time they were stolen he lived in S. county, that he had been plowing with them, that he took them from the plow and put them into the barn about sundown, and that between that time and 11 o'clock at night they were stolen from the barn, warrants the inference that the barn was in S. county, where the venue was laid.

2. LARCENY—WEIGHT OF EVIDENCE—DESCRIPTION OF STOLEN PROPERTY.

The witnesses differed in minor particulars as to the correspondence in description of the mules stolen and those which defendant sold, but they all agreed as to a very peculiarly shaped brand which was on one of the mules stolen, and also on one of those sold. *Held*, that an instruction was warranted submitting the question of identity to the jury under a caution as to reasonable doubt.

Appeal from criminal court, Saline county; JOHN E. RYLAND, Judge.

Defendant, Willis Hill, was convicted of grand larceny, and he appeals.

Boyd & Sebrer, for appellant. *B. G. Boone*, Atty. Gen., and *Alf. F. Rector*, for the State.

BRACE, J. At the September term, 1887, of the criminal court of Saline county the defendant was convicted of grand larceny on an indictment charging him with having stolen a pair of black mare mules from one John J. Hardin, in said county. An examination of the record discloses that the case was in its details well tried, and the only ground urged by counsel here for a reversal is that the verdict is not supported by the evidence; and defendant's demurrer thereto, and his instruction to acquit, should have been given. The first defect pointed out is the alleged failure by the state to prove the venue as laid in Saline county.

1. Hardin, the owner of the mules, testified that at the time the mules were stolen he was living in Saline county, Mo., northwest of Slater; that the weather was fair, and that he had been plowing with the mules; that they were taken right from the plow and put into the barn about sundown; and that between that time and 11 o'clock that night they were stolen from the barn. From this evidence the jury might reasonably infer that the barn was in Saline county. It is not necessary that the venue be proved by direct and positive evidence. It is sufficient if it can be reasonably inferred from the facts and circumstances proven. *State v. Burns*, 48 Mo. 438.

2. It was satisfactorily proven by the state that the mules were stolen on the night of the 18th of May, in Saline county, between sundown and dark; that they were the property of Hardin, as charged in the indictment; that on Sunday, the 29th of May, the defendant came to a wagon-yard on Twelfth and Olive streets, in the city of St. Louis, in a buggy hitched to a span of black mare mules answering the description as to sex, age, size, form, color, and as to a mark on one, and a brand on the other, of the mules stolen; that he stayed there with the mules until the evening of the 30th, when he sold the mules to a man named Julian, who afterwards sold them to a man named Hill, who took them to St. Paul, after which no trace of the mules was found; that the defendant asked \$235, but took \$175, for them; that upon the same day he sold the mules he shipped the buggy and harness to Brownsville, in Saline county, where they arrived on the 1st of June; that this was defendant's buggy, and that on the 3d of June he came for it and took it away. The defendant undertook to give no account of his possession of the mules he sold, saying to the sheriff who arrested him: "I guess you must be mistaken in the man. I was at home at that time. I haven't been out of the county, except on the 1st of June, when I went to Sedalia." But his counsel say they were not sufficiently identified as the mules stolen. Two witnesses testified to the description of the mules stolen,—Hardin, the owner, who

raised one of them, and his near neighbor, Smith, from whom he bought the other. They agreed in their description. Three witnesses testified as to the description of the mules sold, all of whom were acquainted with Hill, but neither of whom had ever seen Hardin's mules before they were stolen,— Julian, who bought the mules from Hill; McGary, to whom he priced them at \$235; and Wentler, the yard-master where Hill kept them until they were sold. It is claimed that the description given by the latter three differs in these three particulars from that given by the two former witnesses: (1) Hardin, in testifying about the mule he raised, said she was not as dark as the Smith mule. "She had a little light on her nose,—a mealy nose." The Smith mule was a darker mule, with a darker nose. Smith testified that the Smith mule's nose was brown, the other a little lighter color; but they made good matches. The witnesses who testified as to the mules sold gave the same general description of their color as that given by Hardin and Smith, but their attention was not directed specially to any shade of difference that might have existed in the color of their noses, and they said nothing on that subject. (2) Hardin testified that the mule he raised was the largest mule, and that she had a small slit about half an inch long in one of her ears, near the top or point. He was not certain in which ear. Was under the impression then that it was in the left ear; but in the card offering a reward, issued directly after the mules were stolen, he described it as in the right ear. McGary testified that the largest of the two mules the defendant sold had a slit in the point of one of her ears; he thought it was the right ear. It might have been an inch or an inch and a half long; he was not certain,—was not nearer than three feet. This mark corresponds in the testimony of each as to the mule it was upon, its character and location on the ear, but it is not certain in the testimony of either as to its exact size, or which ear it was upon. (3) Hardin and Smith testified that the Smith mule had Smith's brand on the left hip, which was the letter L. Smith, who branded her, testified: "When I branded her she was wild, and the brand slipped, and made a scar that looked a little like a figure 6; but a man who knew the brand would take it for a letter L." Julian testified that one of the mules defendant sold was branded on the left hip, and gave a description of the brand, corresponding very well with that given by Hardin and Smith; so well that little doubt that they were testifying about the same brand can be entertained. The peculiarity of this mark, caused by the slipping of the branding iron, making a figure something like a horse-shoe standing on its toe, the open part up, the left side a little longer than the other, and the right, near the end, curving a little towards the left, and which was neither a letter L, O, U, or a figure 6, but might be taken for either, as described by the witnesses, while making the brand difficult of description, furnishes very strong evidence, by reason of its peculiarity, that the mule with such a brand on it that was sold by the defendant was the stolen mule that was thus branded. This evidence, we think, was sufficient to warrant the court in submitting the question to the jury whether the mules sold were not the identical mules stolen, under an instruction which told them they could not convict unless they so found beyond a reasonable doubt; and in giving the hypothetical instruction given in this case as to the presumption arising from the recent possession of stolen property, and in connection with the other facts and circumstances proven in the case, which it is not necessary to set out in detail, is sufficient to support the verdict. The judgment is therefore affirmed.

All concur, except RAY, J., absent.

STATE v. MATTHEWS.

(Supreme Court of Missouri. November 26, 1888.)

1. JURY—SUMMONING—PREJUDICE OF SHERIFF AND CORONER.

On motion for the appointment of elisors in a criminal case, the defendant's affidavit, alleging prejudice in the sheriff and coroner, is not conclusive, and the denial of the motion is not ground for reversal, in the absence of abuse of discretion; Rev. St. Mo. § 3894, providing that, when it shall appear that the sheriff is prejudiced, the coroner shall execute the process. Following *State v. Leabo*, 1 S. W. Rep. 288.

2. SAME—COMPETENCY.

It is not ground of objection to a juror that he was summoned on a previous panel ordered by the regular judge, who did not try the case because of prejudice subsequently alleged against him; nor that he was summoned on the trial of a co-defendant, and was then challenged peremptorily.

SHERWOOD, J., dissenting.

Appeal from circuit court, Christian county; M. G. MCGREGOR, Judge.

Indictment against John Matthews for murder. William Walker and others were indicted jointly with him. Defendant's motion for change of venue on the ground of prejudice in the judge was granted, so far as related to the trial of the case by the regular judge, and Hon. M. G. MCGREGOR, judge of the Fifteenth circuit, tried the case. Defendant was convicted, and appeals. Rev. St. Mo. § 1877, provide that the judge of the circuit or criminal court shall be incompetent to hear and try a criminal cause, when in anywise interested or prejudiced, or when defendant shall make and file an affidavit supported by the affidavit of at least two reputable persons, not of kin to or of counsel for defendant, that the judge will not afford him a fair trial, or will not impartially decide his application for change of venue on account of the prejudice of the inhabitants. Section 1878 provides for the election of a special judge in such case by the members of the bar present. By section 1881, if no suitable person will serve when elected special judge, or if in the opinion of the judge no competent or suitable person can or will be elected, he may request the judge of some other circuit to try the cause.

Boyd & Delaney and *Travers & Payne*, for appellant. B. G. Boone, Atty. Gen., for the State.

NORTON, C. J. At a special term of the Christian county circuit court, held in April, 1887, defendant was jointly indicted with a number of others for murder in the first degree for killing one Charles Green on the 11th day of March, 1887. A continuance of the cause was granted to the August term, 1887, of said court, at which term the cause was again continued till the February term, 1888, of said court, at which time the defendant filed an application for a change of venue, alleging prejudice against the judge of the court. The application was granted, and, it appearing that no member of the bar could or would be elected special judge, it was ordered that MALCOLM G. MCGREGOR, judge of the circuit court for the Fifteenth judicial circuit, be requested to try the case. The cause was then tried at said term, and MCGREGOR presiding as judge, and conducting the trial, which resulted in the conviction of defendant for murder in the first degree, and from this judgment he has appealed to this court. The evidence in this case is substantially the same as in the case of *State v. Walker*, 9 S. W. Rep. 646, (decided at the present term;) and as all the points relied upon for reversal in this case, except those hereinafter noted, were ruled upon in that case adversely to defendant, it is unnecessary to repeat them here. The points made in this case, and neither made nor passed upon in the case of *State v. Walker*, *supra*, are as follows: It appears from the record in this case that at the February term, 1888, of the circuit court, after Judge MCGREGOR had been called to act as judge in the trial of the cause, defendant filed a motion for the appointment of an elisor to summon a jury,

alleging in his affidavit in support of the motion that the sheriff and coroner of Christian were prejudiced against him. This motion was overruled by the court, and this ruling is assigned for error. The exact question here presented was passed upon in the case of *State v. Leabo*, 89 Mo. 252, 1 S. W. Rep. 289, and following the decision made upon it, from which we see no reason to depart, we must hold that the point made is not well taken. When the jurors summoned were put upon their *voir dire* examination, George W. James stated as follows: "I was summoned on the jury in the case of *State v. Wiley Matthews*, one of the co-defendants of this defendant, and was one of the forty that qualified in that case. After I was excused in that case, and while I was claiming my attendance as a juror, I was summoned again as a juror before Judge HUBBARD, in the case of *State v. John Matthews*, (this case,) and when I was discharged in this case by Judge HUBBARD I was summoned again to appear in this case before I got out of the court-room." Elmer F. Cantrell and Jesse D. Jones, two other jurors, made statements the same as above. A. J. Herndon, on his examination, stated: "I was one of the forty in this case summoned before Judge HUBBARD, and was discharged by Judge HUBBARD when he was sworn off the bench, and after I was excused, and before I was out of the room, I was summoned again in this case and on this jury." C. A. Nightwein, John Matthews, and Thomas Swadley, three other jurors, made statements the same as above. Ed. D. Miller, another juror, stated on his examination: "I was one of the panel of forty in the case of *State v. William Walker*, one of the co-defendants of this defendant. I was excused, and, while I was claiming my attendance in that case, I was summoned again in the *Case of Wiley Matthews*, another of the co-defendants of this defendant, and was one of the qualified forty. After I was excused in the *Wiley Matthews Case*, and while I was claiming my attendance in that case, I was summoned again in this case before Judge HUBBARD, and after I was discharged by Judge HUBBARD I was again summoned in this case. I was summoned in this case before I could get out of the court-room." James J. Seller and James S. Doran, two other jurors, testified to the same effect as the above. It appears that all the jurors were summoned on a *venire* issued on the order of MCGREGOR, the judge trying the case, on change of venue, and the above jurors had, with others, been summoned on an order from HUBBARD, judge before the change of venue was granted, and the above-named jurors, after the change of venue, were resummoned, and all qualified as competent jurors under the statute. All of the above-named jurors were objected to by defendant, and the objection overruled. The objection is not founded on the fact that any one of said jurors was disqualified either by reason of prejudice, bias, kinship, or of his having formed or expressed an opinion in the case, for according to the record all of them had been received as qualified and competent on their *voir dire* examination; but the objection is founded on the fact that some of them had been summoned under an order of Judge HUBBARD before defendant filed his motion for change of venue, on the ground that he was prejudiced, and the fact of their having been resummoned on the order of Judge MCGREGOR after he had been called in to try the cause, and the further fact that some of them had been summoned in this case, after they had been summoned in the cases against Walker and Wiley Matthews, and constituted a part of the panel of 40 qualified jurors in those cases, and after they had been peremptorily challenged, whether by the state or defendant does not appear. Under the law of this state governing trials in criminal cases, defendant had the right to a panel of 40 qualified jurors, and the right when such a panel was obtained to challenge 20 of them peremptorily after the state had exhausted its right to challenge 8. The record shows that neither of these rights were either denied defendant, or in any way impaired, and the facts stated constituted no ground for a challenge for cause, and the objections of defendant were properly overruled.

The instructions given in this case are substantially the same as those given in the case of *State v. Walker, supra*, and it is only necessary to say, of the objections made to them, that they were fully considered in the above case, and the instructions held to be proper. The instructions refused, in so far as they contain correct principles of law, were covered by those which were given, and hence no error was committed in refusing them. The evidence in the case fully sustains the verdict of the jury, and the judgment is hereby affirmed, with the concurrence of all the judges, except SHERWOOD, J., who dissents, and RAY, J., absent.

KEITH & PERRY COAL CO. v. BINGHAM.

(Supreme Court of Missouri. November 26, 1888.)

1. RELIGIOUS SOCIETIES—INCORPORATION—POWER TO HOLD REAL ESTATE—CONSTITUTIONAL LAW.

Gen. St. Mo. 1865, c. 70, § 5, as amended by act Leg. 1871, p. 16, provides that "any number of persons, not less than three in number, may become an incorporated church, religious society, or congregation, by complying with the provisions of this chapter;" and section 2: "Any association of persons desirous of becoming incorporated under the provisions of this chapter shall present to the circuit court * * * a copy of their constitution or articles of association, and a list of all their members," etc. *Held*, that this act did not contravene Const. Mo. 1865, art. 1, § 12, providing that "any church or religious society or congregation may become a body corporate for the sole purpose of acquiring, holding, using, and disposing of so much land as may be required for a house of public worship," etc.

2. SAME—ADOPTION OF CONSTITUTION—REPEAL OF FORMER STATUTES.

Const. Mo. 1875, art. 2, § 8, providing that "no religious corporation can be established in this state, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries," does not abrogate the act of 1865, so as to render illegal an incorporation thereunder, effected in 1876; it being provided by section 1 of the schedule to such constitution that all laws consistent therewith should remain in force until altered or repealed, and all laws inconsistent therewith should remain in force until July 1, 1877.

3. SAME—POWER TO MORTGAGE REAL ESTATE.

A religious corporation organized under Gen. St. Mo. 1865, c. 70, has power to mortgage its real estate, under Gen. St. Mo. 1865, c. 62, § 1, and Rev. St. Mo. 1879, § 706, providing that "every corporation, as such, has power * * * to hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation may require," etc.

4. SAME—DECREE OF INCORPORATION—TITLE TO REAL ESTATE.

A decree of court incorporating a religious body passes to the corporation the title to land conveyed to such body before its incorporation, where such court has jurisdiction of the subject-matter and parties, and cannot be collaterally attacked.

5. CORPORATIONS—DEED TO TRUSTEES—VESTING OF TITLE.

Where a conveyance is made to the trustees of a corporate body, without naming them or any of them, the title vests in the corporation named in the deed.

6. COURTS—UNITED STATES CIRCUIT COURT—JURISDICTION—FORECLOSURE OF MORTGAGE.

The United States circuit court has chancery jurisdiction of a proceeding to foreclose a mortgage in Missouri, the statute of that state providing for foreclosing a mortgage in a court of law not doing away with the right to proceed in equity.

7. MORTGAGES—RIGHTS OF MORTGAGEE—PRIOR CONVEYANCE—NOTICE.

A mortgagee who has neither actual nor constructive notice of a prior conveyance of the mortgaged land cannot be prejudiced thereby.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Ejectment by the Keith & Perry Coal Company against Mattie A. Bingham. There was a verdict and judgment for plaintiff. Defendant appeals.

Adams & Field and Rollins Bingham, for appellant. *Daniel B. Holmes and Botsford & Williams*, for respondent.

NORTON, C. J. This is an action of ejectment to recover possession of lot 26, in block 6, of Hubbard's addition to the city of Kansas, in which plaintiff recovered judgment, from which defendant has appealed. It was admitted on the trial that Chester Hubbard was the original owner of the lot in ques-

tion; and plaintiff, in support of his title, put in evidence a deed from said Hubbard, dated June 10, 1856, to J. B. Moore, to the lot in controversy; also an order of the circuit court of Jackson county, dated May 30, 1873, incorporating the members of "The First Baptist Church of Kansas City" by that name, together with the petition to the circuit court, accompanied with the articles of association signed by the members of the church organization proposed to be incorporated; also certificate of the clerk of said court, dated May 30, 1873, under its seal, that said members had become a body politic and corporate under the name and style of "The First Baptist Church of Kansas City, Missouri;" also certificate of the secretary of state, dated February 29, 1876, of the corporate existence of "The First Baptist Church of Kansas City, Missouri." Plaintiff also put in evidence a deed of mortgage from "The First Baptist Church of Kansas City, Missouri," to "The American Baptist Home Mission Society of New York," dated September 30, 1876, conveying the lot in question to secure a debt therein named; also transcript of the record of the United States circuit court for the Western district of Missouri in a suit brought by the "American Baptist Home Mission Society of New York, against "The First Baptist Church of Kansas City, Missouri," to foreclose the aforesaid mortgage, resulting on the 25th May, 1881, in a decree of foreclosure, which, together with the proceedings thereunder, report of sale of the premises made by the United States marshal to William H. Harris, the approval of said report by the court, and an order for the deed, were also put in evidence. Plaintiff further put in evidence a deed dated October 17, 1881, from said United States marshal, conveying the premises to said William H. Harris; and also various mesne conveyances putting the title acquired by said Harris, if any, in the plaintiffs in this suit. It was then stipulated that on April 1, 1880, the said lot and buildings ceased to be used for the purpose of religious worship, and were never thereafter used for that purpose. Plaintiff also put in evidence a tax deed dated March 19, 1884, and recorded March 21, 1884, conveying said lot to John C. Gage, and a deed from said Gage, dated March 19, 1884, conveying the lot to plaintiff. Evidence was offered tending to show that plaintiff paid \$13,000 for the lot, and that a short time before the purchase the streets adjoining the lot had been cut down so as to leave the surface of the lot 28 or 30 feet above the surface of the street; that plaintiff had no key to any door of the church building thereon, but went upon said lot after its purchase, tore down the building, and graded the lot down to a level with the streets, at a cost of about \$2,000, with a view of putting a building upon it; that after said grading had been completed, the defendant, the day before this suit was brought, entered on said lot, and built a wire fence around the same, and notified plaintiff in writing of the fact.

Defendant, in support of her claim, offered in evidence a deed from John S. Hough, dated April 29, 1857, conveying said lot to "The Trustees of the First Baptist Church of Kansas City, viz., R. S. Thomas, J. M. Ashburn, A. J. Martin, and T. M. James," "to have and to hold unto them, the said trustees, parties of the second part, and to their successors, to and for the only proper use and behalf of the said church, forever." In connection with this deed, and before it was offered, the court received, over plaintiff's objection, the evidence of said John S. Hough to the effect that previous to his making said deed he had purchased the lot described therein from J. B. Moore, and received a deed from him conveying said lot; that said deed was never recorded, for the reason that he had lost or mislaid it. It was then stipulated that in 1857, after the delivery of said deed from Hough, a church was erected on said lot out of the funds subscribed for that purpose by the members of said First Baptist Church of Kansas City, Mo., which was then an unincorporated society, and that said lot and church were occupied and used exclusively by the said First Baptist Church for the sole purpose of religious worship continually thereafter until April 1, 1880, when said congregation

moved into a new church building on a different lot, and that said first lot and church building thereon were never thereafter used as a place of religious worship. Defendant next offered, over plaintiff's objection, the evidence of J. M. Ashburn and A. J. Martin, two of the trustees in said deed, and others, tending to show that the lot in controversy was a gift from Dr. Johnston Lykins, since deceased, and the former husband of appellant; that said Lykins purchased said lot from John S. Hough, the grantor in said deed, and paid him therefor \$500, and gave the same to said trustees to hold in trust for the church, as specified in said deed, with the further understanding in parol that if the congregation of said church failed to erect a church building thereon, or if, after erecting a church building on said lot, it ceased to be used for church purposes, or as a place of worship by said congregation or denomination, that then said lot was to become the property of said Lykins, his heirs or assigns; that this parol understanding, as well as the gift, was known and assented to by the trustees in said deed and the members of said denomination, and the gift made and accepted with such understanding. It being stipulated that Johnston Lykins was duly adjudged a bankrupt in 1873, and that he died in 1876, defendant offered in evidence a deed from Edward H. Webster, assignee in bankruptcy of Johnston Lykins, dated September 2, 1884, conveying said lot as such assignee to defendant, and also a quitclaim deed from John S. Hough to defendant, dated November 11, 1884, conveying the lot in dispute. Defendant also offered in evidence the following: (8) City collector's notice of tax sales, published in the Kansas City Mail newspaper once in each week for three successive weeks, as follows, to-wit, on October 22, 1881; on October 29, 1881; and on November 5, 1881. (9) It was here stipulated that the tax sale of 1881 began, as recited in the tax deed, on the first Monday, being the 7th day, of November, 1881. (10) Evidence tending to show that the tract in controversy was not sold or offered to be sold by the city collector until January 10, 1882; that when the sale of 1881 began, only a lot or two a day was offered for sale by the collector for over a month from the beginning of the sale, to give property owners a chance to come in and pay taxes; that the city collector did not sell or offer for sale any delinquent tract of real property on Thanksgiving day (November 27th) of 1881, nor on December 25, 1881, nor on January 1, 1882; that on and one day previous to the day of sale of the lot in controversy there were no persons who bought any property at said tax sale, except the city auditor for the city, Robert F. Barrett, by M. S. C. Donnell, and Joseph Kidd, by one Young; that said Young and Donnell, for Kidd and Barrett, or in their names, took regular turns at bidding off tracts of real property then offered for sale for the taxes, interests, and costs thereon; that they did not bid against each other, and in no instance for less than the whole of any tract of real property delinquent and offered for sale; that previous to the two days mentioned, a short time before and during the sale of 1881-82 aforesaid, said Donnell and Young had a dispute over whose turn it was to bid against each other. Plaintiff, in rebuttal, offered the following, viz.: (1) Evidence tending to show that said deed from John S. Hough to T. M. James, R. S. Thomas, J. M. Ashburn, and A. J. Martin, as trustees of the First Baptist Church of Kansas City, Mo., was made, executed, and delivered unconditionally, and on the terms mentioned in the deed itself, and none other; that Dr. Johnston Lykins subscribed towards the fund for the purchase of a church lot, and the erection of a church edifice thereon, in the same manner, and on the same terms, as all other subscriptions were made to said fund, and that he paid a part of his subscription by furnishing the money to pay for said lot; and there was no parol agreement whatever between Dr. Lykins and said trustees or said congregation respecting any forfeiture or reverter of said lot to Dr. Lykins, his heirs or assigns, on any kind of condition whatever; and that respondent never had any notice or knowledge whatever of any agreement or understanding ever having been

made or existing or claimed, different from or in addition to the terms specified in said Hough deed. (2) It was here stipulated that said R. S. Thomas died intestate before the suit in which the decree hereinafter set forth was rendered was commenced, and that his only heirs were the following: E. K. Bingham, wife of George C. Bingham; John P. Thomas; Mary B. Piper, wife of James M. Piper; Lucy Anderson, wife of J. D. Anderson; Martha Thomas; Robert B. Thomas; William Thomas; and Ella Thomas. (3) Decree of the circuit court of Jackson county of date April 15, 1876, in the suit of the First Baptist Church of Kansas City, Mo., against Thomas M. James, A. J. Martin, J. M. Ashburn, E. K. Bingham, George C. Bingham, John P. Thomas, Mary B. Piper, James M. Piper, Lucy Anderson, J. D. Anderson, Martha Thomas, Robert B. Thomas, William Thomas, and Ella Thomas, divesting the defendants of all the title to said lot, and vesting the same fully and completely in the First Baptist Church of Kansas City, Mo., in its corporate capacity. Said suit was instituted, and service of notice thereof made upon the defendants therein, in the year 1873. The above was all the evidence offered, and the court thereupon gave an instruction that under the pleadings and evidence plaintiff was entitled to recover.

The first question arising on the above record is, was the First Baptist Church of Kansas City, Mo., a body corporate on the 30th of September, 1876, at which time J. B. Moore made the deed in evidence conveying the lot in question to "The Trustees of the First Baptist Church of Kansas City, Missouri?" And, if so, did said Moore's deed vest title to the property conveyed in the corporation? Plaintiff claims that said church became incorporated by virtue of section 5, c. 70, Gen. St. 1865, as amended by the legislature, (Acts 1871, p. 16,) and in compliance with the provisions of said chapter. The said section is as follows: "Sec. 5. Any number of persons, not less than three in number, may become an incorporated church, religious society, or congregation, by complying with the provisions of this chapter, except that it will be sufficient if the petition be signed by all the persons making the application; and, when so incorporated, such persons and their associates and successors shall be known by the corporate name specified in the certificate of incorporation, and shall be entitled to all the privileges, and capable of exercising all the powers, conferred or authorized to be conferred by the constitution of the state upon such corporations." Sections 2 and 3 of said chapter are as follows: "Sec. 2. Any association of persons desirous of becoming incorporated under the provisions of this chapter shall present to the circuit court of the proper county, or the judge thereof in vacation, a copy of their constitution or articles of association, and a list of all their members, together with a petition to such court or judge thereof for a certificate of incorporation under the provisions of this chapter. Sec. 3. If the circuit court or judge thereof shall be of the opinion that said articles of association be not inconsistent with the constitution or laws of the United States or of this state, then the same shall be filed with the clerk of said court, and then said court shall grant to said association a certificate in the following form, to-wit:

"Whereas, A, B, C, D, E, F, and others have filed in the office of the clerk of the circuit court their articles of association, in compliance with the provisions of an 'Act concerning corporations,' approved March 19, 1866, with their petition for incorporation, under the name and style of ———, they are therefore hereby declared a body politic and corporate, by the name and style aforesaid, with all the powers, privileges, and immunities granted in the act above named.

"By order of the circuit court, (or judge thereof.)

"Attest:

G. H.,

[Seal.]

"Clerk of the Circuit Court of ——— County."

The evidence shows that 12 persons, citizens of Kansas City, on the 30th of May, 1873, filed in the office of the clerk of the circuit court of Jackson county

their petition on behalf of themselves and their associates, filing with the same the articles of association with the names of more than three hundred persons, including among them Johnston Lykins and Mattie Lykins, the defendant in this suit, and at that time the wife of said Lykins. These associates are described in the said articles "as members of such organization." The petition prayed that they be incorporated under the name and style of "The First Baptist Church of Kansas City, Missouri." The evidence shows that said petition and articles of association, on being examined by the said circuit court, and being found not inconsistent with the constitution of the United States or this state, it was ordered that the prayer of the petition be granted, and thereupon a certificate of incorporation was duly issued under the hand and seal of the clerk of said court, in strict conformity with the requirements of said chapter 70, Gen. St. 1865, *supra*. It further appears that in pursuance of section 2, c. 62, Gen. St. 1865, a copy of the articles of association of said corporation was filed in the office of the secretary of state, who thereupon issued his certificate, dated February 29, 1876, certifying that said incorporation had been duly organized. It further appears that J. B. Moore, in whom was the record title to the lot in controversy, on August 31, 1876, conveyed the same by deed to "The Trustees of the First Baptist Church of Kansas City, Missouri," and that thereafter, on the 30th September, 1876, "The First Baptist Church of Kansas City, Missouri," by its deed mortgaged said lot to the American Baptist Home Mission Society of New York, to secure an indebtedness therein specified. The evidence shows that this mortgage was foreclosed by a decree of the United States circuit court for the Western district of Missouri, rendered on May 31, 1881, under which the lot in question was sold, as directed by the decree, by the United States marshal to Harris, and a deed executed conveying the same to him. It also shows that the title thus acquired by Harris passed by various mesne conveyances to plaintiff.

Notwithstanding this evidence, it is claimed by defendant that "The First Baptist Church of Kansas City, Missouri," never became a body corporate either *de jure* or *de facto*; and to establish this contention it is insisted that the act of the legislature, *supra*, authorizing such incorporations to be formed, is unconstitutional, in this: that the said act is broader in its scope as to those who could become a church corporation than the constitution warranted. The constitution of 1865 provides as follows: Article 1, § 12. "That no religious corporation can be established in this state, except by a general law, uniform throughout the state. Any church or religious society or congregation may become a body corporate for the sole purpose of acquiring, holding, using, and disposing of so much land as may be required for a house of public worship, a chapel, a parsonage, and a burial ground, and managing the same, and contracting in relation to such land, and the building thereon, through a board of trustees, selected by themselves; but the quantity of land to be held by any such body corporate, in connection with a house of worship or a parsonage, shall not exceed five acres in the country, or one acre in a town or city." We are of the opinion that the act passed by the legislature is in pursuance of the power conferred upon it by the above section. The act in question only allows the incorporation of a church, religious society, or congregation, and this the constitution permits and authorizes to be done. Appellant's contention is that the constitution contemplated that a church, religious society, or congregation should be organized or in existence before it could be incorporated, and that the act of the legislature contemplates and authorizes the incorporation of a church before the persons making the application have organized as a church. Conceding for the argument (although the distinction attempted to be drawn is shadowy) that such was the intention of the above constitutional provision, if the act of the legislature can be construed so as to harmonize with that intention, it is our duty so to construe it; and that it is susceptible of the construction that, before any incorporation can be had, the

persons making the application and their associates must have constituted a church, religious society, or congregation, is, we think, manifest from the requirements in section 2, c. 70, *supra*, that, in connection with the petition, the petitioners must present to the court or judge "a copy of their constitution or articles of association, and a list of all their members," as the word "members" can only refer to those persons composing a church or a religious society or congregation theretofore formed. It is next insisted that section 8, art. 2, of the constitution of 1875, abrogated and annulled all legislative provisions on the subject of religious corporations. Said section 8 is as follows: "That no religious corporation can be established in this state, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries." There is nothing in this contention. If the act in question is not inconsistent with the said provisions, it is provided by section 1 of the schedule to the constitution that it shall remain in force until altered or repealed; and if the act is inconsistent with the above provision, which requires legislation to enforce it, the act nevertheless was continued in force by the same section of the schedule, which declares that "the provisions of all laws inconsistent with this constitution shall cease upon its adoption, except that all laws which are inconsistent with such provisions of this constitution, or require legislation to enforce them, shall remain in force until the 1st day of July, 1877, unless sooner amended or repealed." Before the 1st July, 1877, every act necessary to perfect the church corporation had been performed. It is also insisted that, although the church had become a separate body when Moore executed his deed conveying the lot in dispute to "The Trustees of the First Baptist Church of Kansas City, Missouri," said deed was ineffectual to vest the title of the lot in the corporation. In support of this contention we have been cited to a line of cases which hold that when a conveyance is made to certain named persons as trustees of a corporate body, that the effect of such conveyance is to vest title in them as trustees; but that is not this case. Here the conveyance is made to the trustees, etc., without naming them or any of them, and in such case the title vests in the corporation named in the deed, as is shown by the following cases: *Turnpike Co. v. Brush*, 10 Ohio, 112; *People v. Runkle*, 9 Johns. 147-156; *Road Co. v. Creeger*, 5 Har. & J. 122; *Manufacturing Co. v. Starbird*, 10 N. H. 123; *Bayley v. Insurance Co.*, 6 Hill, 476; *Vansant v. Roberts*, 3 Md. 119; *Christian Church v. McGowan*, 62 Mo. 279; *Douthitt v. Stinson*, 63 Mo. 268; *Society v. Varick*, 18 Johns. 38; *Stein v. Association*, 18 Ind. 237.

It is also contended that the corporation had no power to mortgage the lot in question. This contention is answered by section 1, c. 62, p. 326, Gen. St. 1865, and section 706, Rev. St. 1879, which provides "that every corporation as such has power * * * to hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in its charter or the law creating it." It is also insisted that, as the statute of this state provides for foreclosing a mortgage by a proceeding in a court of law, the proceeding in equity in the United States circuit court to foreclose the mortgage was not permissible, and that the decree rendered therein foreclosing the mortgage, and ordering a sale of the property, was not enforceable, and that the sale and deed made in performance thereof passed nothing to the purchaser and grantee. There is nothing in this point. In the case of *Riley v. McCord*, 24 Mo. 268, it is said: "It was a question in our courts at one time whether the proceeding under the statute concerning mortgages was one in equity, or one at common law, subject to the provisions of the statute. It was early settled that a proceeding to foreclose the equity of redemption of a mortgage under the statute was a proceeding at law, and was not governed by the rules of proceedings in equity. It has also been the opinion that, notwithstanding the

mode prescribed by the statute, a party might forego the statutory remedy, and pursue his rights in a court of chancery." It follows from this that, if chancery jurisdiction in such cases could not be denied to the courts of the state, it could not be denied to the United States circuit court, which possessed chancery as well as common-law jurisdiction. It not appearing in the evidence that either "The American Baptist Home Mission Society of New York," or those claiming under the mortgage made to it, had either actual or constructive notice that the lot in question had been conveyed by J. B. Moore to Hough, the trial court, in the view we have taken, was justified in giving an instruction that under the pleadings and evidence plaintiff was entitled to recover. In regard to the Hough deed, conveying the lot to James and others, trustees of the unincorporated "First Baptist Church," etc., it may be said that the decree of the Jackson county circuit court had the effect to put whatever title it conveyed to the trustees of the unincorporated church in the trustees of the "First Baptist Church of Kansas City, Missouri," said court having jurisdiction of the subject-matter and parties; and, it further appearing that when suit was begun said church was a *de facto* corporation, and when the decree was rendered that it had received the certificate of the secretary of state certifying to its corporate existence, such decree remains firm and effectual till annulled by a direct proceeding, and is not open to collateral attack. *Gray v. Bowles*, 74 Mo. 419; *Rosenheim v. Hartrock*, 90 Mo. 357, 2 S. W. Rep. 478. This view of the case renders it unnecessary to consider or discuss the numerous points made with reference to questions arising on the tax deed, and other matters, and, the judgment on the whole record being for the right party, and no error appearing therein justifying an interference with the judgment, it is hereby affirmed.

SHERWOOD and BRACE, JJ., concurring. BLACK, J., not sitting. RAY, J., absent.

BANK OF COMMERCE v. CHAMBERS *et al.*

(*Supreme Court of Missouri*. November 26, 1888.)

1. TRUSTS—INCOME PAYABLE TO CESTUI QUE TRUST—RIGHTS OF CREDITORS.

An income, given by the will of the wife to the husband on condition of his executing a release of his estate by the curtesy, which he executes accordingly, is subject to the claims of the husband's creditors, notwithstanding the provisions of the will to the contrary. Distinguishing *Lampert v. Haydel*, 9 S. W. Rep. 780.

2. EQUITY—JURISDICTION—SEQUESTRATION OF INCOME OF TRUST-ESTATE.

Though a judgment creditor of the husband may sell under execution the husband's estate by the curtesy, yet, as the release will remain a cloud on the title, the removal of which will require a decree in equity, and as the case is one of fraud and of trust, and as the creditor may go to a court of equity for a construction of the provision of the will for the husband, he may properly resort to a court of equity for relief in the first instance, at his election.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Suit by the Bank of Commerce against B. Maziers Chambers and Julius S. Walsh to sequester the income of an estate held by Walsh in trust for Chambers, a judgment debtor of the plaintiff. A demurrer to the petition was sustained, and, plaintiff declining to plead further, judgment dismissing the petition was rendered, from which it appeals.

Albert Arnstein and J. P. Maginn, for appellant. Hitchcock, Madill & Finkelnburg, for respondents.

SHERWOOD, J. The petition in this cause, omitting formal parts, is as follows: That on the 8th day of April, 1881, in a case, No. 55,867, in the circuit court of the city of St. Louis, in the state of Missouri, being a case of it, the Bank of Commerce, as plaintiff, against B. M. Chambers and Margaret F.

Smith, defendants, it recovered judgment against Chambers and Smith for the sum of \$5,134.35, and costs, which judgment was therein ordered to bear interest at the rate of 10 per cent. per annum from its date; that thereafter, to-wit, on the 18th day of May, 1881, the plaintiff caused an execution to issue on said judgment, which execution was No. 150, returnable to June term, 1881; that said execution was directed and delivered to the sheriff of the city of St. Louis, and was by him duly returned on the 6th day of June, 1881, *nulla bona*; that thereafter, to-wit, on the 19th day of October, 1882, in another case, 56,989, in the circuit court of the city of St. Louis, state of Missouri, being the case of it, the Bank of Commerce, as plaintiff, against B. Maziere Chambers and R. Graham Frost, as defendants, it recovered a judgment against B. Maziere Chambers, who is a defendant in the present suit, and R. Graham Frost, for the sum of \$5,514.37, and costs, which judgment was therein ordered to bear interest at the rate of 10 per cent. per annum from date; that thereafter, on the 2d day of January, 1884, the plaintiff caused an execution to issue on said judgment, which execution was No. 135, returnable to February term, 1884; that said judgment was directed and delivered to the sheriff of the city of St. Louis, and by him duly returned on the 14th day of February, 1884, *nulla bona*. And plaintiff further says that nothing has been paid on either of the above-mentioned judgments; that none of the defendants in either of said cases has any property or effects of any kind subject to execution and levy. And plaintiff says that Mrs. Marie C. Chambers, the wife of defendant B. Maziere Chambers, died on the 9th day of December, 1883, in the county of St. Louis, state of Missouri; that she made a will, which was duly probated in the probate court of St. Louis county, on the 20th day of December, 1883; and a certified copy thereof was filed in the office of the recorder of deeds of the city of St. Louis, state of Missouri, in Book 723, p. 81, on the 24th day of December, 1883; that among other provisions immaterial to this case the said testatrix gave the income of property worth half a million dollars, which income is now \$20,000 per annum, to the defendant Walsh, in trust for the defendant Chambers, during his natural life. The language of the will on this point is as follows:

"*Seventh.* All of the rest and residue of my estate, real, personal, and mixed, whereof I shall die seized, entitled, or possessed, I give, bequeath, and devise to my brother Julius S. Walsh in trust, that he manage, hold, and dispose of the same during the natural life of my husband; that quarterly he pay the net rents, issues, and profits arising therefrom into the proper hands of my husband alone, or such person or persons as he, my husband, by any order in writing, may, for that purpose, appoint, and after the death of my husband to convey to such person or persons for such estates and in such portions as would by the laws of Missouri, then in force, be declared to be my rightful heirs had I survived him: provided that such heirs be descendants of mine, they, or the survivors of them, shall have only a contingent estate in the property thus inherited, to become vested only on his or hers, the survivor, attaining majority. And upon the death of any one the inheritance to be declared to the exclusion of my husband, my desire being that my estate shall remain in my family; if it cannot, among my descendants. And I give to my said trustee the power to sell or to convert any part of the trust property, and the proceeds thereof, to reinvest in such real or personal estate, or in such securities, as to my said trustee may seem expedient and discreet; or to employ the same in the improvement of any portion of my real estate, giving, also, to my said trustee power to lease over for a term of years, not exceeding thirty. But, in every instance of such sale, conversion, lease, or improvement, the written consent of my husband thereto to be first had and obtained, and without such consent no exercise of powers herein conferred to be valid; my object, and my only object, and I have by the creation of this trust none other than that, because of the affection I entertain for my hus-

band, the tender love which has characterized our union with each other, the fear he may become embarrassed, I may of my own estate always throughout his life secure to him an ample independence forever, free from the claims and demands of any creditor he may now or hereafter have, and without any right to intervene or sequester the revenues of the trust for the payment of their claims or demands. And in the event of the death or resignation of my said trustee, or that by any cause he be incapacitated or disqualified for the performance of the duties of the trust, I authorize my husband, by writing under his seal and signature, and duly acknowledged as in release of deeds, to name and appoint another trustee, who, from the date of the filing of such instrument for record in the proper office in the said city of St. Louis, shall be subrogated in the lieu and stead of said Julius S. Walsh, the same as herein originally named, and of course to be subjected to the said trust, limitations, conditions, restrictions, and provisions here contained. This power of appointment is a continuing one, to be exercised as often as necessity require. The provisions herein made for my husband are upon condition that, within six months after the probate of my will, he, by deed duly executed and in the said city of St. Louis duly recorded, release any right, title, or estate as tenant by the curtesy he may have."

And plaintiff further says that the defendant Chambers had an estate by the curtesy in the real estate of his deceased wife, from which, if he had retained it, he would have had an income of at least \$15,000 per annum, which said income would have been subject to seizure and sale upon execution by plaintiff, to satisfy its judgment hereinbefore set forth. Plaintiff further states that, for the purpose of hindering, delaying, and defrauding plaintiff, and for the purpose of securing to his own use an estate which he (said Chambers) believed to be secure from attack and seizure by plaintiff herein, he did, heretofore, to-wit, on the 30th day of December, 1883, by deed duly recorded in the office of the recorder of deeds of the city of St. Louis, state of Missouri, and in Book No. 714, page 525 thereof, convey his said estate, by the curtesy, as required by the will of his wife, to the defendant Julius S. Walsh, in consideration of the provision in his favor in the said will of his wife. And plaintiff further says that the defendant Walsh has accepted the position of trustee for defendant Chambers under the will of the latter's wife, and by reason of the conveyance of the estate by the curtesy to him by defendant Chambers, he (said Walsh) pays over to said Chambers, quarterly, as such trustee, the income of the trust-estate, to the amount of \$5,000 per quarter. And plaintiff further says that the deceased testatrix did not leave, and never had, any equitable separate estate; that she inherited the property she left from her father; that there are no debts proved against her estate, though it has been in process of administration since December 23, 1883; and that there are no debts in existence to be proved. And plaintiff further says it is wholly without remedy as to the collection of its two judgments above set out, unless this court order and decree that the defendant Walsh pay, quarterly, to plaintiff what, under the terms of the will, and by reason of the conveyance of said estate by the curtesy, he would otherwise pay to defendant Chambers, until the plaintiff's said judgments shall be satisfied. Wherefore plaintiff prays that defendant Chambers be enjoined from receiving, and defendant Walsh be enjoined from paying, him any of the income provided for in the will of Mrs. Marie C. Chambers until the plaintiff's judgments are satisfied; and that defendant Walsh be ordered to pay plaintiff, in part satisfaction of them, each quarter of a year, the income of the estate of which he is trustee for defendant Chambers until they, said judgments, are fully satisfied; and that such further relief be granted plaintiff as to the court may seem proper. A demurrer was successfully interposed on the grounds that the petition did not state facts sufficient to constitute a cause of action, and did not state facts sufficient to entitle plaintiff to equitable relief. The plaintiff de-

clining to plead further, final judgment was entered, dismissing his petition. Hence this appeal.

1. The object of this proceeding, as is apparent from the petition, is to sequester the income of an estate held by Julius S. Walsh, as trustee for the defendant Chambers, under and by virtue of a trust created in his favor by the will of his late wife, and to apply such income to the payment of two judgments, each for about \$5,000, recovered by plaintiff against the defendant Chambers and others.

2. The validity of such trusts, speaking in a general way, has been recently affirmed in the case of *Lampert v. Haydel*, 9 S. W. Rep. 780, decided at the present term.

3. But there are some circumstances connected with this particular trust, deserving of consideration, as to whether they do not take it out of the operation of the rule announced in the case just cited, that trusts may be created in favor of a person which will be inalienable by him, and out of the reach of his creditors, though there be no limitation over or cesser, and no discretionary power of payment lodged in the trustees, if such trust be created by the gratuitous act of a third person, with a view to the support and maintenance of the beneficiary during life. That decision, and the class to which it belongs, rest in a large part upon the distinct ground that a creditor is not defrauded, and therefore has no cause of complaint, because the owner of property, in the free exercise of his will, so disposes of it that the object of his bounty, who parts with nothing in return, has a sufficient income provided for and applied to his life support. In the case at bar the beneficiary did part with something in return. But for his compliance with the express condition in the will, by the surrender of his curtesy in his wife's estate by deed, as the petition recites, duly recorded, the income provided for his use would never have become his. This stands confessed by the demurrer. He therefore occupies the attitude of a purchaser of that income, as much so as does a wife who receives a conveyance of land in consideration of the relinquishment of her dower in other property of her husband. *Woodson v. Pool*, 19 Mo. 340; *Novelty Co. v. Pratt*, 21 Mo. App. 171; Bisp. Eq. 157; 2 Perry, Trusts, (3d Ed.) § 635; *Garbut v. Bowling*, 81 Mo. 214. The two cases are absolutely parallel. Regarding, then, the defendant in the light of a purchaser of the income bestowed upon him by the will of his wife, and not as the mere recipient of her bounty, it must be ruled that such income is subject to the claims of his creditors, and subject in this proceeding.

4. Something has been said about the plaintiff having a remedy at law by proceeding to sell the curtesy estate. It is true, he might have done this,—taken a sheriff's deed, brought an action of ejectment, and on the trial have shown the fraud, and thus have succeeded; but in the end the deed made by defendant Chambers to defendant Walsh would still have remained a cloud upon the title, requiring a decree in equity to have it removed. This would give equity jurisdiction in the first instance, in order to avoid a multiplicity of suits, and afford full and complete relief in a single proceeding. *Harrington v. Utterback*, 57 Mo. 519.

5. Besides, the petition discloses a case of fraud and of trust, both of which are ancient grounds of equitable jurisdiction, and when such jurisdiction is original and ancient, it is not ousted by the mere fact that a court of law can afford an apparently adequate relief. *Pratt v. Clark*, Id. 189; *Stewart v. Caldwell*, 54 Mo. 536.

6. Moreover, plaintiff had a right to go into a court of equity to have it construe the clause, and have it enforce the trust created by the will, and the facts alleged in the petition; and the prayer for general relief authorized such action by the court.

7. Finally, the plaintiff had its election to resort either to the fund it did, in order to compel payment of its judgment, or it might have resorted to the

property alleged to have been fraudulently exchanged for that fund. Therefore judgment reversed, and cause remanded, with directions to enter a decree for plaintiff. All concur. RAY, J., absent.

TROYER *et al.* v. WOOD ✓

(Supreme Court of Missouri. December 20, 1888.)

TAXATION—TAX SALE—NOTICE TO NON-RESIDENT—ERROR IN NAME.

Rev. St. Mo. § 3494, provides that in actions against non-residents the court or clerk shall make an order directed to them, notifying them of the commencement of the suit. Section 3499 makes provision for cases where the names of the parties whose interests are sought to be passed upon are unknown. *Held*, that the names must be correctly given, and that a sale of the land of Daniel Troyer for taxes, in a proceeding against and notice to Daniel Tragar, was a nullity, though the latter name was taken from the record of Daniel Troyer's deed.

Appeal from circuit court, Vernon county; CHARLES G. BURTON, Judge.

Ejectment by Seth Troyer and others, heirs of Daniel Troyer, against Joseph M. Wood, holding under a sale for taxes. Judgment for plaintiffs, and defendant appeals.

G. S. Hoss, for appellant. E. E. Kimball, for respondents.

SHERWOOD, J. Plaintiffs, the heirs of Daniel Troyer, deceased, brought ejectment for N. E. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 18, township 35, range 29. Petition in usual form; answer, a general denial. Plaintiffs proved themselves heirs of Daniel Troyer, deceased, and then showed a regular chain of title from the United States to Holbrook, Holbrook to Huselton, Huselton to Richardson, and Richardson to said Daniel Troyer. The deed from Richardson to Troyer was, however, entered on the records as being from Richardson to Daniel Tragar. Defendant claims under tax proceedings resulting in judgment and sale of the land in controversy, and through mesne conveyances from the purchaser at such sale, who received a sheriff's deed for the land aforesaid. The tax suit mentioned was instituted against Daniel Tragar. The circuit court was of the opinion that the tax proceedings were void, because of the insufficiency of the affidavit for publication, in that it alleged the non-residence of the defendant Daniel Tragar, on "knowledge and belief." Owing to views to be presently developed, it is not necessary to discuss the sufficiency of that affidavit. For the purposes of this opinion it may be conceded that every step taken in the tax suit against Daniel Tragar was regular and valid from inception to termination. It may also be conceded that, owing to the mistake made by the recorder in recording the deed from Richardson to Daniel Troyer, that deed was so recorded as to make it appear that Daniel Tragar was the grantee in such deed, and therefore, under the ruling in *Terrell v. Andrew Co.*, 44 Mo. 309, Tragar must be regarded as the record owner of the land in suit. It may also be conceded that under the ruling in *Vance v. Corrigan*, 78 Mo. 94, that a suit for back taxes is properly brought against the apparent, *i. e.*, the record owner, of real property, and that such record owner is to be treated as the true owner, and that a tax sale made against such apparent or record owner of the property will bind the true owner, who claims under the apparent owner by unrecorded deed. These concessions may freely be made; yet, being made, how do they affect, or what bearing do they have on, the case at bar? These concessions and statements have been made in order to a full understanding of the precise *status* of the case in hand. But Daniel Troyer, nor those who derive their title from him, do not claim under Daniel Tragar, neither by unrecorded deed nor otherwise; they are not in privity with him, either in blood, estate, or law, and consequently the principle announced in *Vance's Case*, *supra*, can have no application here. Bigelow, Estop. (3d Ed.) 284.

The only question, therefore, arising upon the foregoing facts is: What effect did the tax proceedings and judgment against Daniel Tragar have against Daniel Troyer? It is a principle of universal justice that no one shall be condemned in his person or property without notice, and opportunity to be heard in his defense. Notice is therefore essential to the jurisdiction of all courts; and the rule which requires that it be given to the party whose interests and rights are sought to be affected by judicial proceedings, is as old as the law itself. A judgment, without notice given, without opportunity to be heard, possesses none of the attributes of a judicial determination; it is simply judicial usurpation and oppression; a mere arbitrary edict, based upon an *ex parte* statement, and entered upon the records of the courts in defiance of the maxim, *audi alteram partem*. Such a judgment deserves not the name it bears, and will not be respected and upheld in any forum where right and justice are administered. This doctrine is met with and approved at almost every turn you take in the broad fields of adjudication, and is announced by authorities too numerous for computation. *Nations v. Johnson*, 24 How. 203; *Lessee of Walden v. Craig*, 14 Pet. 154; *Webster v. Reid*, 11 How. 437; *Galpin v. Page*, 18 Wall. 350; *Earle v. McVeigh*, 91 U. S. 503; *Windsor v. McVeigh*, 93 U. S. 274; *Pennoyer v. Neff*, 95 U. S. 714; *Rockwell v. Nearing*, 35 N. Y. 302; *Mason v. Messenger*, 17 Iowa, 261; *Freem. Judgm.* (3d Ed.) §§ 117, 118, 495; *Hitchcock v. Aicken*, 1 Caines, 473; *Blackw. Tax Titles*, 213. But notice may be either actual or constructive, and the state possesses the power to substitute service by publication in lieu of personal service; but such substituted service, when authorized or permitted by law, is as much an element of jurisdiction as is personal service where trial is the only method of service prescribed. *In re Bank*, 18 N. Y. 199. And proceedings *in rem* or *quasi in rem* are not exempt from the operation of the rule which makes service of notice in some form an essential of jurisdiction. *Cooley, Const. Lim.* (5th Ed.) 498-500, and cases cited; *Wells, Jur.* § 88; *Wade, Notice*, (2d Ed.) §§ 1144, 1161; *Wap. Proc. in Rem*, p. 88, § 570 *et seq.*, and cases cited; *Woodruff v. Taylor*, 20 Vt. 65; *Denning v. Corwin*, 11 Wend. 647; *Freeman v. Thompson*, 53 Mo. 196, and cases cited. Our statute in relation to proceedings where publication of notice is authorized as to non-resident or absent parties, requires that the court or clerk "shall make an order directed to the non-residents or absentees, notifying them of the commencement of the suit," etc. Section 3494. This section of course means that the names of such non-residents or absentees shall be specified in the order. In no other conceivable way could the order be "directed" to them. This view is enforced by section 3499, requiring certain things to be done where the names of parties whose interests are sought to be passed upon are "unknown" to the institutor of the suit. The name of such non-resident party, or the proper excuse for not giving it, is as essential to jurisdiction in any given case, as is the description of the property sought to be affected by the proposed judgment or decree; and the necessity of such description will not be denied. These premises being granted, it must needs follow that the judgment in the tax suit did not bind Daniel Troyer, as he was not a party thereto; and as he was not a privy in estate, or otherwise, with the defendant in such suit, the only rational conclusion which can be reached is that as to him such judgment was a nullity, and has, as to him and his heirs, no binding force or validity. *Wells, Res Adj.* § 28, and cases cited; *Bigelow, Estop.* (3d Ed.) 95 *et seq.*; *Freem. Judgm.* (3d Ed.) § 162. Therefore the judgment of the circuit court holding the tax-suit proceeding invalid as against plaintiffs is affirmed. All concur. RAY, J., absent.

CHAMBERLAIN v. BLODGETT.

(Supreme Court of Missouri. December 20, 1888.)

TAXATION—NOTICE OF TAX SALE—ERROR IN NAME—IDEM SONANS.

Under Rev. St. Mo. § 3494, providing that in proceedings to enforce a lien against the property of a non-resident, he must be named in the order of publication, a tax sale of land owned by "M. B. Millen," under a publication of notice to "M. B. Miller," is void, the two names not being *idem sonans*; and it is immaterial, as against a grantee of "Millen," that the name of "Miller" appears on the tract-books of the county as owner of the land. Following *Troyer v. Wood*, ante, 42.

Appeal from circuit court, Barry county; WILLIAM F. GEIGER, Judge.

Ejectment by C. W. Chamberlain against C. A. Blodgett. Judgment for defendant, and plaintiff appeals.

George Hulbert, for appellant. *Norman Gibbs* and *T. M. Allen*, for respondent.

SHERWOOD, J. Ejectment for S. E. $\frac{1}{4}$ of section 3, township 24, range 28, in Barry county. Plaintiff relies upon tax proceedings in Barry circuit court, instituted against M. B. Miller, resulting in sale of the land aforesaid, and deed by the sheriff to Talbert and Heese, under whom plaintiff claims by mesne conveyances. The county tract-book showed for more than 10 years past that the property in suit had been located and entered in 1857, by said M. B. Miller. The defendant, Blodgett, is the tenant of Allen, who bought the land and received a deed from McPherson B. Millen, the patentee from the United States government in 1860, which patent was put to record in 1885, after the occurrence of the tax sale. The deed of the patentee to Allen is signed "M. B. MILLEN." Under the provisions of the statute, where proceedings are instituted against a non-resident, in order to the enforcement of a lien against his property, he must be named in the order of publication. Section 3494. If not thus named, and named correctly, the substituted service of process is as void and valueless as if a blank had been left where the wrong name was inserted. A case of this sort does not rest upon the same footing, by any means, as the service of personal process upon the right party by the wrong name. Such service as that is generally held to be good, (*Wade*, Notice, § 1318;) but the distinction between the two methods of service and their legal effect is most obvious. In the case of substituted service, or service by publication, no one is served who is not named, or, what amounts to the same thing, who is incorrectly named; while in case of personal service, the right party is actually served by delivery of the writ, though he is not correctly named therein. The publication as to Miller was no publication as to Millen; the names are not *idem sonans*. They are readily distinguishable in sound from each other. Their pronunciation is by no means similar. "It matters not how two names are spelled,—what their orthography is. They are *idem sonans*, within the meaning of the books, if the attentive ear finds difficulty in distinguishing them when pronounced, or common and long-continued usage has by corruption or abbreviation made them identical in pronunciation." This was the rule announced in *Robson v. Thomas*, 55 Mo. 581, where it was held that Mathews and Mather were not *idem sonans*. See, also, *Whelen v. Weaver*, 93 Mo. 430, 6 S. W. Rep. 220. This is not a case of a judgment *in rem* where the proceedings bind the whole world; but the proceedings were of a limited character; they bound only the parties to the tax suit. Millen was not one of those parties; and process in such cases gives no jurisdiction as to the things indebted, when it fails to run against such "*thing as the property of the debtor*." Wap. Proc. in Rem, § 596. And the necessity for the service of notice is just as great in this class of actions as in any other. A judgment without notice is void, and it is beyond the power of the legislature to make it valid. Notice in some form is the *sine qua non* of jurisdiction. And the

case is not bettered for the plaintiff because the name of Miller was on the tract-books of the county as the owner of the land. It would have made no difference, either, if his name had been on the deed records as the apparent owner, because this is not a case where an apparent owner has been at one time the real owner of the property, and others, whose names do not appear, hold by unrecorded deed, or as heirs or devisees; on the contrary, the grantee of Millen holds by a title wholly independent of Miller. He is not in privity with, and makes no claim under, him. The authorities bearing on the different points hereinbefore set forth are fully discussed in *Troyer v. Wood*, ante, 42, decided at the present term. Ruling the same way in this case as in that, we affirm the judgment. All concur. RAY, J., absent.

HOFFELMANN *et al.* v. FRANKE.

(*Supreme Court of Missouri*. December 20, 1888.)

INJUNCTION—DISSOLUTION—ASSESSMENT OF DAMAGES—NOTICE.

After an injunction *pendente lite* has been dissolved at the final hearing, a motion for an assessment of damages caused by the injunction, made at a subsequent term, without notice to the adverse party, should be denied.

Error to St. Louis circuit court; WILLIAM H. HORNER, Judge.

A suit was pending in which Frieda Hoffelmann and others were plaintiffs and George Franke was defendant. An injunction *pendente lite* was granted, which at the final hearing was dissolved. At a later term defendant moved to assess the damages occasioned by the injunction, which was refused, and he brings error.

Martin, Laughlin & Kern, for plaintiff in error. *Krum & Jonas*, for defendants in error.

SHERWOOD, J. In this cause the injunction was in aid of the principal suit, the latter was heard on its merits, the petition dismissed, and the injunction dissolved on the 15th day of December, 1881. On the 23d of April, 1883, a motion was filed for the assessment of damages, but no notice of the motion was served on the opposite party, and on November 12th next following the motion to assess damages was denied. The point has, it seems, never been ruled by this court, whether an assessment of damages must occur at the same term at which the dissolution of the injunction occurs; but this has been the ruling made by the St. Louis court of appeals in *Loehner v. Hill*, 19 Mo. App. 141, and it is believed that this ruling is in accord with the prevalent practice in such cases. But, however that may be, whether it be admissible to proceed to have an inquiry of damages after the lapse of the term at which the dissolution of the injunction occurs or not, it would certainly seem requisite, after such term has gone by, to notify the opposite party of the proposed inquiry of damages before proceeding to have the same assessed. This was the view taken by the lower court, and we affirm the judgment.

NORTON, C. J., and BLACK and BRACE, JJ., concur. RAY, J., absent.

In my opinion, the court should have ordered notice to be given of the motion, and not have dismissed the cause.

T. A. SHERWOOD.

FITZGERALD v. BARKER.

(*Supreme Court of Missouri*. December 20, 1888.)

1. NEGOTIABLE INSTRUMENTS—CONSIDERATION—SATISFACTION OF LARGER DEBT.

One who takes a note in part satisfaction of a larger debt, and releases valuable liens, is a holder for value.

2. SAME—ACTION ON—KNOWLEDGE OF FRAUD.

Where a grantee assumes in the deed the payment of notes of the grantor, the grantor's fraudulent misrepresentations as to the non-existence of liens are no defense to an action against the grantee by a holder of the notes for value before maturity, the latter not being implicated in the fraud; and the holder cannot be prejudiced by knowledge subsequently acquired.

3. SAME—EVIDENCE—PAYMENT OF SIMILAR NOTE.

The grantee having paid one of the notes, it is proper to refuse to allow him to testify to "the circumstances concerning the payment."

4. APPEAL—REVIEW—RULINGS ON EVIDENCE.

Any admissions by the holder, at the time of payment, tending to show complicity in the fraud, should have been disclosed at the time of offering testimony of the circumstances in order to raise error in its rejection because of such alleged admissions.

5. SAME—REVIEW—HARMLESS ERROR—REVERSAL.

A defendant cannot complain of erroneous instructions where the evidence admits of a verdict for plaintiff only, especially as by Rev. St. Mo. § 8775, there cannot be a reversal except for error materially affecting the merits.

Appeal from St. Louis circuit court; WILLIAM H. HORNER, Judge.

Action by John Fitzgerald against John Barker on several promissory notes. Judgment for plaintiff, and defendant appeals.

Taylor & Pollard, for appellant. *George A. Castleman*, for respondent.

SHERWOOD, J. This cause comes here on appeal, and for the third time. 70 Mo. 685; 85 Mo. 13. The petition alleges that on November 2, 1872, John S. Thomas and wife conveyed to defendant certain real estate, by warranty deed, wherein they covenanted to warrant and defend the title to said premises against the lawful claims of all persons whomsoever, except against the following-named deed of trust and notes on said property, to-wit: Two notes of \$2,000 each, payable two years after date, and eight interest notes, for \$100 each, payable, respectively, at 6, 12, 18, and 24 months after date, all of said notes being made by said John S. Thomas, and payable to his own order, (which said defendant assumed and agreed to pay,) and the taxes for 1873; said assumption and agreement being duly incorporated in said deed. Plaintiff, at the date of said deed, was the holder and owner of one of said \$2,000 notes, and the four interest notes thereon, payable, respectively, in 6, 12, 18, and 24 months from date, all said notes bearing date November 1, 1872, and bearing interest, after maturity, at 10 per cent. per annum. Defendant accepted said deed, and entered into possession of said property thereunder and thereby, and by virtue of said assumption and agreement and assignment to plaintiff became liable to pay said several notes to plaintiff, as the holder thereof, as they severally fell due. The first of said interest notes was duly paid by defendant to plaintiff at maturity thereof, but the residue remains in his hands, unpaid; but, although said \$2,000 note and said three interest notes, due, respectively, in 12, 18, and 24 months, have been long since due, yet they, and each of them, remain wholly unpaid. Wherefore, plaintiff prays judgment for the amount of said \$2,000 principal note and said three unpaid interest notes, due at 12, 18, and 24 months from date, with interest and costs. By his answer the defendant admits that on the 2d day of November, 1872, John S. Thomas and wife, by their deed of that date, conveyed to this defendant the real estate in said petition described by warranty deed, and that said deed contained an assumption of two notes of \$2,000 each, executed by John S. Thomas, and eight interest notes of \$100 each; but the defendant denies each and every other allegation of the petition. For a further and special defense the answer sets up that Thomas made fraudulent misrepresentations and concealments as to certain mechanics' liens and deeds of trust, which were not recited in the deed from Thomas to Barker, and by such misrepresentations Barker was induced to accept such deed in settlement of a demand he held against Thomas; "that plaintiff knew of and was privy to said false and fraudulent misrepresentation;" that defendant never learned of the

falsity of such representations till early in 1873; that the property conveyed was thereafter sold under the mechanic's lien judgment; and that the title, as conveyed by Thomas to defendant, was wholly defeated thereby. Plaintiff's reply was a general denial.

1. There is not a particle of evidence in this record tending to show that plaintiff was in any way concerned in the alleged fraudulent misrepresentations made by Thomas. This being true, it is useless to inquire what frauds Thomas practiced, or what misrepresentations he made as to the non-existence of other incumbrances or liens, since plaintiff had no part or lot in that matter.

2. The testimony shows that he was the purchaser, before maturity, of the notes in suit, and therefore, presumably, the innocent purchaser, and, as a result of a purchase in such circumstances, he could not be prejudiced, nor his title invalidated, by subsequently learning that Thomas had been a fraudfeasor. *Hagerman v. Sutton*, 91 Mo. 519, 4 S. W. Rep. 73; *Leavitt v. La Force*, 71 Mo. 353.

3. For this reason the trial court very properly refused to permit the defendant, who had testified to the payment of the first interest note to plaintiff, "to state the circumstances concerning the payment of that note." The very payment of that note was an acknowledgment by defendant that it was due plaintiff, and if there was anything which then transpired, any admissions made by plaintiff, either tacit or express, tending to show complicity between plaintiff and Thomas in hoodwinking defendant, it was the duty of the latter's counsel to make it known by showing the relevancy of the proposed testimony. This not having been done, the usual presumption which attends the acts and doings of courts of justice must prevail here; for such courts cannot be convicted of error upon mere surmise or conjecture. *Aull v. Aull's Adm'r*, 80 Mo. 199; *Bank v. Wills*, 79 Mo. 275; *Howell v. Stewart*, 54 Mo. 400; *Cooney v. Murdock*, Id. 349; *State v. Douglass*, 81 Mo. 231; *State v. Leland*, 82 Mo. 260; *Jackson v. Hardin*, 83 Mo. 175.

4. But it is insisted that plaintiff is not an innocent purchaser, in that he did not pay cash for the notes, but only took them on account of an old debt due him by Thomas. The testimony shows that plaintiff took the notes in part satisfaction of a much larger debt, and also released valuable liens which he held on the property of Thomas, and that the latter, on this consideration, transferred to him the notes, and promised to pay some money besides, but never did. The point whether a transferee of notes, in such circumstances, who takes them before maturity without notice, and in absolute payment of an antecedent debt, is to be regarded in the same light as one who pays cash for them in the ordinary commercial way, has, it seems, never been directly adjudicated by this court, though it was intimated in *Hodges v. Black*, 76 Mo. 537, affirming the judgment of the St. Louis court of appeals in the same cause, (8 Mo. App. 389,) that the correct rule in such cases is that such a transferee is to be regarded as a *bona fide* purchaser for value, in the ordinary acceptance of the term, though the debt discharged be but a simple contract debt, and no security be surrendered. In an earlier case in this court a similar intimation was given. *Goodman v. Stmonds*, 19 Mo. 106. This is believed to be the true rule, and is certainly supported by sound reason and ample judicial authority. This has long been the view taken by the supreme court of the United States, (*Railroad Co. v. Bank*, 102 U. S. 14, and cases cited,) and is the principle asserted in most of our sister states, in England, and by the text writers. 1 Daniel, Neg. Inst. (3d Ed.) § 827 *et seq.*, and cases cited; 3 Kent, Comm. (13th Ed.) 81; Story, Bills, § 183; Story, Prom. Notes, § 186; 1 Pars. Notes & B. 221, and cases cited. In the circumstances presented by the case at bar the plaintiff would be regarded as a holder for a valuable consideration, and therefore not subject to precedent equities of which he was unaware, even in New York, (*Insurance Co. v. Church*, 81

N. Y. 226,) whose adjudications upon commercial paper differ, in some respects, from those of the supreme court of the United States, as well as from those of many state courts. 1 Daniel, Neg. Inst. § 881c. Following this line of authorities, it must be held that the plaintiff's title is as free from flaw as if he had purchased in open market, and in the usual course of trade.

Since writing the above my attention has been called to several cases in this court where the holder of negotiable paper taken prior to maturity as collateral security for a pre-existing debt will hold such collateral free from equities. *Institution v. Holland*, 38 Mo. 49; *Deere v. Marsden*, 88 Mo. 512; *Crauford v. Spencer*, 92 Mo. 498, 4 S. W. Rep. 713. Of course the principle announced in those cases necessarily dominates this one.

5. It is also urged as a ground of reversal that the trial court erred in giving and in refusing instructions. This, for argument's sake, may be conceded; but the proper determination to be made of this case is not in the least affected thereby, because, under the foregoing remarks, as plaintiff is to be regarded as a *bona fide* holder of the notes, all other questions are subordinated to that one, and the trial court would have been fully justified in directing a verdict for the plaintiff. This being the case, it is quite immaterial what the instructions were, so long as the jury found the only verdict they could have found consistently with the evidence, and this court is expressly forbidden to reverse the judgment of any court, unless we believe that error was committed against the party appealing, "materially affecting the merits of the action." Rev. St. § 3775. Therefore judgment affirmed. All concur. RAY, J., absent.

YOUNG v. BOARDMAN et al.

(Supreme Court of Missouri. December 20, 1888.)

1. DOWER—RENUNCIATION UNDER WILL—INSANITY OF WIDOW.

A widow who is insane cannot renounce the provisions of her husband's will, and elect to take dower or the statutory provision in lieu thereof.

2. SAME—DEVISE IN LIEU OF DOWER—CONSTRUCTION OF WILL—NATURE OF ESTATE DEVISED.

A will devising all testator's property to a trustee to be sold and the proceeds distributed among the legatees, but providing that the family residence and furniture shall be retained for the use of his widow during her life, passes to the widow real estate within the meaning of Rev. St. Mo. § 2190, by which, if the testator shall "by will pass any real estate to his wife, such devise shall be in lieu of dower," unless otherwise declared, or she elects, under section 2200, not to accept its provisions; and this is so although the homestead is exempt from devise, as the rights under a homestead exemption and life-estate are different.

3. SAME—ELECTION BY GUARDIAN.

Under Rev. St. Mo. § 2194, providing that, "in all cases when any widow entitled to the benefit of election under this chapter shall be of unsound mind," her guardian "may elect" for her, such guardian may, by writing, "not accept the provisions made for her" by her husband's will in lieu of dower, within the meaning of section 2200, as well as elect between dower and the statutory provision in lieu thereof, as provided for in sections 2190 and 2192.

4. SAME—PROCEDURE.

The guardian being by the above act given power to elect "in the same manner and with like effect as said ward might do were she capable," it is not necessary for him to procure an order of court directing him to make the election.

5. SAME—CONSTITUTIONAL LAW.

Such act, giving the guardian power to elect, is not in conflict with Const. Mo. art. 6, § 1, which declares that the judicial power of the state shall be vested in designated courts.

6. CLERK OF COURT—PROBATE CLERK—POWERS—DEEDS—ACKNOWLEDGMENT.

Rev. St. Mo. § 1179, requires a probate judge to act as his own clerk, but gives him power, by an entry of record, to "appoint a separate clerk, who shall be paid by said judge, and shall hold his office at the pleasure of the judge." This clerk is required to give bond to discharge the "duties of his office," and "may discharge all the duties of clerk, and shall have power to do and perform all acts and duties in

vacation which the judge of said court is or may be authorized to perform in vacation." Held, that such clerk is an officer of the court, and a proper person before whom to acknowledge deeds.

7. SAME—APPOINTMENT OF PROBATE CLERK—CONSTITUTIONAL LAW.

The constitution of Missouri provides for the establishment of probate courts, and that they shall be courts of record. By article 6, §§ 34, 39, certain courts excepted, "the clerk of all other courts of record shall be elective." Section 35 provides that "probate courts shall be uniform in their organization, jurisdiction, duties, and practice, except that a separate clerk may be provided for, or the judge may be required to act *ex officio* as his own clerk." Held that Rev. St. Mo. § 1179, authorizing a probate judge to appoint a clerk, is not unconstitutional.

8. DOWER—ELECTION OF ABSOLUTE INTEREST.

Under Rev. St. Mo. § 9960, providing that "every male person * * * may by last will devise all his estate, * * * saving the widow her dower," the widow, on renouncing the provisions of the will, is not confined in her election to dower, but may take the absolute interest provided in lieu thereof in certain cases.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

L. C. Slavens and *W. F. Spotswood*, for appellant. *Warner & Dean*, for appellees.

BLACK, J. This is a suit in equity to remove a cloud from the title to the real estate of the late Samuel M. Bowman, who died testate. The plaintiff brings the case here by appeal from a judgment sustaining a demurrer to the petition. The petition discloses these facts: The will, which bears date the 14th March, 1885, was duly probated in the probate court of Jackson county on the 9th of June, 1885. The testator devised all of his real and personal property to Mr. Young, the plaintiff, to hold in trust, with power to sell the same and distribute the proceeds among the various legatees, some 18 or 20 in number. One of the trusts declared is: "To support, maintain, and care for my wife, E. Adaliza Bowman, and pay her funeral expenses;" and in another clause the testator makes this provision: "Said trustee will be at liberty to close up the estate, and make distribution, according to his best judgment, or as I may direct him hereafter; but in case my wife survives me, the family residence and furniture to be retained for her use, and sufficient money to pay help and all expenses during her life-time." Mrs. Bowman was insane at the date of the will, and so continued until her death. On the 5th August, 1885, though insane, she filed, in the probate court of Jackson county, a declaration, by the terms of which she renounced the provisions of her husband's will, and elected to take one-half of the real and personal property, subject to the payment of debts, under the provisions of section 2190, Rev. St. 1879. Subsequently, and on the 21st day of the same month, she was adjudged to be insane by the probate court of that county, and thereupon the court appointed Mr. Talbott guardian of her person and estate, and on the succeeding day the guardian executed and acknowledged and filed, in the probate court, a declaration, whereby, for his ward, he renounced the provisions of the will made for her benefit, and for her elected to take one-half of the property, subject to the payment of the debts of the estate. Mrs. Bowman died on the 27th of the same month, intestate, leaving as her only heirs the defendants in this suit, who are either brothers or heirs of a deceased brother. The testator died without child or other descendants. The real estate is of the value of \$100,000, and for the most part unproductive. The plaintiff alleges that these two declarations, filed in the probate court, constitute a cloud upon the title vested in him as trustee; that by reason thereof he is unable to sell the property for more than half of its value,—and he prays that they be adjudged to be null and void.

1. As Mrs. Bowman was insane, she could not, by her own act, make a valid renunciation of the provisions of her husband's will, nor could she make an election to take one-half of the estate in lieu of dower. *Rannells v. Gerner*, 80 Mo. 478; *Penhallow v. Kimball*, 61 N. H. 596. Indeed, we do not understand that the defendants place any reliance upon the declaration made by her.

The sections of the dower act, by which the various questions in this case must be determined, are in substance or language as follows: Section 2186 is declaratory of dower in its common-law signification. Sec. 2190. When the husband shall die without any child or other descendant in being capable of inheriting, his widow shall be entitled to one-half of the real and personal estate belonging to her husband at the time of his death, subject to the payment of the husband's debts. Sec. 2192. In all such cases the widow shall have her election to take dower, as provided in section 2186, discharged of debts, or the provisions of section 2190, as therein provided. Sec. 2194. Such election shall be made by declaration in writing, acknowledged, and filed, etc., otherwise she shall take dower under section 2186; "and in all cases, when any widow entitled to the benefit of election under this chapter shall be of unsound mind, or a minor, the lawful guardian of such person may elect for his said ward in the same manner and with like effect as said ward might do were she capable in law of so electing." Sec. 2199. "If any testator shall, by will, pass any real estate to his wife, such devise shall be in lieu of dower out of the real estate of her husband, * * * unless the testator, by his will, otherwise declared." Sec. 2200. In such case the wife shall not be endowed in any of the real estate, unless she shall, in writing, etc., "not accept the provisions made for her by said will."

2. The question is made whether the will passed to the widow real estate, so as to put her to an election under sections 2199 and 2200. The term "pass," as used in this statute, means, and means only, devise. *Gant v. Henly*, 64 Mo. 162. It is held, in *Wusthoff v. Dracourt*, 3 Watts, 240, that a clause in a will reserving two rooms in a designated house for the use of and during the life of a named person, vested in such person an estate for life, and not a mere easement for the use of such person. In *Collins v. Carman*, 5 Md. 522, the testator placed the management of his property in the hands of trustees, and directed that a designated lot, house, and furniture should be used by his wife during her life, and it was held that these provisions of the will were such a devise of real and personal property under the statute of that state as to create a necessity for a renunciation before the widow could claim dower. We entertain no doubt but the will of Gen. Bowman, in this case, gave the widow a life-estate in the property known as the family residence. It is true, he devises all of his property to the trustee, and directs a sale thereof for the purposes of the trust; but at the same time he says the family residence and furniture shall be retained for the use of his wife during her life. This, we think, vested in her a life-estate, and put her to an election before she could claim dower. The defendants insist on the authority of *Kaes v. Gross*, 92 Mo. 648, 3 S. W. Rep. 840, that the homestead is exempt from the operation of the will, and therefore nothing was devised to or for the wife. The answer to this is that a life-estate and a homestead exemption are different things. As shown in that case, a homestead may be lost by abandonment, while as to this life-estate, the widow would have been entitled to the income therefrom, had she lived and seen fit to reside elsewhere; and we see no reason why that life-estate was not at her disposal. Again, for aught that is shown, this family residence is in excess of the homestead exemption, both in quantity and value.

3. The first contention of the plaintiff is that, while these statutes give the guardian power to elect to take one-half of the property in lieu of dower, they do not give him the power to elect as between dower and the provisions of the will. The clause of section 2194 giving to the guardian the power to elect for his ward, is not limited by reference to any section or particular case or cases. It applies to all cases where, under the chapter of the statutes concerning dower, any widow is entitled to the benefit of election. There are other cases besides that where the husband dies without any child or other descendants in which she has an election. Thus she is entitled to make an

election where he dies leaving such child, but not by the last marriage. So, too, the widow has the right to take a child's part in lieu of dower. The sections before set out, relating to her right to renounce the provisions of the will, are a part of the dower act. They do not, it is true, use the term "elect," but say she must, by writing "not accept the provisions made for her by said will." The filing of the declaration under those two sections is but an election not to take under the will. The provisions made for her in the will stand for dower until she declines to accept them. The act of renunciation is an election. Until the act of February 17, 1865, (Acts 1864, p. 24,) the guardian of a minor or insane person had no such power of election. This power was then for the first time given to the guardian by way of an amendment to what is now section 2194. No reason is seen why the guardian may not make the election not to accept the provisions of the will as well as in the other cases. The evident object of the amendment was to give him this right in all cases of election provided for in the dower act, including the right and power to "not accept" the provisions of the will. We cannot see that *Bretz v. Matney*, 60 Mo. 444, has any bearing upon the present case.

4. The guardian did not, in this case, apply for or procure an order of the court directing him to make the election, and in this there is no irregularity. The power to make the election either to not accept the provisions of the will or to take one-half of the estate subject to the payment of debts, is vested in the guardian without any such order. The statute does not contemplate that he will procure an order therefor before or after making the election. On the contrary, the power vested in him is that he may, for his ward, elect in the same manner and with like effect as she could had she been of sound mind.

5. Nor is the statute in conflict with section 1, art. 6, of the constitution, which declares that the judicial power of the state shall be vested in designated courts. The power of the legislature to authorize the guardian of an infant or insane person to transfer the estate of such infant or insane person has been again and again affirmed by this court. *Thomas v. Pullis*, 56 Mo. 211; *Gannett v. Leonard*, 47 Mo. 205; *Cargile v. Fernald*, 63 Mo. 304. Happily such powers can no longer be conferred by special acts as under former constitutions; but the power of the legislature to enact general laws, authorizing the guardian of a minor or insane person to transfer the estate of the ward, remains unimpaired. This being so, there can be no doubt but the act in question is not open to the objection made to it. Without authority conferred by statute upon the guardian of an insane widow, it would, of course, devolve upon the courts to make the election for her. *Penhallow v. Kimball*, *supra*; *Van Steenwyck v. Washburn*, 59 Wis. 483, 17 N. W. Rep. 289; *Kennedy v. Johnston*, 65 Pa. St. 454. These cases are cited as opposed to the conclusion before reached, namely, that the guardian of an insane widow may, for her, elect not to take under the will; but they are based upon the fact that there was no statute in those states giving to the guardian such powers. We do not understand these cases to hold that the legislature could not confer such powers upon the guardian. On the contrary, it is said in the case last cited: "It is under this act the committee derives all his powers, and unless the power to elect can be found in the law, or be fairly inferred from its general terms, it does not exist,"—thus giving recognition to the proposition that the committee might make the election if authorized by law so to do, as in the case now under consideration.

6. Again, it is insisted that the declaration filed by the guardian was not acknowledged before an officer authorized to take the acknowledgment of deeds. It is certified under the hand and official seal of "James H. Smith, Clk.," who affixes thereto the seal of the probate court. The charge is that he was clerk of the judge, and not of the court; but it is stated that he was appointed by the judge of the court in pursuance of section 1179, Rev. St. That section makes it the duty of the judge of the probate court to act *ex officio*

as his own clerk, "provided that any judge of probate may, by an entry of record in said court, appoint a separate clerk, who shall be paid by said judge, and shall hold his office at the pleasure of the judge." The clerk thus appointed is required to give bond before entering upon the "duties of his office," conditioned to discharge the "duties of his office;" and, when so appointed and qualified, "may discharge all the duties of clerk, and shall have power to do and perform all acts and duties, in vacation, which the judge of said court is or may be authorized to perform in vacation," etc. Throughout the law relating to the administration of estates of deceased persons and the probate of wills various duties are assigned to probate clerks. When the judge appoints a clerk, these duties devolve upon the clerk thus appointed. There can be no doubt but he is the clerk of the court, and an officer of the court, and not in any sense the clerk of the judge.

7. It is also insisted that the clerk of the probate court should be elected, and that the act authorizing the judge of the probate court to appoint the clerk is unconstitutional. The present constitution made it the duty of the general assembly to establish a probate court in every county to be a court of record, and to consist of one judge; and the jurisdiction of these courts is defined. The supreme court and the St. Louis court of appeals have power to appoint their own clerk. "The clerk of all other courts of record shall be elective." Sections 34, 39, art. 6, Const. The general assembly did establish a probate court in every county, and if the constitution ended with these sections, the act in question would be in conflict with them. But section 35 of the same article provides: "Probate courts shall be uniform in their organization, jurisdiction, duties, and practice, except that a separate clerk may be provided for, or the judge may be required to act *ex officio* as his own clerk." At the time this constitution was adopted jurisdiction over probate matters in many counties still remained in the county courts, and in others it was vested in probate and other courts, by special acts, with little or no regard to uniformity. Hence the declaration that these courts, required to be established, should be uniform in their jurisdiction. The convention also knew that in many counties the business did not require the services of a clerk, and hence the provision that the legislature might provide for a separate clerk, or the judge might be required to act as clerk. In many counties there is no necessity for a separate clerk, and in others there is, by reason of the amount of work to be done. It was necessary that the court should have a separate clerk, or that the judge should act *ex officio* as clerk, in view of the many duties assigned to the clerk in the existing statutes. Section 35 was designed to supply these wants, and it leaves the matter of appointing or electing a clerk entirely with the legislature. Had the framers of the constitution intended that probate clerks should be elected, this section would have been omitted, or different language used. With this section, leaving it to the legislature to provide for clerks of probate courts, they are excepted from the operation of section 39 the same as is the clerk of this court or the clerk of the court of appeals. The statute is therefore in accord with the constitution. It provides for the very necessities contemplated by the constitution. As the clerk is a clerk *de jure*, the question is presented on both sides whether he can be regarded as a *de facto* officer is out of the case.

8. By the first section of the statute concerning wills (Rev. St. § 3960) every male person of sound mind, and 21 years of age, may, by last will, devise all of his estate, real, personal, and mixed, "saving the widow her dower." Because of this statute it is insisted that the widow must take under the will or dower; that she cannot renounce the will, and then take an absolute interest in lieu of dower. In *Griffith v. Canning*, 54 Mo. 282, the husband devised to his wife one-third of his real estate for life, and one-third of the personal property, subject to the payment of debts. She refused to take under the will, and then elected to take one-half of the real and personal estate, subject to the

payment of debts, under what is now section 2190. She then claimed the \$400 allowed by sections of the statute now numbered 107, 108, 109. It was held that the effect of the election was to so change her attitude to the estate that she thereby ceased to be doweress, and became, as to the personal property, a distributee; that she could not recover the \$400 as doweress, but must await the final settlement and payment of debts, and take like any other distributee. The exact point made in this case was not made in that, but that case is based on the proposition that she could renounce the will and also elect to take one-half of the property, subject to the payment of debts; for, if she could only elect to take dower, then she should have recovered the \$400 as doweress. That dower, as used in the statute concerning wills, means one-third of the real estate for life may be conceded, so far as it has any reference to real estate. But other provisions of the statute give the widow the right to take one-half of the property in lieu of dower. When the law saves to her dower, it also saves to her the right to take that which it gives in lieu thereof. The will is as much subject to one of these statutes as the other. When she renounces the will we can see no reason why she does not stand on the ground of any other doweress, nor why she should not be entitled to the same rights of election. It is argued by counsel for defendants that the act of electing under section 2190 is of itself an election not to take under the will; but, in the view we have taken of the case, that question need not be considered. The leaning of the courts is in favor of wills. The testator here made ample provision for his wife, and if it devolved upon the courts to exercise the power of election, they would in all probability not disturb the will. But the power to make the election is conferred upon the guardian, and his election, legally made, as it is in this case, is final. The judgment is affirmed. RAY, J., absent. The other judges concur.

BRYAN v. RHOADES.

(*Supreme Court of Missouri*. December 20, 1883.)

DOWER—ASSIGNMENT—ALLOTMENT OF HOMESTEAD—JOINDER.

Under Rev. St. Mo. § 2694, providing that the commissioners appointed to set out homestead shall also set out dower, but that the amount of the dower shall be diminished by the amount of the widow's interest in the homestead, an action for the recovery of dower and homestead may be joined in one count, but the widow cannot seek in one count the recovery of homestead, and in a second count the recovery of dower.

Appeal from circuit court, Knox county; B. E. TURNER, Judge.

Action by Nancy Bryan against George Rhoades to recover dower and homestead. Defendant appeals. Rev. St. Mo. § 2694: "The commissioners appointed to set out such homestead shall, in cases where the right of dower also exists, also set out such dower, and they shall first set out such homestead, and from the residue of the real estate of the deceased shall set out such dower, but the amount of such dower shall be diminished by the amount of the interest of the widow in such homestead; and if the interest of the widow in such homestead shall equal or exceed one-third interest for and during her natural life in and to all the real estate of which such housekeeper or head of a family shall have died seized, no dower shall be assigned to such widow."

L. F. Cottey, for appellant. *O. D. Jones* and *W. C. Hollister*, for respondent.

BLACK, J. The plaintiff is the widow of Daniel M. Bryan, who died in November, 1877, leaving a number of children, some of whom are still minors. The first count of the petition sets out these facts, and then states that deceased and his family, at the time of his death, occupied and resided in a house situated on one-fourth of an acre of land in the unincorporated town of Novelty; that in connection with this residence he cultivated, used, and oc-

cupied as part of his homestead 40 acres of land located two and one-half miles from the town; that she claims the house, lot, and land as a homestead; that in 1883 the administrator of her husband's estate sold the land to defendant to pay debts of the estate, which were contracted after the purchase of the land. She asks that the house, lot, and land be set off to her as a homestead, alleging that the whole is of no greater value than \$1,200. The second count sets out the marriage and death of her husband, as before, and then states that he died seized of the 40 acres of land; that dower has not been assigned to her; possession of the land by defendant; and prays for the assignment of dower, and damages for the detention thereof. No mention is made of the house and lot. The third count is an action of ejectment for the land—the 40 acres. Defendant's demurrer for a misjoinder of causes of action being overruled, he moved to strike out the second count, which motion was overruled, and he declined to plead over. The court gave judgment for dower. After the approval of the commissioner's report, defendant took this appeal.

By reference to section 2694 of the Revised Statutes it will be seen that the amount of dower must be diminished by the amount of the widow's interest in the homestead. If the widow's interest in the homestead equals or exceeds in amount dower in the entire estate, then she can have no dower. If her interest in the homestead is less than dower in the entire estate, then she is to have the difference set off to her in dower. *Graves v. Cochran*, 68 Mo. 76. The homestead must first be set out. This is the plain letter of the statute. Until that is done, and the widow's interest therein valued, it cannot be told that she is entitled to dower. When her interest in the homestead is valued, and her dower in the entire estate is valued, if there is a difference in her favor, then the amount of that difference is to be set off to her in dower in property other than the homestead. The proceeding to set out the homestead and assign dower is but one cause of action. The two go together. The amount of dower is dependent upon her interest in the homestead. Here the plaintiff seeks first to get house, lot, and land for a homestead. Failing in that, she seeks to get dower in the land, regardless of her homestead interest in the house and lot. This she cannot do. The motion to strike out should have been sustained. If the plaintiff claims both homestead and dower, then the first count can be framed with both of these objects in view. In no other way can the provisions of the law be carried into effect. Possibly she may be entitled to both land and house as a homestead, but upon this point we express no opinion, for the facts of the case are not disclosed. Whatever her rights are, they can be adjusted in one cause of action. The judgment is reversed and the cause remanded, to be proceeded with in accordance with this opinion.

RAY, J., absent. The other judges concur.

EDWARDS *et al.* v. GEORGE KNAPP & Co.

(Supreme Court of Missouri. December 20, 1888.)

1. LIBEL AND SLANDER—TRUTH AS JUSTIFICATION—REASONABLE DOUBT.

In a civil action for libel, where defendant pleads truth in justification of a charge imputing a crime to plaintiff, it is error to instruct that defendant must prove the charge "beyond a reasonable doubt;" a preponderance of the evidence being sufficient. Overruling *Polston v. Sec*, 54 Mo. 291.

2. SAME—PLEADING.

A plea in justification, alleging that plaintiff had had sexual intercourse with her brother, is sufficient to cover a charge that she had had such intercourse, and was pregnant thereby.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

Action for libel by Mary B. Edwards and Cyrus Edwards, her husband, against Publishers George Knapp & Co., a corporation. Judgment for plaintiffs, and defendants appeal.

James J. Lindley and Edward P. Lindley, for appellants. *Crosby, Rusk & Craig*, for respondents.

NORTON, C. J. This is an action for libel, in which plaintiffs obtained judgment for \$5,000, from which defendant has appealed; and as one of the points relied upon to sustain the appeal arises on the pleadings, it is necessary to insert so much of them as bears upon the point raised and hereinafter adverted to. Plaintiffs charge in their petition that on the 18th of January, 1885, defendant maliciously published of and concerning the female plaintiff the false and defamatory words and libel as follows:

"CAUSE OF A DOUBLE MURDER. Special to the Republican. ST. JOSEPH, Mo., January 17. The cause that led to the horrible murder of Austie and Adella McLaughlin, aged seven and nine years, respectively, near Flag Springs, Andrew county, in August last, for which crime Oliver H. Bateman was hanged at Savannah, on November 21st last, is now unearthed. The deed was the most damnable in the criminal history of the state, and the motive that led to its commission has been a matter of no little conjecture. It was predicted that Bateman would weaken, and make a confession before the date of his execution, but he failed to do so. On the other hand, he claimed to have experienced religion, and denied that there were any facts that he had kept from the public. The McLaughlin and Bateman families lived neighbors, and one Sunday in August the little girls who were murdered went to the Bateman residence to spend the afternoon. There was no one at home but Oliver Bateman and his sister, a young girl in her teens. The children remained a couple of hours, and then started home, but never reached their destination. On the following day their little bodies were found in a corn-field, lifeless. The eldest, Adella, had been outraged, and her throat cut, while a pistol ball had penetrated the brain of the younger. Oliver H. Bateman was arrested a few days later, and made a confession of his guilt, which led to his execution on the gallows. To-day your correspondent met two prominent farmers of Andrew county, who reside in the neighborhood of the McLaughlin and Bateman families. From them it was ascertained that the sister of the murderer is now in a delicate condition, and there is no doubt that she was ruined by her brother, Oliver A. Bateman, who was a couple of years her senior. Their theory, and that of the entire neighborhood, is that when the McLaughlin children visited the home of the Batemans on that Sunday afternoon in August last, they saw something that led young Bateman to fear exposure, and that he followed the children, when they departed for home, and brutally murdered them in the field where their bodies were found. The Gazette of this city will to-morrow publish an article giving the facts substantially as related above, and the motive that actuated Oliver H. Bateman to commit the deed will no longer remain a mystery."

Defendant, in its answer, admits the publication, and sets up in justification: "That it is true that on the 15th day of June, 1884, in an outhouse on the farm of Thomas Bateman, the father of the female plaintiff and of Oliver Bateman, the said Oliver Bateman did have carnal, sexual intercourse with said female plaintiff. And further, in justification, says that on the 21st day of August, 1884, two little girls, Austie and Adella McLaughlin, went to the house of Thomas Bateman, and found no one at home but the female plaintiff and her brother, Oliver Bateman, and said little girls saw said Oliver fondling and caressing said plaintiff, manifesting a lustful passion for her, unbecoming, improper, and wrong by a brother towards a sister."

The court by instructions numbered 4 and 5 told the jury that defendant's plea justifying the charge made, that the female plaintiff had been ruined by

her brother Oliver, amounts to an allegation that she had committed the crime of incest, and it devolved upon defendant to establish and prove the charge beyond a reasonable doubt. This action of the court is assigned for error. The said instructions were warranted by the ruling made in the case of *Polston v. See*, 54 Mo. 291; but inasmuch as that ruling was made by a divided court, and is claimed to be not in harmony with the ruling in the case of *Marshall v. Insurance Co.*, 43 Mo. 586, we are asked to reconsider it, and lay down a rule in harmony with that asserted in 43 Mo., *supra*, and in harmony with the rule which it is claimed generally prevails in the courts of this country. And inasmuch as no authority is cited in the case of *Polston v. See*, *supra*, in support of the rule there laid down, and none in the brief of counsel, except section 426, 2 Greenl. Ev., and inasmuch as in the dissenting opinion by SHERWOOD, J., the authorities therein cited bear directly upon the question involved, and favor the conclusion therein announced, it is deemed not to be inappropriate to review the rule established in the majority opinion, and establish a rule according to principle and weight of authority. In the case of *Marshall v. Insurance Co.*, *supra*, when suit was brought to recover insurance on a steam-boat destroyed by fire, the defense set up was that the owners of the boat had willfully burned it, thereby imputing to them the crime of arson. It was held broadly that "in all civil cases it is the duty of the jury to decide in favor of the party on whose side the evidence preponderates, and according to the reasonable probability of truth;" and it was further held that an instruction in that case to the above effect was proper, though the whole defense was staked upon the issue thus made. The ruling thus made is logically antagonistic to that made in the case of *Polston v. See*, *supra*. Conceding that the English authorities relied upon to sustain the text as laid down in section 426, Greenl. Ev., *supra*, give support to it, the reason for its adoption in England, as is clearly shown in the dissenting opinion above referred to, has no application here; the reason being that, according to the English practice, if, upon a trial of the plea of justification in a slander suit, when a felony is imputed, the issue was found for defendant, the plaintiff was thereupon held to answer for the felony, without any further accusation, the verdict being held equivalent to an indictment, and the intervention of a grand jury therefore unnecessary. And as the reason of the rule has no application here, the English cases establishing it do not amount to persuasive authority, and for the *status* of the question we are remitted to reason, and to what has been held by the courts of this country. At the time the case of *Polston v. See* was decided, in the states of Iowa and Indiana the rule was laid down as stated by Mr. Greenleaf in section 426, *supra*; but since then it has been directly repudiated in Iowa, and in effect in Indiana. In the case of *Riley v. Norton*, 65 Iowa, 306, 21 N. W. Rep. 649, (decided in 1884,) which was a slander suit, where the crime charged was larceny, and where the defendant pleaded the truth of the charge, it is said: "The court instructed the jury that the defendant must establish beyond a reasonable doubt that the plaintiff did commit the crime of larceny in manner and form as defendant had pleaded. This instruction is in accord with *Bradley v. Kennedy*, 2 G. Greene, 231; *Forshee v. Abrams*, 2 Iowa, 571; *Fountain v. West*, 23 Iowa, 9; *Ellis v. Lindley*, 38 Iowa, 461. It is logically impossible to say that one rule should obtain where an action is brought to recover damages caused by the commission of the crime of arson, and another in an action brought to recover damages for slander charging such crime, when the defendant pleads justification. * * * We deem it unnecessary to enter into an extended discussion of the pending question, simply contenting ourselves with saying that, in our opinion, the decided weight of the latest authorities is opposed to *Fountain v. West*, and other cases above cited, and that they should be and are hereby overruled." So, in Indiana, in the case of *Insurance Co. v. Jachnitzen*, 110 Ind. 59, 10 N. E. Rep. 636, it is held where, in an action on a policy of insur-

ance, it is answered that the accused burned the property with intent to defraud the company, it is sufficient to establish such defense by a preponderance of the evidence; and an instruction that its truth must be established beyond a reasonable doubt is erroneous. In disposing of the question, after speaking of the extension of the rule in criminal cases, requiring the crime to be proved beyond a reasonable doubt, to civil cases, it is said: "The rule was first extended to cases of slander and libel in England;" and, after showing the reason for its establishment there, it is further said: "No such reason can exist in this country for the application of the rule, and it may therefore be said that it has been applied without adequate reason. It may well be doubted whether its application can be supported upon principle, notwithstanding the precedents in its favor." It may therefore be observed that the rule stated by Mr. Greenleaf, though it had taken root in both the above states, was uprooted by the decisions referred to.

In *Ellis v. Buzzell*, 60 Mo. 209, in speaking of the rule requiring that in an action of slander, where crime is imputed, and the defendant justifies, the charge must be proved beyond a reasonable doubt, it is said: "But we think it is time to limit the application of a rule which was originally adopted *in favorem vitæ* in the days of a sanguinary code to cases arising on the criminal docket, and no longer suffer it to obstruct or encumber the action of juries in civil suits sounding only in damages." So, in *Peoples v. Evening News*, 51 Mich. 11, 16 N. W. Rep. 185, 691, which was a proceeding for libel, when the defendant justified the charge, which imputed a crime, it is held that the defendant was only required to sustain the charge by a preponderance of the evidence. *Bradish v. Bliss*, 35 Vt. 326; *Matthews v. Huntley*, 9 N. H. 150, —are to the same effect. See, also, 10 Amer. Law Rev. 642, where an exhaustive article on this subject is to be found.

From what has been said it will be seen that the English authorities referred to, in support of the rule in section 426 of Greenleaf, *supra*, have no application here, and that the Iowa cases cited in support of it have been expressly overruled, and the Indiana cases in effect overruled. We therefore conclude that the rule stated in *Marshall v. Insurance Co.*, 43 Mo., *supra*, that in civil cases the rights of the parties are to be determined by the preponderance of the evidence is the correct one, both on principle and authority, and that the case of *Polston v. See*, *supra*, in so far as it holds that in an action of slander or libel, when a crime is imputed, and the defendant justifies, he must introduce evidence sustaining his plea beyond a reasonable doubt, ought no longer to be followed, and it is hereby overruled.

It is also insisted that the court erred in holding by instruction No. 1, given for plaintiffs, that the charge of pregnancy involved in the publication was separate and distinct from the charge therein made that the female plaintiff did have carnal and sexual intercourse with her brother, and that the plea of justification was not as broad as the charge. This point, we think, is well taken. The charge in the publication, in substance and effect, is that the female plaintiff did have carnal and sexual intercourse with her brother, and that pregnancy was the result of it. In the case of *Snow v. Witcher*, 9 Ired. 346, a similar point was made, where the charge was that the female plaintiff "had lost a little one," and it is held that it was sufficient to plead and prove that the plaintiff was an incontinent woman; and in the disposition of the question it is said: "It is insisted that the words, 'she had lost a little one,' not only charged that plaintiff was incontinent, but that she had brought forth a bastard child, and that the plea should aver the fact, and the evidence show it to be true." "Conception and delivery are mere effects of nature. There is no harm in them *per se*. The guilt lies in the criminal intercourse, which is made neither greater nor less by the collateral circumstances of conception and delivery, although these circumstances may be considered unfortunate, as leading to detection and exposure. Criminal inter-

course is the gist of the charge, and is all that the plea need aver, or the evidence establish." For error committed in giving the instruction last commented upon, and in giving the fourth and fifth instructions, requiring defendant to prove his plea of justification beyond a reasonable doubt, the judgment is reversed, and cause remanded. All concur, except RAY, J., absent.

LEAHEY v. CASS AVE. & F. G. RY. CO.

(Supreme Court of Missouri. December 20, 1888.)

1. EVIDENCE—DECLARATIONS—RES GESTÆ.

In an action for death of a boy, caused by injuries received under a horse car, his declarations as to how he got under the car, made at the scene of the accident, and when first picked up, are admissible in evidence, but his declarations made after he had been removed, and the persons connected with the accident have separated, and in answer to questions as to how he got injured, are inadmissible, though made only a short time after the accident.¹

2. SAME—SHOUTS OF BY-STANDER.

In such case evidence that a disinterested by-stander shouted "Murder!" after the accident, is inadmissible.

3. WITNESS—IMPEACHMENT—CONTRADICTORY STATEMENTS.

A witness may be impeached by showing statements made by him out of court, inconsistent with those made in court, after laying the proper foundation therefor.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Action by Ann Leahey against the Cass Avenue & Fair-Ground Railway Company. Judgment for plaintiff, and defendant appeals.

Leonard Wilcox, for appellant. J. F. Merryman, for respondent.

BLACK, J. 1. This is an action to recover statutory damages for the death of James O'Neil, a boy 11 years of age, and the son of the plaintiff. The defendant corporation owns, and with horse-power operates, a street railroad in the city of St. Louis. That the boy was run over by one of defendant's cars, and received wounds and bruises from which he died on the next day, is an undisputed fact. At the time of the accident the car was a few yards east of the Twenty-Fourth Street crossing, going east on Cass avenue. Plaintiff produced evidence tending to show that the boy was standing on the front platform of the car, with the driver, just before and while crossing Twenty-Fourth street; that they appeared to be talking together, and the driver appeared to be angry; that the boy opened the gate, and stepped out backwards on the step, facing and looking at the driver, and appeared to be frightened; and that he stepped and fell off and under the car. One witness says the driver made a pass at the boy with his hand. The defendant's evidence tends to show that this and another boy by the name of Brown were together on the street; that Brown jumped on the step to the front platform, and in answer to a question of the driver said he was going down town, whereupon the driver told him to get in the car; that Brown opened the gate, stepped in on the platform, and then out and off; that at this moment O'Neil got on the step, and immediately slipped and fell under the car; that the driver did not speak to him, and only observed his presence when he fell. Two policemen arrested the driver and conductor, and took them to the station. Persons present then carried the boy to the house of Mr. Keating, a distance of 50 or 75 feet, where a cot was provided for him. After he had been placed upon it, he stated to Mr. Keating, in answer to questions as to where he lived, and how he got hurt, that he got on the step of the car, and the driver kicked him off. These statements were made 5 or 8 minutes after the accident. Dr. Miller arrived within 15 or 20 minutes, and he interrogated the boy as to how

¹In general, as to what declarations are admissible as *res gestæ*, see *State v. Rider*, (Mo.) 8 S. W. Rep. 723, and note; *Dunbar v. McGill*, (Mich.) 37 N. W. Rep. 235, and note; *City of Austin v. Ritz*, (Tex.) 9 S. W. Rep. 884, and cases cited.

he got hurt, and in answer the boy said he was on the front platform of the car; that he attempted to get off, and the driver kicked him off, and he fell under the car. These statements were detailed in evidence by Mr. Keating, his daughter, and Dr. Miller, and the question is whether they are a part of the *res gestæ*.

In *Harriman v. Stowe*, 57 Mo. 93, the plaintiff was injured about noon. Her physician called between 1 and 4 o'clock of the same day, when she stated to him how she got hurt, namely, by falling through a trap-door. This statement the physician related on the witness stand, and this court held the evidence competent, because part of the *res gestæ*; saying that the declaration and accident formed connecting circumstances. That case, it is argued by the plaintiff, goes far enough to admit the declarations made in the present case.

The case of *Brownell v. Railroad Co.*, 47 Mo. 240, was a suit instituted to recover damages for the death of the plaintiff's husband. There the declaration of Brownell, in reference to the switch, it is said "grew directly out of, and was made immediately after, the happening of the fact," and it was held that the declaration was competent evidence for the plaintiff. That case cites with approval *Insurance Co. v. Mosley*, 8 Wall. 397, which was an action on a policy of insurance. To show that the death of the insured was caused by an accident, the wife testified that her husband left his bed between 12 and 1 o'clock; that when he came back, he said he had fallen down the back stairs, and almost killed himself. The evidence of the son was to the same effect. He also testified further, that on the day after the fall his father said he felt badly, etc. This evidence was held to be competent for two purposes: *First*, to show bodily injuries and pain; and, *second*, to prove that deceased fell down the stairs. In respect of the first it is said such evidence must relate to the present, and not to the past. Anything in the nature of narration must be excluded. As to the second, it is said, in substance, that generally the declarations must be contemporaneous with the event, yet the rule is not of universal application. Further on it is said: "Here the principal fact is the bodily injury. The *res gestæ* are the statements of the cause made by the assured almost contemporaneously with its occurrence, and those relating to the consequences made while the latter subsisted and were in progress." That court, as well as this, in the cases last cited, quote approvingly from *Railroad Co. v. Coyle*, 55 Pa. St. 402, where a peddler's wagon was struck and injured by a locomotive. The court said: "We cannot say that the declaration of the engineer was not a part of the *res gestæ*. It was made at the time, in view of the goods strewn along the road by the breaking up of the boxes, and seems to have grown directly out of and immediately after the happening of the fact."

Adams v. Railroad Co., 74 Mo. 553, was an action by the plaintiff to recover damages for the death of her husband. Plaintiff proved by one witness that after the deceased was struck, and after the train had stopped, two trainmen, whom the witness took to be the fireman and engineer, came up, and one of them said to the other, "If you had stopped the train when I told you, you would not have killed him." The other replied, "It cannot be helped now; it is too late." This court, after reviewing various authorities, stated its conclusion as follows: "Were the declarations connected with the calamity as a cause or concomitant? Were they contemporary with the principal transaction, and illustrative of its character, or merely a subsequent narrative of how it occurred, or an explanation of how it might have been avoided? If the latter, as we think, they were wholly inadmissible, and the court erred in permitting the evidence to go to the jury." This case was cited as an authority in the subsequent case of *Devlin v. Railroad Co.*, 87 Mo. 545, but that case was quite different in its facts, as will be seen from the following statement made therein: "It does not appear that these statements made by the

section foreman to the foreman of the road-house were made while the foreman was transacting the business of the defendant."

Railroad Co. v. O'Brien, 119 U. S. 99, 7 Sup. Ct. Rep. 118, was a personal damage suit. A witness was permitted to testify that between 10 and 30 minutes after the accident he had a conversation with the engineer in charge of the locomotive, and that he (the engineer) said the train was moving at the rate of 18 miles per hour. The court held that this evidence should have been excluded, four of the justices dissenting. The majority opinion is put upon the ground that the declaration did not accompany the act from which the injury arose; that it was a mere narration of a past occurrence, and therefore not a part of the *res gesta*. The dissenting justices say: "As the declaration was made between ten and thirty minutes after the accident, we may well conclude that it was made in sight of the wrecked train, and in the presence of the injured parties, and while surrounded by excited passengers. * * * The modern doctrine has relaxed the ancient rule that declarations, to be admissible as part of the *res gesta*, must be strictly contemporaneous with the main transaction. It now allows evidence of them, when they appear to have been made under the immediate influence of the principal transaction, and are so connected with it as to characterize or explain it."

Greenleaf says the principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character. 1 Greenl. Ev. § 108. Taylor says: "In all these cases the principal points of attention are whether the circumstances and declarations offered in proof were so connected with the main fact under consideration as to illustrate its character, to further its object, or to form, in conjunction with it, one continuous transaction." 1 Tayl. Ev. (7th Ed.) 537. The same author, after speaking of the change in the old rule, where there are connecting circumstances, goes on to say: "Still, an act cannot be varied, qualified, or explained, either by a declaration which amounts to no more than a mere narrative of a past occurrence, or of an isolated conversation held, or an isolated act done, at a later period." Section 539. These authorities show that there is still some diversity of opinion, both as to the rule and as to the application of a given rule. Care must be taken not to make the field of *res gesta* too large or too contracted. The better reasoning is that the declaration, to be a part of the *res gesta*, need not be coincident in point of time with the main fact to be proved. It is enough that the two are so clearly connected that the declaration can, in the ordinary course of affairs, be said to be the spontaneous explanation of the real cause. The declaration is, then, a verbal act, and may well be said to be a part of the main fact or transaction. Again, if the subsequent declaration and the main fact at issue, taken together, form a continuous transaction, then the declaration is admissible. Much, therefore, depends upon the nature and character of the transaction in question; for it may be, and often is, of a continuing character. It cannot be said that a mere subsequent declaration will of itself furnish a sufficient connecting circumstance. Applying these principles to the present case, it is clear that what the boy said as to how he got under the car, when first picked up, was properly received as evidence of the cause of his injuries. He was then at the scene of the accident, surrounded by persons who witnessed the calamity, and his declarations then made were verbal acts, though made after the accident had happened. But what he said after he had been removed to the house of Mr. Keating, after the persons connected with the accident had separated, and in answer to questions as to how he got hurt, should have been excluded. These answers were but narratives of what had transpired, made and intended as such. The time between the accident and making these declarations is short, it is true, but they are disconnected from the main fact. We do not understand any of the cases before cited to go far enough to admit these dec-

larations, unless it be that of *Harriman v. Stowe*. It is to be observed that these statements, made at the house of Mr. Keating, were not offered for the purpose of showing that the boy was then suffering from the injuries, but for the purpose of showing the cause of the injuries. It was error to admit them in evidence.

2. Callahan, a policeman, testified: "I heard a cry on the sidewalk. I heard a lady shout 'Murder!'" This statement was repeated several times by this and another witness. Defendant's motion to strike out this evidence should have been sustained. The books report the case of the trial of Gordon for treason, where the cry of the mob who accompanied the prisoner on his enterprise was received in evidence. But in this case the woman had nothing to do with the accident. She saw the crowd that gathered around the car, and shouted "Murder!" This, we understand, was after the accident. Her shouts shed no light whatever on the real issue. *State v. Brown*, 64 Mo. 371; *State v. Sneed*, 88 Mo. 138.

3. Jessop, the driver, was a witness for defendant. For the purpose of impeaching the credit of this witness, it was competent to show that he had made statements out of court inconsistent with those made in court, the proper foundation having been laid therefor, as was done in this case. The testimony of officer Morgan was received for this purpose, and none other. The objection to it is without merit. For the reasons before stated the judgment is reversed, and the cause remanded for new trial.

RAY, J., absent. The other judges concur.

SIMMONS v. HILL.

(Supreme Court of Missouri. December 20, 1888.)

1. BANKS AND BANKING—STOCKHOLDERS—SALE OF PLEDGED STOCK ON EXECUTION—LIABILITY OF PURCHASER.

A levy and sale of bank shares, under execution, against the former owner, after he has transferred them on the books to others as collateral security for a debt unpaid and due at the date of the levy, and greater than the market value of the stock at that time, passes no title, and the purchaser is not liable for unpaid subscription to the stock, at the instance of a creditor of the bank, under Rev. St. Mo. 1879, § 736, authorizing an execution on behalf of such creditor against a stockholder to the amount of the stock owned by him.

2. SAME—UNAUTHORIZED TRANSFER—RATIFICATION.

The fact that the execution creditor, ignorant of the transfer, bought the stock at the sale to save his debt, but, after learning that it had been transferred, abandoned all claim to it, would not authorize the persons in whose name it stood to transfer it to him without his knowledge or consent, and such a transfer, unless ratified, would not make him a stockholder, and liable for said unpaid subscription.

Appeal from St. Louis circuit court; ELMER B. ADAMS, Judge.

Motion by George A. Simmons, administrator, etc., of Robert Tucker, deceased, a judgment creditor of the Butchers' & Drovers' Bank, an insolvent corporation, for execution against Britton A. Hill, for the amount of the unpaid subscription to shares of stock in said bank, of which Hill was alleged to be the owner. Rev. St. Mo. 1879, § 736, authorizes an execution to issue upon the motion of a judgment creditor of an insolvent corporation, against "any of the stockholders to the extent of the amount of the unpaid balance of the stock by him or her owned." The circuit court awarded an execution, and defendant appealed to the St. Louis court of appeals, whence the cause was transferred to the supreme court.

Britton A. Hill, (pro se,) and *Martin, Laughlin & Kern*, for appellant.
H. I. D'Arcy and *James P. Maginn*, for respondent.

BRACE, J. On the 7th of April, 1881, plaintiff's intestate obtained a judgment in the circuit court of St. Louis against the Butchers' & Drovers'

Bank for the sum of \$10,880, and an execution issued thereon on the 25th of that month was returned *nulla bona* on the 6th of June, 1881. At the April term, 1883, of said court, the plaintiff moved for an execution against the defendant as a stockholder in said bank. The motion was resisted, and on the hearing was sustained, and an execution ordered against the defendant in the sum of \$5,000; and from this order the defendant appeals. The facts in the case, as they appeared in evidence, are substantially as follows: On the 7th day of December, 1870, Peter Curran, being then the owner of 100 shares of the capital stock of said bank, of the par value of \$10,000, 50 per cent. of which was unpaid, borrowed from the bank the sum of \$2,000, for which he executed his note, payable in 90 days, bearing 10 per cent. interest, and at the same time transferred on the books of the bank 50 shares of his stock to P. S. Langton. On the 8th of May, 1871, Curran borrowed the further sum of \$3,964.50, for which he executed two notes, bearing the same rate of interest, and at the same time transferred to B. M. Chambers the remaining 50 shares of his stock. Chambers was the president and Langton was the cashier of the bank. According to the testimony of Chambers, by an oral agreement, the stock was to be held by him and Langton as collateral security for these loans. On the 27th of April, 1877, while the stock thus stood in the name of Langton and Chambers, Hill & Collins, a firm, of which the defendant was a partner, obtained judgment against Curran for \$2,500, and caused execution to be issued thereon. The officer holding the execution repaired to the bank, and demanded a statement of the amount of stock held by Peter Curran, and the cashier thereupon gave him the following certificate: "There is no stock of the Butchers' & Drovers' Bank in Peter Curran's name. P. S. LANGTON, Cashier." And the sheriff indorsed the following return on the execution: "Executed this writ in St. Louis county on the 7th of May, 1877, by levying upon one hundred shares of stock in the Butchers' & Drovers' Bank, as the property of Peter Curran, the defendant, and I delivered a copy of this writ to B. M. Chambers, president of said bank, with my indorsement of said levy thereon, stating to him that I did levy on and take such rights and shares to satisfy this writ."

On the same day the sheriff advertised for sale, on the 19th of May, 1877, the interest of Curran in said 100 shares of stock to satisfy said execution, and at the sale it was struck off to Hill & Collins for \$1,000, which amount, after deducting costs, was credited on the execution, and as to the remainder the writ was returned *nulla bona* on the 4th of June, 1877, with this additional return: "I delivered a copy of this writ, together with the advertisement, a copy of which is hereto attached, to P. S. Langton, cashier of the Butchers' & Drovers' Bank, with my return of levy and sale of one hundred shares of stock above mentioned, and offered to transfer said stock to the purchasers, but was assured the defendant had none to transfer." Curran had never paid anything on his notes, and at the time of this sale they were long overdue, and amounted, principal and interest, to more than \$9,000. On the 12th of July, 1877, Hill & Collins brought suit against the bank for \$5,000 damages, for refusing to permit a transfer of Curran's stock upon the books of the bank; on the 13th the writ was served on Chambers, the president, and on the same day he and Langton transferred the 100 shares of stock in their name to Hill & Collins on the books of the bank, without their knowledge or consent. On the same day the bank closed in an insolvent condition, and ceased to do business. At the time of the transfer from Curran to Chambers and Langton the stock of the bank was worth, in the market, probably 70 to 80 cents on the dollar of paid-up stock. At the time of the levy of Collins & Hill there was no demand for it, and when transferred to them by Chambers and Langton, was worth nothing. On the 2d of October, 1877, the bank filed an answer in the suit of Hill & Collins, and on the 28th of January, 1878, an amended answer, in which, after denying the allegations of the peti-

tion, and that Curran was the owner of any stock in the bank except as thereinafter stated, then proceeded to set out the transfer of the stock by Curran to Chambers and Langton, to be held by them as collateral security for the payment of the notes before mentioned, with interest, averring that said notes and interest remain due and unpaid, and setting up the provision in the charter of the bank, prohibiting a transfer except on its books, and after all debts due by the shareholder had been paid, but saying nothing about the transfer by Chambers and Langton to Hill & Collins on the 13th of July preceding. On the trial, on the evidence in support of the answer, Hill & Collins took a nonsuit. They were, by the answers in this case, for the first time informed that Curran had transferred his stock to Langton and Chambers; and more than five years afterwards the defendant was first informed, by the commencement of this proceeding against him, that Langton and Chambers had transferred the stock to Collins & Hill. On this state of facts the circuit court held that the defendant was a holder of said unpaid-up stock, and as such subject to execution upon plaintiff's judgment against the bank to the amount remaining unpaid thereon.

The only question presented on the record of this case is, was the defendant Hill a stockholder of the Butchers' & Drovers' Bank on the 6th of June, 1881, within the meaning of section 736, Rev. St. 1879? It will be observed from the foregoing statement that, if Hill was such stockholder, it must be because he became so either by virtue of his purchase at the execution sale of Curran's stock, or by virtue of the transfer of stock to him by Chambers and Langton. It therefore becomes necessary to inquire what were the legal relations of these parties to the stock. The transfer by Curran of his stock to Chambers and Langton was to them individually, on the books of the bank, absolute and unconditional. By that transfer they became the legal owners of the stock, entitled to vote it, draw dividends on it, and, to the extent of it, exercise control and management of the affairs of the bank, and become liable as holders of it to creditors of the bank. Curran then ceased to be a stockholder in the bank, so far as that stock was concerned. He had in good faith, for a valuable consideration, parted with it, and, as to subsequent creditors of the bank, was no longer liable as a stockholder, having lost the power either to protect them or himself, although he may have had an equity in respect of that stock against the holders by virtue of a parol agreement made at the time of its transfer. "It is thoroughly established that one to whom stock has been transferred in pledge, or as collateral security for money loaned, and who appears on the books of the corporation as the owner of the stock, is liable as a stockholder for the benefit of creditors." *Bank v. Case*, 99 U. S. 628. "Where shares are held by a person as trustee for another, the legal holder of the shares, and not the equitable owner, is primarily liable both to the company and its creditors. Neither the company nor its creditors would be entitled to charge the equitable owner as shareholder." 2 Mor. Priv. Corp. § 853. "Unless the rule has been changed by statute, liability to pay calls and to respond in the case of insolvency to creditors attaches to the holder of the legal title only, and the court will not look beyond the registered shareholder, nor inquire under what equities he holds." *Thomp. Liab. Stockh.* § 178. It follows that during the six years of the existence of this bank, after the transfer of Curran, during which time, by its management, the value of the stock was reduced from 75 cents on the dollar to nothing, those dealing with the institution were, by the books of the bank, and the law of the land, pointed to Chambers and Langton as the stockholders liable to respond to them for the amount unpaid on these 100 shares of stock, in case they should be compelled to resort to that fund for satisfaction of their demands. And in this summary proceeding, in which the court is charged with the duty of ascertaining who is the stockholder to be legally charged with liability for plaintiff's debt, and not to settle the equities between Curran's vendee, the bank, or its creditors, and the legal

owner of the stock, the question that becomes important is not, who stands in Curran's shoes, but who stands in the shoes of Chambers and Langton, if they have ever legally cast them off? And for this purpose it is not necessary to define what, if any, interest or right the defendant acquired under the execution sale. He did not acquire Chambers' and Langton's stock, for the process was not against them. Curran had none, and the defendant acquired none by his purchase, and did not, by reason of that purchase, become a stockholder. Did he become one by virtue of the transfer of Chambers and Langton on the 13th of July? "The general rule is that a person whose name appears on the books of a corporation is a shareholder, both as to the corporation and as to the public." *Thomp. supra*, § 177. This supposes, of course, that the shares have been placed in his name with his consent, as was remarked in the case of *Chapman & Barker*, L. R. 3 Eq. 360. "If the mere placing a name upon the register rightly or wrongly is to give the creditors a right to proceed against the individual, any one of us now in this court might find himself upon the register of some company, and liable to its creditors. It is an absurdity to say that I am to be liable because directors choose to put me down upon the register as a shareholder. * * * The case is wholly different where a person agrees to have his name put upon the register for any purpose. The creditors have a right to take as their debtor everybody who is properly upon the register, including the trustees for the company; but creditors do not, therefore, obtain the right of insisting upon retaining as their debtor a person whose name has been placed there by fraud or wrong, or ought never to have been there at all. An important question might arise as to how far a person, after he knows that his name has been wrongly placed upon the register, may, by acts of acquiescence, such as accepting a dividend or the like, be held liable. It is like any other case. He cannot approbate and reprobate. If, for his own convenience, he adopts the act, he must be liable for the consequence of the act. The question whether he has or has not adopted it is wholly one of degree and of evidence for the court. But I cannot entertain any doubt that a man, who is placed by the directors, through contrivance, in a position which they are not entitled to place him in, will not be liable to creditors or anybody else." As Hill knew nothing of this transfer by Chambers and Langton to Hill & Collins until the motion in this case was filed for execution against him, and as from that moment he has been persistently repudiating it, it cannot be pretended that he ever expressly agreed to the transfer, or ratified it, by any act or word of his after it was done. But it is insisted that by his acts he, by implication, authorized it to be done, and is now estopped from denying that it was done with his assent; that, if Hill & Collins did not, by their purchase at the execution sale, become the owners of the stock that stood in the name of Chambers and Langton, and did not thereby become stockholders in the bank, they did, by virtue of that purchase, acquire the equity that Curran had as against the bank and Chambers and Langton to redeem the stock; and that they must be held by their acts in acquiring that equity and their subsequent action to have requested a redemption, which was accepted by Chambers and Langton and the bank; and that the transfer made to them was in pursuance of that request; and that the defendant thus became a stockholder of the bank. We are cited to the case of *Foster v. Potter*, 37 Mo. 526, in support of the proposition that Hill & Collins, by their purchase at the execution sale, acquired Curran's equity of redemption in the stock. Without stopping to distinguish this case from that one, and without being understood as holding, either that Curran had an equity of redemption in this stock upon the facts in the case, or that, if he had, it passed by the execution sale,—for the sake of argument let it be conceded that he had such an equity; that it passed by the sale; and that the argument may flow unimpeded, let any objection that might be raised to considering the bank and its trustees as one in their transactions, or the right of the trustees to give away the

trust fund, be waived. Do we find in the evidence any fact from which at any time either the bank, Chambers, or Langton would be authorized to infer a request upon the part of Hill & Collins that the incumbered stock should be transferred to them? Unless we do find such a fact, the defendant is not estopped from denying that it was assigned at his request.

A brief consideration of the salient facts in the case will answer this question, and for this purpose the further mention of the name of Collins may be omitted. The defendant, having a judgment for \$2,500, against Curran, being desirous of making his debt, and believing that Curran was the owner of stock in the bank, and that something might be made out of it, sues out his execution. The officer goes to the bank for the purpose of levying the execution on Curran's stock, if he has any, and informs the officers of his purpose. The law then made it the duty of the cashier to furnish the officer with a certificate under his hand, stating the number of shares the defendant in the execution held in the stock of the bank "with the incumbrance thereon." The cashier certified that "there was no stock in the bank in Curran's name." Is it to be supposed for a moment that, if Curran had then been regarded by the officers of the bank as the holder of this stock, half paid up, worth in the market less than 40 cents on the dollar, incumbered with a debt to the bank of more than \$9,000, and with a contingent liability for the amount unpaid thereon, and they had so certified, as it was their duty to do, that the subsequent levy and sale would have been proceeded with? If they had done so, the defendant would have seen at once that he was engaged in a vain pursuit, and would, doubtless, have abandoned it as quickly as he did a similar one, at a later stage in the proceedings, when the officers of the bank first disclosed such a state of case in the answers, and supported by their evidence in the suit instituted by him against the bank for their refusal to permit a transfer on their book of Curran's supposed stock. The defendant was seeking, by due process of law, to subject Curran's stock, if he had any, to his debt. In attempting to do so, he claimed to have become the owner of that stock by purchase under such legal process, and asked that a transfer be made on the books of the bank in pursuance of such purchase. The bank refused to permit such transfer to be made, and, when sued for damages for such refusal, by showing that at the time of the levy and sale Curran had no stock in the bank; that Chambers and Langton were the owners of the stock that Curran once owned; that Curran had a mere equity, and a worthless one at that, against the then holders of that stock,—satisfied him that he had acquired nothing by his purchase, and he abandoned his action for damages, as he would, doubtless, have abandoned his pursuit of Curran's supposititious stock before the sale, if they had given him this information at the time it was their duty to have done so. The defendant was after Curran's stock. He did not get it, because years before Curran had parted with it to Chambers and Langton. He was not after Chambers' and Langton's stock. He could not have gotten it if he had wanted it, by that process, and would not have wanted it if he could have gotten it, burdened as it was with liabilities far exceeding its value. This effort made by the defendant to subject the supposed stock of Curran (in his ignorance of the disposition that Curran had long since made of it) to the payment of his debt, and his subsequent action for damages, superinduced by the failure of the officers of the bank to give him timely and proper information of the actual condition of the stock, is the sole ground upon which is rested the claim that the transfer made by Langton and Chambers to the defendant on the 13th of July, 1877, was made at the request of the defendant. Conceding, then, that the defendant acquired the right to redeem this stock from Chambers and Langton, (he never exercised it, or sought to exercise it,) they could not exercise it for him, and, without his consent, thrust upon him obligations which they had incurred by the ownership of this stock up to the very hour that the shades of bankruptcy closed in around the institution, and rendered its stock worthless. This trans-

fer was not made in answer to any demand ever made by Hill to redeem this stock, for he never made such a demand. The only demand that he ever made, or was ever made in his behalf, was that the officer who made the sale under the execution might transfer on the books of the bank the stock of Curran's that he undertook to sell. If that demand had been granted, and the transfer had been made by him, Langton and Chambers would have still remained the holders of the stock that Curran once owned, by virtue of his previous transfer to them, and Hill, by such transfer, would not have become the owner of that stock, or a stockholder of the bank. How, then, can it be held that this secret transfer by them can enlarge the scope of that demand, or be held to be in compliance with it? Upon what principle of law or equity can the defendant be estopped from asserting that such transfer was without his assent? Every dollar of indebtedness incurred by the bank upon the faith of this unpaid stock was upon the faith of the legal ownership of that stock by Chambers and Langton, and it would be monstrous to hold that, as these officers closed the doors of that institution, which they had conducted to the brink of financial ruin, to any future credit, upon the faith thereof, they could, in the act of doing so, unload their present obligations, incurred upon the faith of their past ownership of that stock, upon the shoulders of the defendant; or that creditors of the bank, by their act, could acquire a right to look from those whom they had trusted to him whom they had not trusted to answer their demands, simply because he himself had been trying to secure his debt from one who had formerly been, but had long since ceased to be, a stockholder in the bank. There can be no doubt that the defendant was not a stockholder in the bank when the execution against it was returned *nulla bona*, and that the trial court committed error in holding that he was. The judgment of that court is therefore reversed. All concur except RAY, J., absent.

SCHLERETH v. MISSOURI PAC. Ry. Co.

(*Supreme Court of Missouri.* December 20, 1888.)

1. TRIAL—INSTRUCTIONS—DIRECTING VERDICT.

In an action against a railway company for negligence, whereby plaintiff's intestate was killed, when contributory negligence is not pleaded, and plaintiff's testimony does not disclose such negligence, but shows that defendant's train was, at the time of the accident, violating an ordinance limiting the rate of speed of trains and requiring signals to be given, the jury should not be instructed peremptorily to find for defendant.¹

2. SAME—ACTS OF NEGLIGENCE—LIMITED BY PLEADINGS.

An instruction in such case, defining the law of negligence applicable, is erroneous if it does not limit the acts of negligence for which plaintiff may recover to such as are charged in the petition.

3. DAMAGES—MEASURE—DEATH BY NEGLIGENCE.

The death being caused by defendant's train negligently striking plaintiff's intestate, who was a track repairer in defendant's employ, while walking on the track, it is error to direct the jury that if they find for plaintiff, they should assess his damages at \$5,000.

Appeal from St. Louis circuit court; WILLIAM H. HOMER, Judge.

Action by Anna M. Schlereth, widow of Anton Schlereth, deceased, against the Missouri Pacific Railway Company for negligently causing her husband's death. Deceased was killed by being struck by defendant's train while walking on the track. The defense was a general denial. At the close of plaintiff's testimony defendant asked the following instruction: "The court instructs the jury that under the evidence and pleadings in this case the plaintiff is not entitled to recover;" which the court refused to give, and

¹ That the failure of a railroad company to observe statutory requirements in running its trains is *per se* negligence, see *Petrie v. Railroad Co.*, (S. C.) 7 S. E. Rep. 515, and cases cited, *Railway Co. v. Wals*, (Kan.) 19 Pac. Rep. 737, and note.

defendant excepted. The defendant offered no evidence. Plaintiff then asked, and the court gave to the jury, the following instructions, viz.: (1) "The jury are instructed that if they believe from the evidence that on or about the 26th day of November, 1884, the plaintiff and one Anton Schlereth were husband and wife, and that said Anton died on or about the day aforesaid and left the plaintiff surviving him as his widow, and that on or about said day the defendant, by its officers, agents, servants, employees, was running, conducting, or managing one of its locomotives, and that said locomotive was then running on, along, and over defendant's line of railway within the limits of the city of St. Louis, and that said locomotive was then run against or upon the body of said Anton, and that said Anton was then struck with said locomotive and injured, and that said Anton died of such injury on or about said day, and that such striking of said Anton and injury to him resulted from, or was occasioned by, the negligence of any of said officers, agents, servants, or employees of defendant while running, conducting, or managing said locomotive at or prior to the time said locomotive was run against or upon the body of said Anton, they will find for the plaintiff. (2) The jury are further instructed that if they find for the plaintiff they will assess her damages at the sum of five thousand dollars." To the giving of each of which said instructions the defendant objected and excepted. The defendant then prayed the court to instruct the jury as follows: "The uncontradicted evidence in this case showing that the deceased husband of plaintiff was an employe of defendant at the time of his death, to-wit, a section hand or track repairer, and there being no evidence showing or tending to show the relation that said deceased bore to the servants or employes of defendant in charge of the engine that ran over the said deceased, the presumption of law is that said deceased and the said employes in charge of said engine were fellow-servants, and there can be no recovery in this case." Which instruction the court refused, and defendant excepted. The jury thereupon found a verdict for plaintiff in the sum of \$5,000, which defendant moved to set aside, and grant a new trial. A new trial having been refused, defendant appeals.

Bennett Pike and Thos. J. Portis, for appellant. *E. P. Johnson*, for respondent.

SHERWOOD, J. Action for damages, brought by plaintiff against defendant for causing the death of her husband, Anton Schlereth, who was killed by one of defendant's trains near Tower Grove station, in the city of St. Louis, while he was in defendant's employ as track repairer. Omitting formal parts, the petition is the following: "That on said day the defendant, by its officers, agents, servants, and employes, was running, conducting, and managing one of its said locomotives, which was then and there being propelled by steam-power, on, along, and over its said line of railway within the limits of the city of St. Louis, and ran the said locomotive against and upon the body of said Anton, whereby said Anton was violently struck with said locomotive, and thrown down and injured, of which injury the said Anton died on said day. That said injury to said Anton resulted from, and was occasioned by, the negligence and unskillfulness and criminal intent of said officers, agents, servants, and employes of defendant, while running, conducting, and managing said locomotive, at and prior to the time it was run against and upon the body of said Anton. That by sections twenty-five and twenty-six of article four of chapter thirty-one of the Revised Ordinances of the City of St. Louis, approved March 29, 1881, entitled "Public Carriers," it is, among other provisions, provided as follows: 'Sec. 25. It shall not be lawful, within the limits of the city of St. Louis, for any car, cars, or locomotive propelled by steam-power to run at a rate of speed exceeding six miles per hour. Sec. 26. It shall not be lawful, within the limits of the city of St. Louis, for any car, cars or locomotive propelled by steam-power to obstruct any street crossing by standing

thereon longer than five minutes; and, when running, the bell of the engine shall be constantly sounded within said limits.' That, contrary to the provisions aforesaid of said ordinances of the city of St. Louis, said locomotive was at and prior to the time it was run against and upon the body of said Anton, running at a rate of speed exceeding six miles per hour, and the bell of the engine of said locomotive was not constantly sounded while running within the limits of said city of St. Louis, at and prior to the time it was run against and upon the body of said Anton. That at and prior to the time said locomotive was run against and upon the body of said Anton, the said locomotive was running at an irregular and unusual hour, at an immoderate and dangerous rate of speed, at a point in the city of St. Louis where great care and caution in running the same were required, and no warning or signal of its approach was given. That by reason of the aforesaid negligence and unskillfulness and criminal intent of said officers, agents, servants, and employees of the defendant in running, conducting, and managing said locomotive, whereby it was run upon and against the body of said Anton, by which he was thrown down and injured, and of which injury he died as aforesaid, she has been damaged in the sum of five thousand dollars, for which she asks judgment." The answer was a general denial.

The testimony tended to show that the deceased started at Tower Grove station, and walked in a westerly direction upon the railway track, going to work upon defendant's road, and at a distance of 1,200 or 1,500 feet from that station was struck and run over by some train and killed. Though the testimony showed that the accident happened in the city limits, yet it did not show that the railway tracks between that station and Kings highway are laid upon a street, or are crossed by a street, for that distance,—some three-fourths of a mile,—and at the point of the accident a train could readily be seen in either direction for some 300 yards. The deceased had been in the employ of defendant in that neighborhood about four years, and was therefore presumably conversant with the perils of the locality, and its immediate surroundings. It had been the custom for 10 or 12 years for the hands on that section of the road to start to their work on a hand car; but on the morning referred to, as the distance was short, they walked. There are two tracks at the point mentioned,—one north and one south track,—and they run parallel for a long distance. No one saw the deceased on the track, nor saw him at the time he was struck, nor knew the situation he was in; but the testimony tends to show that the deceased could have seen and heard the train coming east or the engine going west, if he had looked or had listened; and tended to show that if upon the track the deceased could have been seen by those in charge of the train or engine; and the testimony also tended to show that the ordinances quoted in the petition, and read in evidence, were not complied with by those in charge of either engine or train; and there was testimony tending to show that the engine did not exceed in its rate of speed that prescribed by ordinance. On the facts thus presented, the main question for determination is: Should an instruction in the nature of a demurrer to the evidence have been given?

1. It is the settled law of this court that the contributory negligence of the plaintiff is a matter of defense, and must be pleaded and proved in order to escape liability. *Thompson v. Railroad Co.*, 51 Mo. 190, *Loyd v. Railroad Co.*, 53 Mo. 509; *Stephens v. Macon*, 83 Mo. 345; *Petty v. Railroad Co.*, 88 Mo. 306. The only defense the answer sets up is a general denial, and therefore the defendant is in no condition to invoke the contributory negligence of the plaintiff, unless the evidence offered in behalf of plaintiff shows such contributory negligence as defeats the action. *Milburn v. Railroad Co.*, 86 Mo. 104. But there is no such evidence here.

2. And it is the established law of this court that the violation of municipal ordinances which regulate the rate of speed, etc., of trains is negligence *per se*, (*Keim v. Railroad Co.*, 90 Mo. 314, 2 S. W. Rep. 427, and cases cited;) and

if such negligence be established, and injury is done to person or property by the train, it will, in the absence of other evidence, be presumed to be caused by the first negligent act of the company, to-wit, the failure to comply with the ordinance in question. See above authorities. On these grounds only can the refusal of the trial court to give the instruction in the nature of a demurrer to the evidence be supported.

3. There was error in giving the first instruction asked on behalf of the plaintiff, in that it did not confine the jury to the specific grounds of negligence alleged in the petition.

4. In the second instruction, also, for plaintiff, there was error as to the measure of damages. *Flynn v. Railroad Co.*, 78 Mo. 201; *Holmes v. Railroad Co.*, 69 Mo. 536; *Elliott v. Railroad Co.*, 67 Mo. 272. Therefore, judgment reversed, and cause remanded. All concur. RAY, J., absent.

In re LIFE ASSOCIATION OF AMERICA.

(Supreme Court of Missouri. December 20, 1888.)

MORTGAGES—FORECLOSURE—LIABILITY OF PURCHASER TO FIRST MORTGAGEE.

A deed of trust, after describing the land in the granting clause, added: "Together with the net income realized from said property as the rents thereof." There was no express stipulation that the trustees might take possession on default of interest; and no demand was made for the rents, or for an accounting. *Held*, that the purchaser at a sale under a second deed of trust, who took possession, was not liable to the trustee for the rents accruing while he was in possession, and before the trustee attempted to take possession on default.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

A petition by M. A. Rosenblatt, asking that the superintendent of insurance, in possession of the property of the Life Association of America,—a corporation which had been dissolved,—be required to pay to him certain rents, was denied, and the petitioner appeals.

Geo. W. Taussig, for appellant. *Wm. S. Relfe and Hough, Overall & Judson*, for respondent.

BLACK, J. The petitioner, M. A. Rosenblatt, filed two applications in the matter of the Life Association of America, asking that the superintendent of insurance be required to pay to him the net rents arising from property known as the "Masonic Building." The court declined to make the orders prayed for, or either of them, and he appealed. These claims for the rents grow out of the following agreed facts: The Masonic Hall Association owned a parcel of ground in St. Louis, and the building thereon; and on the 1st of June, 1869, made a deed of trust to secure the payment of 140 bonds of that date for \$1,000 each, due in 15 years, bearing interest at 8 per cent. per annum, payable semi-annually, on the 1st days of June and December, as evidenced by attached coupons. The deed of trust, after describing the real estate, goes on to say: "Together with the net income realized from said property as the rents thereof, after expenses of collection and repairs shall be reserved therefrom." The deed of trust contains the usual power of sale, to be exercised upon the failure of the Masonic Association to pay the bonds and coupons, or any them, when due, or upon failure to keep the property insured in the amount of \$150,000, for the benefit of the owners of the bonds. The Masonic Association made a second and subsequent deed of trust on the property, and, at a sale made thereunder, the Life Association purchased the property on the 10th November, 1873, and at that date took possession thereof. In 1874 the Life Association erected on a then vacant portion of the lot a new building at a cost of \$23,356. After this, and on the 10th November, 1879, the Life Association was dissolved by an order of the circuit court, and its affairs were then put in the hands of the superintendent of insurance, who held possession of the property to the 28th March, 1881, at which date he sold the interest therein.

owned by the dissolved corporation. In the following April the property was sold under the first deed of trust, and the petitioner became the purchaser at a price which paid about 50 per cent. of the bonds. At that date he owned the bonds and the unpaid coupons. The first claim of the petitioner is for the rents from 10th November, 1873, to 10th November, 1879, and the second is for the rents from that date to 28th March, 1881, both claims covering the entire time that the property was in the possession of the Life Association, and the superintendent of insurance. In the view we take of the case, it is unnecessary to separate these claims; and it is sufficient to say that the interest coupons paid by the Life Association and the superintendent exceeds in the aggregate the net rental of the property, including the new building, during the entire time covered by both claims. The first default in payment of coupons occurred on those maturing December, 1880. No demand was ever made by the petitioner, or the trustees in the deed of trust, or the prior holders of the bonds and coupons, for rents, or for an accounting therefor, except by the filing of these petitions. The general rule is that until default the mortgagor is entitled to the possession of the mortgaged real property. So long as the mortgagee refrains from taking possession, he has no right to the rents and profits received by the mortgagor. 2 Jones, Mortg. § 1120. The mortgagor cannot be made to account for the rents for the time past. 1 Hil. Mortg. (4th Ed.) 156. This general rule is perhaps not controverted in this case, but the rule itself must be kept in mind. The petitioner founds his claim on that clause in the deed of trust which, after granting and conveying the real estate, says: "Together with the net income realized from said property as the rents thereof," etc. In *Gilman v. Telegraph Co.*, 91 U. S. 603, the railroad company, to secure its bonds, executed to trustees two mortgages on its road and property, "together with the tolls, rents, and profits." The trustees were authorized, on default, to take possession of the mortgaged property. After speaking of the general rule that, until the mortgagee takes possession, the mortgagor is owner, and entitled to all the profits made, the court proceeds to say: "It is clearly implied in these mortgages that the railroad company should hold possession and receive the earnings until the mortgagee should take possession, or the proper judicial authority should interpose. Possession draws after it the right to receive and apply the income. * * * In this condition of things, the whole fund belonged to the company, and was subject to its control. It was therefore liable to the creditors of the company as if the mortgages did not exist. They in nowise affected it. If the mortgagees were not satisfied, they had the remedy in their own hands, and could, at any moment, invoke the aid of the law, or interpose themselves without it. They did neither." The doctrine of that case had been before asserted, and has been approved by subsequent adjudication of that court. *Railroad Co. v. Cowdrey*, 11 Wall. 482; *Bridge Co. v. Heidelberg*, 94 U. S. 798. The same principle was applied by the court of appeals to a case where the parties to the deed of trust were individuals. *White v. Wear*, 4 Mo. App. 341. In this case, it is true, there is no express stipulation that the trustees may take possession on default in payment of interest. But can that make any substantial difference? The deed of trust contemplates, beyond the shadow of a doubt, that the mortgagor is to remain in possession until default. Default in the payment of any of the coupons makes the whole indebtedness due for all the purposes of the trust. Such is the stipulation in the deed. Upon default, the mortgagees had a right to the possession without an express stipulation to that effect. If denied to them, they could resort to the courts, and, if need be, have a receiver appointed to take and collect the rents. We cannot see that the want of such a stipulation in the deed of trust takes this case out of the rule of the cases before cited. Rents are nowhere mentioned save in the granting clause, and a public sale of accrued rents is not contemplated, nor does the deed contemplate an accumulation of rents to meet any possible de-

fault. The conclusion is irresistible that the Life Association is not liable for rents while it or the superintendent had possession of the property. This result disposes of the secondary questions discussed in the briefs. The judgment is affirmed.

RAY, J., absent. The other judges concur.

VAN METER v. HAMILTON *et al.*

(*Supreme Court of Missouri*. December 20, 1888.)

INJUNCTION—SALE UNDER TRUST DEED—CONSIDERATION—EVIDENCE.

In a suit to enjoin the sale of land under a trust deed executed by plaintiff's vendor for want of consideration for the note, plaintiff's vendor testified that it was given to secure to defendant money to be advanced by him in the purchase of a tract of land for witness, and that defendant bought the land and took the deed to himself. Defendant denied the agreement, and stated that the note, which was for \$2,000, was given for \$1,280 found due him from said vendor on a settlement then made, and the balance for money loaned. He further stated that said vendor had leased land of him, and that on a settlement of accounts for rent and improvements, the said amount was owing him. Mutual receipts were executed, acknowledging satisfaction of counter-demands, the one given by plaintiff's vendor containing a promise to surrender the lease, which had not expired. Plaintiff's vendor testified that on the settlement \$3,374 was found due him, and that the \$720 was paid on that account, and that he thought the receipt was only an agreement to surrender the lease. No demand was ever made by said vendor for a deed for the land alleged to have been purchased for him, or for the residue of the \$3,374. At the time of this transaction, said vendor was pressed by creditors. Defendant's brother, who obtained possession of the land after the lease expired, signed an agreement to pay for the improvements thereon, if plaintiff's vendor had not already been paid. This agreement stated that the latter had paid \$1,280 to make good his lease. *Held*, not sufficient evidence to support a finding for plaintiff.

Appeal from circuit court, Bates county; JAMES B. GAUTT, Judge.

Suits in equity by Isaac C. Van Meter against A. L. Hamilton and others. The object of one suit was to cancel a deed of trust on the ground that there was no consideration for the note secured by it, and that of the other was to enjoin a sale under the deed. The suits were consolidated, and heard together, and judgment rendered for plaintiff. Defendant Hamilton appeals.

A. Comingo, for appellants. *Gates & Wallace*, for respondents.

BLACK, J. This is a suit in equity, to enjoin the sale of real estate under a deed of trust. The history of the title to the land is this: W. S. Van Meter owned 554 acres of land in Bates county, which was incumbered with a deed of trust for \$5,500. On the 23d February, 1883, he made a second deed of trust thereon, to secure his note of that date for \$2,000, payable to A. L. Hamilton, in nine months after date. The land, except 160 acres, was sold under the prior deed of trust; and Isaac C. Van Meter, who is the father of W. S. Van Meter, became the purchaser. This sale paid off the prior deed of trust, so that the Hamilton deed of trust became the first lien on the 160 acres. Isaac C. Van Meter thereafter became the purchaser of this 160 acres. In 1885, A. L. Hamilton caused the land to be advertised for sale under his deed of trust, and thereupon the plaintiff, Isaac C. Van Meter, commenced this suit against A. L. Hamilton, as the principal defendant, to enjoin the sale. The court found the issues for the plaintiff, and gave judgment according to the prayer of the petition. Hamilton brings the case here by appeal. The plaintiff insists that this \$2,000 note and deed of trust was without consideration, or, rather, that the consideration failed in whole. Whether this be true or not depends upon a settlement had between W. S. Van Meter and A. L. Hamilton at the date of the deed of trust in respect of a certain lease then held by Van Meter on land owned by George Hamilton, who is the father of A. L. Hamilton. The evidence of the parties as to the settlement well dis-

closes the real issues in this case. It is an admitted fact that A. L. Hamilton, as the agent of George Hamilton, leased to W. S. Van Meter what is called "Section 18," and another tract of 400 acres, all in Bates county, Mo., for a period running from March, 1879, to March, 1884; that at the date of the deed of trust in question these parties had a settlement in respect of this lease, and that the lease was then surrendered to Hamilton. A. L. Hamilton resided in the state of Kentucky, and he came to Bates county, and there agreed upon a settlement with W. S. Van Meter. The parties then went to Butler, in that county, to see Smith and Lashbrook, who had purchased the Van Meter land—the land in suit—at an execution sale made on a judgment against W. S. Van Meter. From there they went to Kansas City, where the note and deed of trust were prepared, and on the next day they went to Independence, where the deed of trust was executed, and the settlement closed. W. S. Van Meter explains the \$2,000 note in this way: He says, in his direct examination, that the Wall heirs, who resided in Kentucky, near A. L. Hamilton, owned 160 acres of land adjoining his land in Bates county; that A. L. Hamilton agreed to buy this land for him, and, to save and protect Hamilton for any advances made in the purchase of the Wall land, he made to Hamilton the deed of trust in suit. He says Hamilton purchased the Wall land, and took the deed in his own name. A. L. Hamilton testifies that he did purchase the Wall land in April, 1883, and paid therefor in cash \$2,200; but that that purchase had no connection with the deed of trust in question. He says that by the terms of the lease of the George Hamilton land W. S. Van Meter was to pay the taxes thereon, and grow a stock hedge fence around section 18, and if he (Van Meter) failed to grow the stock hedge fence, then he was to pay a fair rent for the land. Hamilton testifies further that Van Meter's efforts to grow a stock hedge fence had proved a failure in January, 1883; that they then agreed that Van Meter should surrender the lease; that he took some improvements, valued at \$810, for the rent of 1880; and they agreed upon \$1,280 as the rent for 1881 and 1882, on section 18, and that no rents were allowed as to the 400 acres; that as a part of this settlement Van Meter agreed to secure the \$1,280 by a deed of trust, and that he agreed to and did loan Van Meter \$720, and that these two amounts constitute the \$2,000 note in suit. This version of the settlement is corroborated by the evidence of J. C. Hamilton, who was present while the parties were at the house of W. S. Van Meter, in Bates county. The proof is conclusive that Hamilton did, at Independence, pay Van Meter \$720 in cash. It may be stated here that \$175 of this payment was sent in a check of Hamilton to a bank in Butler, to pay off the Smith and Lashbrook claim, which amount they did not accept for their claim. W. S. Van Meter says there was no agreement that he should pay rent if he failed to grow a hedge fence; that the terms of the settlement were that he was to surrender the lease, and A. L. Hamilton was to pay him rents for the unexpired year of the lease, 1883; and that Hamilton was to pay for all improvements placed on the leased land, the amount agreed upon for all being \$2,374. He says the amount paid him in money at the settlement was in part payment of this last-named agreed sum. When this settlement was concluded at Independence, and on the date of this deed of trust now in question, A. L. Hamilton, as agent for George Hamilton, made a receipt to Van Meter, acknowledging payment in full of all demands on account of the lease; and at the same time W. S. Van Meter gave a receipt acknowledging payment in full by George Hamilton of all demands on account of buildings and other improvements upon the leased land; and Van Meter therein agreed to surrender the leased lands to Hamilton on the 1st March, 1883. Van Meter testifies that he understood this receipt to be simply and only an agreement to surrender the lands. It seems that Smith and Lashbrook refused to accept the check of \$175 for their claim, and in May, 1883, A. L. Hamilton paid them \$350 for a deed to himself.

On this evidence, and the facts hereafter noticed, the judgment of the circuit court cannot stand. The circumstance that the Wall 160 acres adjoined Van Meter, amounts to little, for it appears A. L. Hamilton owned land adjoining the same tract, so the purchase was as desirable for one as the other. Again, at the date of this deed of trust, W. S. Van Meter was involved and hard pressed with debts, to the knowledge of Hamilton, and it is not likely that the latter would undertake to buy the Wall land for Van Meter, having only a second deed of trust to secure his advances. In this state of affairs it is much more reasonable to believe that he desired to get security for what was due on the lease, for Van Meter seems to have put up fencing on the 400 acres, but Hamilton says for this work he surrendered to Van Meter the latter's note for \$168.66. Van Meter does not mention this transaction at all, or deny the fact that he got the note in payment of that work. The receipts executed by the parties at the date of the settlement are a denial of Van Meter's statement of the settlement, and his explanation of the one which he signed is not satisfactory in view of the fact that these parties were together three days, perfecting and completing the settlement. The evidence of Smith and Lashbrook does show that Hamilton said he was buying the claim for Van Meter. But Hamilton, by his answer in this suit, says he bought that claim to protect his deed of trust, and he can, of course, hold the claim for no other purpose. Besides all this, W. S. Van Meter says he has been to Kentucky frequently since that settlement, and saw both George and A. L. Hamilton, and that he never asked them for the deed of trust, or for a conveyance of the Wall land, or for the balance of the alleged \$2,374, which he says A. L. Hamilton agreed to pay him. Mr. Isaac C. Van Meter says, after he purchased the land in suit he went to the defendant, and offered to pay him all just claims owing by W. S. Van Meter, but that defendant referred him to his attorney. Indeed, all the undisputed circumstances in this case are against the theory of the case on which plaintiff prevailed in the circuit court.

There is one other circumstance on which the counsel for plaintiff placed much reliance. It appears that J. C. Hamilton, who is a brother of A. L. Hamilton, gave W. S. Van Meter an agreement dated in April, 1883, wherein reference is made to the lease, stating that Van Meter was to inclose the land with a hedge fence, and pay taxes on same, and that Van Meter had surrendered the lease on condition that A. L. Hamilton should pay for improvements, and that Van Meter had paid to A. L. Hamilton \$1,280 to make good his lease contract, and that Van Meter claimed that he had not been paid for the improvements. J. C. Hamilton then agrees that if Van Meter will yield up possession of the land, he will pay for the improvements upon the basis of the former settlement, in the event Van Meter has not been paid for them. This agreement seems to have been executed under these circumstances. J. C. Hamilton took possession of the land, and Van Meter came to him with a shotgun, and ordered him off, claiming that he had not been paid for his improvements. The parties then had this paper prepared, to settle their then dispute. J. C. Hamilton says he desired to have a loose kind of paper drawn up to pacify Van Meter, and the remark is much criticised; but a loose kind of paper it is. It states this, however, that Van Meter had paid \$1,280 to make good his contract of lease, which is inconsistent with the claim that the \$2,000 note, of which the \$1,280 is a part, was made for the purposes stated in the petition. Before the grantor can set aside a deed of trust or enjoin a sale thereunder on the ground that the consideration has failed, or that it was without consideration, he must by his proof make out a case by a clear preponderance of the evidence. The rule applicable to such cases is often stated even in stronger language. *Worley v. Dryden*, 57 Mo. 226; *Forrester v. Moore*, 77 Mo. 651. The plaintiff here has made out no such a case. This case, and that of the same plaintiff against A. L. Hamilton, which was a suit to cancel the deed of trust, were consolidated and tried together. The judgment in both cases is reversed,

and the cause remanded, with directions to the trial court to enter up judgment in favor of the defendant, dismissing the petition for want of equity. Should all the parties desire to convert these proceedings into a bill to redeem, then that can be done, but the issues on the present pleading are now settled once for all. Judgment reversed and cause remanded.

RAY, J., absent. The other judges concur.

CRUMB v. WRIGHT.

(*Supreme Court of Missouri. December 20, 1888.*)

1. EJECTMENT—DEFENSES—FORECLOSURE—FRAUD—RESCISSION.

After land has been sold under a deed of trust to secure the purchase money, and repurchased by the vendor, the vendee, having retained possession of the land, cannot defend ejectment by the vendor on the ground of fraudulent misrepresentations by the vendor inducing the first sale, as, upon discovery of the fraud, he should have repudiated the purchase, and surrendered possession of the land.

2. SAME—INVALIDITY OF TITLE—EVIDENCE—DOCUMENTARY.

In such an action, before the defendant can introduce evidence of the falsity of plaintiff's statements, he must prove the invalidity of plaintiff's title, which should be done by documentary evidence, or its equivalent, showing in whom the legal title is.

Appeal from circuit court, Stoddard county; JOHN G. WEAR, Judge.

Ejectment by D. S. Crumb against Charles P. Wright. Verdict and judgment for plaintiff, and defendant appeals.

Smith, Silver & Brown, for appellant. *Housh & Keaton*, for respondent.

SHERWOOD, J. Ejectment for S. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of section 13, township 27, range 9. The answer was a general denial, and the following: "And defendant, further answering plaintiff's said petition, says that he admits that on the 27th day of December, 1880, he did execute a deed of trust to plaintiff, which said deed of trust was obtained by plaintiff through false and fraudulent representations made by plaintiff to defendant; that is to say, plaintiff represented to defendant that he was the owner of the land therein described, and that he had good right to sell the same, he, the said plaintiff, well knowing at the time that said representations were false and fraudulent. Defendant further says that by the said false and fraudulent representations, so made as aforesaid, he was induced to execute the said deed of trust, and the notes upon which the same was based, and for no other nor greater consideration; that the same was made without any consideration whatever passing from plaintiff or to defendant." Prayer that said deed of trust, and the said notes so secured by said deed of trust, be declared by the court null and void, and for all other proper relief. Replication, general denial. Plaintiff introduced testimony showing that defendant was in possession of the premises at the commencement of the suit. Then read in evidence a deed of trust dated December 27, 1880, to secure notes given for the purchase money, executed by defendant, conveying the land in suit to Collin Morgan, trustee, and deed of trust to plaintiff for said land, executed 12th day of January, 1884. Plaintiff then testified as to rents and profits, number of acres in cultivation, etc. On cross-examination, defendant offered to prove by the plaintiff that at the time he conveyed to defendant, he had no title to the land in suit; that defendant was at the time the owner; that the plaintiff obtained his note and deed of trust, through which he now derives his title through false and fraudulent representations to the defendant that he had title to the premises; that the deed from plaintiff to defendant, which conveyed nothing, was the only consideration for defendant's said note and deed of trust. The court held said evidence inadmissible, and overruled the offer of defendant to prove said

facts; to which defendant objected, and excepted. Judgment was then rendered for plaintiff, and defendant appeals.

The defendant, by his answer, took upon himself the burden of showing that the representations alleged therein, respecting the title, were false, and known by the plaintiff to be false, when he made them. In order to do this, it was first necessary for him to show in whom the title was; but this he did not do, nor attempt to do, by any legitimate method known to the rules of evidence. Unless the whereabouts of the title were shown, and shown by documentary evidence, or its equivalent, it would be a vain and useless thing to ask as to fraudulent representations respecting that title. The first step in the case was to show, by proper methods, the invalidity of plaintiff's title, and next to show the fraudulent representations concerning it, and then to show that defendant, relying on such representations, was induced to become the purchaser of the land. But the truth or falsity of plaintiff's representations, respecting his ownership of the land, could not be established without first investigating his title to the land in the proper way, which, as already seen, was not done. There is not a *scintilla* of testimony or evidence in this record, nor allegations in the pleadings, whether the defendant was the real owner of the premises or not, or whether he was in possession thereof, prior to receiving a deed from plaintiff, nor whether that deed was one of general warranty indented, or poll in form.

Inasmuch, however, as the deed of trust was executed on the 27th day of December, 1880, to secure notes given for the purchase money of the land, and inasmuch as the defendant was in possession of that land at the commencement of the suit several years after the deed of trust and notes were executed, it may fairly be presumed that possession was acquired by defendant from plaintiff at or about the date of his deed from the latter, and that such deed was at least contemporaneous with the deed of trust, and was in ordinary form,—that is, a general warranty; because this is the usual manner of doing business, and courts and juries, in the absence of opposing evidence, indulge the presumption that the ordinary course of business is pursued. *Fitzgerald v. Barker*, 85 Mo. 13, and cases cited. But whether the deed received by the defendant, and under which it must be presumed he took possession, contained covenants of warranty or not, cannot affect the determination of this cause, even were it conceded that plaintiff was guilty of fraudulent representations as to his title, when he sold and conveyed the land to defendant, and placed him in possession; because, clearly, defendant could not retain possession of the land, and the purchase price also. *Smith v. Busby*, 15 Mo. 388. To allow the defendant to do so would be to allow him to set off one fraud against another, something not permissible. The only method open to defendant to pursue, upon discovering the alleged fraud, was to abandon the possession of the premises, and proceed for rescission of the contract. He could not grasp its benefits with one hand, and yet shirk and repudiate its burdens with the other; and this is true whether the deed contained covenants of warranty or not, or whether the plaintiff was solvent or not, or whether there was fraud on his part or not. The defendant had paid no portion of the purchase money nor interest, had made no betterments on the estate granted, and had enjoyed its rents and profits for years, without eviction or threatened eviction, and therefore, even if fraud were committed against him as aforesaid, it had not altered his condition for the worse. It had done him no hurt, and the rule is familiar that fraud and injury must concur in order to invoke equitable interposition. *State v. West*, 68 Mo. 229; *Lenox v. Harrison*, 88 Mo. 491; 1 Story, Eq. Jur. (13th Ed.) p. 227, § 203. Again, the same rule prevails, both at law and in equity, announcing that, until the grantee has paid the purchase money, "he holds, in respect to the payment, a relation of duty to the grantor similar to that of tenant to his landlord," and is precluded to that extent, and by a similar estoppel, from invoking to his aid an outstanding title. *Bigelow, Estop.* (3d.

Ed.) 429, 464, 484. The rule rests upon principles of justice and good faith. Having acquired possession by admitting the title of his grantor, and receiving a conveyance from him, the grantee would be guilty of a breach of good faith if he should attempt to hold the possession thus obtained, in order to assist to defeat the recovery of the consideration, without which the conveyance would not have been made nor possession given. Frequent instances are to be found in our reports where it has been ruled that a purchaser of land who has taken a conveyance with covenants for title, and is in undisturbed possession, will not be relieved against the payment of the purchase money on the mere ground of defect of title; there being no fraud in the sale nor eviction. *Mitchell v. McMullen*, 59 Mo. 252; *Connor v. Eddy*, 25 Mo. 75; *Wheeler v. Standley*, 50 Mo. 509; *Cooley v. Rankin*, 11 Mo. 643; *Barton's Adm'rs v. Rector*, 7 Mo. 528. But these cases are not to be understood as conveying the idea that if fraud had been practiced by the grantor when placing the grantee in possession, that the latter could retain possession of the land as well as resist the recovery of the purchase price; for such a course of action would be inconsistent with itself, repudiating the contract, with all of its obligations, but at the same time retaining the possession which the contract had conferred. As a general rule, it will be found that those cases where fraud has been practiced as to title, and the defendant or complaining party has been allowed to retain possession, are exceptional in their character, and the defect or incumbrance does not go to the whole estate, or is very limited in its nature. *Abbott v. Allen*, 2 Johns. Ch. 519, and cases cited. In most cases where a right to retain possession of land has been allowed and exercised, it has been when the defendant or party complainant had a precedent possession and ownership of the land, but was induced by the fraudulent practices of another to believe that the latter had the title, and, being thus deceived, accepted a deed from, and became responsible to, the vendor for the purchase money. *Jackson v. Ayers*, 14 Johns. 224; *Fitch v. Baldwin*, 17 Johns. 161; *Alderson v. Miller*, 15 Grat. 279, and cases cited; *Jackson v. Spear*, 7 Wend. 401; *Mattison v. Ausmuss*, 50 Mo. 551. But in such cases the fraud or imposition destroys the estoppel, and defeats the covenants for the payment of the purchase money. In the case at bar the defense sought to be maintained was virtually a resistance of the payment of the purchase price. It is singular, indeed, if a valid ground for such resistance existed, that it did not manifest itself in proceedings to enjoin the sale under the deed of trust. Looking at the whole case, and the faint manner in which the present action was defended, it is to be strongly suspected that the answer was but a sham plea. Therefore judgment affirmed. All concur. RAY, J., absent.

STATE v. KINDER.

(Supreme Court of Missouri. December 20, 1888.)

1. CRIMINAL LAW—EVIDENCE—CONFESSIONS—FEAR AND COMPELSION.

On a preliminary examination by the judge to determine whether confessions were made with that degree of freedom to warrant their admission in evidence, it is error to exclude evidence offered by the prisoner to show that they were procured through fear and compulsion, and the error is not cured by the submission of such evidence to the jury.

2. WITNESS—COMPETENCY—ACCUSED IN CRIMINAL CASE—PRELIMINARY EXAMINATION.

The accused, being competent under the Missouri statutes to testify in his own behalf, is competent to testify on such preliminary examination.

Appeal from criminal court, Johnson county; JOHN E. RYLAND, Judge.
Mr. Sparks, for appellant. *B. G. Boone*, Atty. Gen., for respondent.

BLACK, J. The defendant appealed from a conviction had in the criminal court of Johnson county on an indictment for larceny committed in the dwelling-house of John Hopkins. Hopkins and Constable Hurt went from Johnson county to Lexington, La Fayette county, with a warrant, and there arrested the defendant. They placed him in the jail at that place on the night of the arrest, and on the succeeding day took him to Johnson county, before the justice by whom the warrant was issued. Hopkins and Officer Hurt both testify to confessions made by the defendant to them while he was in jail, and while on the road the next day. These confessions were all made in the presence of the officer, and while defendant was in his custody. Hurt and Hopkins testified that the confessions were not procured by threats or promises. Hopkins was the first witness for the state, and when he came to relate these confessions the defendant asked the court to cause the jury to be withdrawn that the court might hear the evidence, and pass upon its admissibility. The jurors were withdrawn, and, after Hopkins had related the circumstances under which the confessions were made, the defendant offered to show by other evidence that the confessions were not voluntary, but were made from fear and compulsion. The judge refused to hear the evidence. During the trial the defendant called Charles Barr, who testified that he was in the jail at Lexington when Hopkins and the constable came there; that they told the defendant that they had him, and he had better acknowledge that he took the property; that defendant made no acknowledgment, and one of them said he had better acknowledge or they would break his neck, string him up, or something to that effect. Hurt and Hopkins both say that on the road the next day they had a new rope, about the size of a clothes line, but that they bought and used it only for securing the defendant while passing through some timber; that defendant and Hopkins rode on the front seat of the wagon, and Hurt on the rear seat. Defendant, in testifying in his own behalf as to what transpired on the road, says: "Hurt said, if I didn't acknowledge taking the property [a pair of boots, a pair of pants, and a pocket-book] they would hang me. I said, 'All right,' and I acknowledged. Hurt was drunk, and rode with a pistol on the seat." The court, at the request of the defendant, instructed the jury to exclude from their consideration any confessions made under fear or compulsion. When there is reason to believe that the confessions were obtained by the influence of hope or fear, it became the duty of the judge to hear the evidence, and determine whether they shall go to the jury. Whether the confessions were made with that degree of freedom which allows of their admission is a preliminary question for the judge to determine. This is the long-settled rule in this state. *Hector v. State*, 2 Mo. 167; *State v. Duncan*, 64 Mo. 262; *State v. Patterson*, 73 Mo. 696. This being the law, it would seem to follow that the judge should hear all the evidence bearing upon the question whether the confessions were obtained by improper influences, before he passes upon their admissibility. It is the duty of the judge to hear all such competent ev-

idence on this preliminary question as the defendant may see fit to offer. This is true though the officer or other person called to the stand by the state may deny that any improper influences were used. Whart. Crim. Ev. § 689; *People v. Soto*, 49 Cal. 69. Since a defendant is a competent witness, under our statutes, in his own favor, he is a competent witness on this preliminary issue. This, indeed, is the legitimate deduction to be drawn from what we said in the recent case of *State v. Rush*, 95 Mo. 199, 8 S. W. Rep. 221. It follows that the judge erred in refusing to hear the evidence offered on this preliminary issue. The fact that this question was, in the end, submitted to the jury, does not cure the error. Even should the judge find that the confessions were made with such freedom as to allow them to go to the jury, still the circumstances under which they were alleged to have been made could be put in evidence to the end that the jury may determine what weight they will give to them; but whether the confessions shall be admitted at all or not is a question for the judge, and not the jury, to determine. The judgment is therefore reversed, and the cause remanded.

RAY, J., absent. The other judges concur.

PRESTON *et al.* v. BRANT *et al.*

(Supreme Court of Missouri. December 20, 1888.)

1. WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEES.

Testator devised land to his wife for life, "and after her death unto the heirs of my daughter, E., and the heirs of my son, H., * * * which said heirs shall take * * * as purchasers from me, and not by inheritance of or descent from my said wife." Held, that the heirs of E. and H. took *per stirpes*, and not *per capita*, especially as in other clauses similar devises were made to E. for life, and then to her heirs, and to H. for life, and then to his heirs; thereby showing that the testator used the terms "heirs of E." and "heirs of H.," respectively, as referring to a class.

2. SAME—NATURE OF ESTATE.

The estate created in favor of the heirs of E. and H. was a contingent remainder, which became vested upon the death of E. and H. during the life of the life-tenant.¹

3. PARTITION—OF VESTED ESTATE.

Such estate is, under the Missouri statutes, subject to be partitioned during the life of the life-tenant.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

John Wickham and Henry T. Kent, for appellants. Hitchcock, Madill & Finkelnburg, Krum & Jonas, and Davis & Davis, for respondents.

NORTON, C. J. This is a suit for the partition of certain lands described in the petition. The suit was dismissed by the circuit court, and from the judgment entered upon the dismissal plaintiffs have appealed; and the controlling point in controversy is as to what construction ought to be given to the third clause of the will of Joshua B. Brant. In this clause the testator devises to his wife certain real estate set out in plaintiffs' petition, and which is the subject in controversy in this suit, the *habendum* clause being as follows: "To have and to hold the said real estate described in this section unto her, my said wife, Sarah B. Brant, during her natural life, (and no longer,) and after her death unto the heirs of my daughter, Elizabeth Lovejoy McDowell, and the heirs of my son, Henry B. Brant, and the heirs and assigns forever of said heirs, which said heirs shall take said last-mentioned real estate as purchasers from me, and not by inheritance of, or descent from, my said wife." In construing the above section of the will it must be looked at

¹On the construction of wills with reference to the nature of the estate created thereby, see *Commons v. Commons*, (Ind.) 16 N. E. Rep. 820, and cases cited; *Roe v. Vingt*, 1 N. Y. Supp. 914.

in the light shed upon it (if any) by the following provisions thereof: Sec. 4. He devises certain real estate to his son, Henry, the *habendum* clause being as follows: "To have and to hold the said real estate described in this section unto my said son, Henry B. Brant, during his natural life, (and no longer,) and after his death unto his heirs, and the heirs and assigns forever of said heirs, which said heirs shall take said last-mentioned real estate as purchasers from me, and not by inheritance or descent from my son, Henry B. Brant." Sec. 5. He bequeaths to his son, Henry, certain personal property. Sec. 6. He devises certain real estate to his daughter, Elizabeth L. McDowell, with *habendum* clause as follows: "To have and to hold the said real estate described in this section unto my daughter, Elizabeth Lovejoy McDowell, during her natural life, (and no longer,) and after her death unto her heirs, and the heirs and assigns forever of said heirs, which said heirs shall take the last-mentioned real estate as purchasers from me, and not by inheritance or descent from said Elizabeth Lovejoy McDowell." Section 7 provides that if any of the children of Elizabeth and Henry die, leaving issue, that said issue is to receive the portion of their father or mother.

Among other things agreed upon at the trial are the following: That Joshua B. Brant, the testator, died in 1861. That he left a widow, his second wife, the defendant Sarah B. Brant; a son, Henry B. Brant, by his first wife; and a daughter, Elizabeth L. McDowell, by his second wife, the defendant Sarah B. Brant, him surviving. That at the date of the will Henry B. Brant, the son of the testator, was a married man, with five children then living. That since that time two other children have been born to him. That Henry Brant died in 1869, leaving seven children, who are defendants in this suit. It was further agreed that at the date of the will Elizabeth L. McDowell, testator's daughter, was the wife of James McDowell, now deceased, and that she had three children then living; that since the death of the testator, Brant McDowell, one of the plaintiffs, was born to the said Elizabeth; that said Elizabeth L. died June 10, 1875, leaving three children as her heirs, — Mary McDowell, Sarah B. McDowell, and Brant McDowell; that said Mary McDowell died in December, 1875, leaving a will devising her interest in the estate in question to Sarah McDowell, who intermarried with plaintiff Wickliffe Preston, in February, 1888. It was also admitted that Joshua B. Brant by his last will divided the whole of his estate into three parts, nearly or quite equal to each other, and disposed of these parts as stated in the will.

The controlling controverted question in this case grows out of the third clause of the will above noted; it being contended on the part of plaintiffs that under said clause the heirs of said Elizabeth and the heirs of said Henry take *per stirpes*, and not *per capita*. This proposition is disputed by defendants, who contend that said heirs take *per capita*, and the respective counsel have cited us to a number of cases to support their respective contentions. It may be said that in construing wills precedents are of but little value, except in so far as they may be like the case in hand, and except in so far as they formulate and lay down rules to be applied alike in the construction of all wills. One of these rules is that the intention of the testator, when ascertained, must govern, and that such intention must be sought for by a consideration of the whole instrument, and not from single words or passages. Viewing the will in question in this light, we think it is apparent that in the fourth clause thereof the testator referred to the heirs of Henry Brant as a class, and that in the sixth clause he referred to the heirs of his daughter, Elizabeth, as a class, and intended they should take as such. Having twice referred to these heirs respectively as a class, no reason is perceived why we should conclude, when they are referred to as heirs in the third clause of the will, that the same words were used by the testator in a different sense from the same words used in the fourth and sixth clauses. The testator having classified these heirs in two classes of his will by naming them as distinct classes,

why should we conclude that in the third clause he did not intend to refer to the heirs as a class, where he uses the same language as that employed in the two clauses, viz., fourth and sixth? In the case of *Lockhart v. Lockhart*, 3 Jones, Eq. 205, 206, it is said: "When a testator in one part of his will uses words in a sense about which there can be no mistake, and the same words are used in another part of the will, the presumption is that he uses them in the same sense. So, when in one part of his will he treats the objects of his bounty as a 'class,' and in another part of his will he refers to them by the same words of description, the presumption is that he used the same words in the same sense, and intends them to take as a class; and the division of the fund would be *per stirpes* as to them, treating them as a class, because the will in another part treats them as a class." This rule, which is a reasonable one, applied to this case, supports the contention of plaintiffs that the heirs of Henry and the heirs of Elizabeth, as referred to in the third clause of the will, take *per stirpes*. It is suggested in argument that, while the language used in the third clause of the will constitutes the heirs of Henry into one group and the heirs of Elizabeth into another, and that these two groups, being connected by the word "and," were thereby constituted into one class, and that they therefore take *per capita*. This reasoning is too subtle, and the distinction drawn too refined, for practical application. It is also suggested in argument that if the testator had intended that the heirs of Henry and Elizabeth should take *per stirpes*, that he could have so said, and that, not having said so, it is to be inferred that he did not intend that they should so take. The answer to this is that if he intended them to take *per capita* he could have said so, and that, not having said so, the inference might be drawn that he did not so intend, especially so when the legal significance of the words employed, considered with reference to other clauses of the will, required them to take *per stirpes*. There being no words in the third clause of the will indicating that the testator used the word "heirs" in said clause in a sense different from that in which it was used in the fourth and sixth clauses, we are not authorized to supply or infer them, for that would be not to construe, but to make, a will. We think it cannot fairly be claimed that the testator indicated that the heirs of said Henry and Elizabeth should take *per capita* by providing in the three clauses of the will above named that they should take as purchasers. While this indicates the manner in which they are to take, it does not indicate the quantum of interest they were to take, or that they were to take any greater or less interest than is given by the will. Those who take by purchase may take unequally if it is so provided by the donor or grantor. *Templeton v. Walker*, 3 Rich. Eq. 543; *Lachland's Heirs v. Downing*, 11 B. Mon. 34, 35. The conclusion we have arrived at, that under the third clause of the will the heirs of said Henry and said Elizabeth take the fee in remainder *per stirpes*, and not *per capita*, is sustained by the following authorities: *Bassett v. Granger*, 100 Mass. 348; *Rand v. Sanger*, 115 Mass. 128; *Cole v. Creyon*, 1 Hill, Eq. 319, 320; *Fissel's Appeal*, 27 Pa. St. 55; *Henderson v. Womack*, 6 Ired. Eq. 437; *Roome v. Counter*, 6 N. J. Law, 111; *Miller's Appeal*, 35 Pa. St. 323; *Walker v. Griffin*, 11 Wheat. 375; *Balcom v. Haynes*, 14 Allen, 204; 2 Jarm. Wills, 69; *Daggett v. Slack*, 8 Metc. 450; *Spear v. Hooper*, 9 Metc. 144. That the estate created by the will in the third clause is a remainder contingent upon the death of Henry and said Elizabeth during the life of the life-tenant, and that upon the happening of the contingency it became vested, is settled by what is said in 4 Kent, Comm. 208. That the estate sought to be partitioned is subject to be partitioned is settled by the case of *Reinders v. Koppelman*, 68 Mo. 501, 502. The judgment is hereby reversed, and cause remanded to be proceeded with in conformity with this opinion. All concur, except RAY, J., absent.

GULF, C. & S. F. RY. CO. *et al.* v. STATE.

(Supreme Court of Texas. December 21, 1888.)

1. RAILROAD COMPANIES—TRAFFIC ASSOCIATIONS—RATE AGREEMENT—CONSTITUTIONAL LAW.

Under Const. Tex. art. 10, § 5, prohibiting railroad corporations from controlling competing or parallel lines, an agreement forming a traffic association between a number of such corporations for the purpose of "preventing sudden and extreme changes in Texas rates," by which a managing committee is authorized to fix freight rates, no member being allowed to reduce them, is illegal, though a unanimous vote is required to establish the rates, which may be reduced as provided by the agreement, and though punishment is provided for violating the agreement, and any member is at liberty to withdraw upon notice.

2. CONSTITUTIONAL LAW—INTERSTATE COMMERCE.

Said constitutional provision is not void for assuming to regulate interstate commerce when applied to the agreement in question, though some of the traffic embraced therein is partly without the state, and some of the parties to the agreement, being corporations created under the laws of Texas, the agreement as to them is illegal, and is therefore illegal as to all.

3. INJUNCTION—ENFORCEMENT OF ILLEGAL AGREEMENT.

The enforcement of such an agreement may be restrained, though no charges in excess of the rates permitted by law have yet been made, as the illegality is in the agreement itself.

4. EVIDENCE—JUDICIAL NOTICE—RAILROAD LINES.

The court has judicial knowledge of the fact that the G., C. & S. F., and the H. & T. C., and others of the defendant railroads touch the same points, and are practically parallel, and necessarily competing, lines.

5. RAILROAD COMPANIES—ILLEGAL TRAFFIC AGREEMENT—ACTION TO RESTRAIN—COMPLAINT.

A petition alleging the authority under which the defendants' charters were granted, defining the lines operated by them, averring that the lines so owned and operated are the main trunk lines and leading railways, and so traverse the state and touch her commercial centers that they are lawful competitors for the traffic of said business centers, that each is a competing line for Texas traffic, and that they have by the agreement mentioned formed a consolidation of competing and parallel lines, sufficiently alleges an unlawful combination of parallel lines under the constitution, and is good on demurrer.

Appeal from district court, Travis county; JOHN C. TOWNES, Judge.

Action by the state of Texas to restrain the Gulf, Colorado & Santa Fe and other railroad companies from carrying out an illegal agreement respecting freight rates. Decree for plaintiff. Defendants appeal.

Geo. W. McCrary, Baker, Bolts & Baker, and J. W. Terry, for appellants.
J. S. Hogg, Atty. Gen., for the State.

GAINES, J. This suit was brought in the name of the state by her attorney general to restrain certain railroad companies engaged in operating lines within the state from carrying out an agreement entered into by them by which they committed to a body of representatives of the companies the power to fix the rates for which freights should be carried to and from points within the state. The theory of the state's case is that the parties to the agreement are parallel and competing lines, and that the association formed by it is prohibited by section 5, art. 10, of the constitution, which provides that "no railroad, * * * or managers of any railroad corporation, shall consolidate the stock, property, or franchises of such corporation with, * * * or in any way control, any railroad corporation owning or having under its control a parallel or competing line." The first assignment of error is that "the court erred in finding that many of the railroad companies defendant own and control parallel and competing lines; because, as defendants claim, there is no such admission in the answers, nor is there such an allegation in the state's petition, except that defendants are averred to be made parallel and competing lines by the action of said Texas Traffic Association."

Under this assignment we will first consider the allegations in the petition.

The petition alleges the authority by which the respective charters of the defendant corporations were granted, and defines the lines of railroad respectively operated by them, and then charges "that the lines so owned and operated by the defendants are the main trunk lines and leading railways in Texas, and so traverse the state as to touch and penetrate her commercial centers, and become and are lawful competitors for the country's traffic concentrated in the cities aforesaid." After alleging the formation of an executive committee of the "Traffic Association" by the agreement, the carrying out of which is sought to be restrained, the petition also avers "that each of said executive committee, and each of the employes of said association, is an officer of each and all the defendants, * * * and are in common employed and paid by them, and that each of said railroad companies is a competing line for Texas traffic and trade." Also, referring to the association formed by the agreement, the petition charges "that said railway companies, by their said conspiracy, contract, combination, and copartnership, have formed a consolidation of parallel and competing lines," etc. The exceptions to the petition are upon grounds that would have been raised by a general demurrer. There is no exception on account of vagueness or indirectness of the allegations. In the absence of such an exception, every reasonable intendment must be indulged in favor of the sufficiency of the petition. See District Court Rules, 17, 18, 47 Tex. 619, 620; *Burks v. Watson*, 48 Tex. 108. We think it sufficiently appears from the allegations quoted above that the defendant companies are alleged to be owners and operators of parallel and competing lines of railroad.

But the further question is presented whether, from the admissions in the pleadings and facts, of which the court could take judicial notice, it was authorized to make the finding complained of in the assignment of error. The case was submitted to the court for final disposition upon the petition, the answers, and the supporting affidavits. The answers of the Gulf, Colorado & Santa Fe Railway Company and the Fort Worth & Denver City Railway Company formally admit all allegations in the petition which are not therein specifically denied. The St. Louis, Arkansas & Texas Railway Company adopts the answer of the Santa Fe Company. The answers of these defendants do not deny that the roads of the defendant companies are parallel or competing lines; therefore the fact may be considered established as to them. On the other hand, the other defendants, in their answers, deny all the allegations of the petition not specially admitted in such answers, and we find in their pleadings no admission that any one of the railroads is parallel to or a competitor for traffic with any other. Unless, therefore, the court could know judicially that two or more of the roads which were operated by the members of the association were parallel or competing lines, the finding was not warranted against the last-named defendants. In Wharton on Evidence it is said: "Our own law * * * adopts the position that reason and evidence are the co-ordinate factors which go to make up proof, and that a judge in trying a case must not only exercise his own logical faculties in construing and applying evidence, but must draw on his own sources of knowledge for such information as is common to all intelligent persons of the same community. Such information must not only be thus common, but must be of indisputable truth. When it becomes disputable, it ceases to fall under the head of notoriety." 1 Whart. Ev. § 329. The supreme court of the United States say: "It certainly cannot be laid down as a universal or even as a general proposition that the court can judicially notice matters of fact. Yet it cannot be doubted that there are many facts, particularly with reference to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than parol proof, which the court may judicially notice. Thus in the case of *U. S. v. La Vengeance*, 3 Dall. 297, the court judicially noticed the geographical position of Sandy Hook. And it

may certainly take notice judicially of like notorious facts, as that the bay of New York, for instance, is within the ebb and flow of the tide." *Peyroux v. Howard*, 7 Pet. 324. "A court is bound to take judicial knowledge of the leading geographical features of the land, the minuteness of the knowledge so expected being in inverse proportion to the distance." 1 Whart. Ev. § 339. The principle has been applied in various ways, as the following cases will show: *Trenier v. Stewart*, 55 Ala. 458; *Gibson v. Steens*, 8 How. 399; *Vanderwerker v. People*, 5 Wend. 580; *Pearce v. Langfit*, 101 Pa. St. 507; *Steinmetz v. Turnpike Co.*, 57 Ind. 457; *Tewksbury v. Schulenberg*, 41 Wis. 584; *Walker v. Allen*, 72 Ala. 456; *Oppenheim v. Wolf*, 3 Sandf. Ch. 571; *Neaderhouser v. State*, 28 Ind. 257. In *Railway Co. v. Rushing*, 69 Tex. 306, 6 S. W. Rep. 834, Chief Justice WILLIE says: "It may be that this court, judicially knowing the geography of the state, might take notice of the general direction of these two roads, as fixed by the statutes under consideration, that their lines must necessarily cross each other, and could therefore treat them as connecting lines, and not parallel to each other. But as to whether they are competing lines, we can have no judicial knowledge whatever." This latter proposition, as a general rule, and as applied to the case then before the court, is undoubtedly correct. Whether two roads which intersect each other at a certain point are competitors for freight or not must depend upon a variety of circumstances not known to the court. But the authorities cited show that we must take notice of the geography of the state, and at least of its navigable streams. It is a matter of history that important lines of railroad, once established, have remained as fixed and as permanent in their course as the rivers themselves. They supersede, in the main, all other modes of travel between the points which they touch, and become as well, if not better, known than any other geographical feature of the country. Their locality becomes "notorious and indisputable." For instance, can we doubt that the Houston & Texas Central road runs from Houston to Dallas, and that the Gulf, Colorado & Santa Fe touches with its lines the same point? Can we doubt that they run during a considerable portion of their lines practically parallel to each other, and that they must necessarily compete for the traffic lying between them? We think we must take judicial notice that these two roads are parallel and competing lines, and this is sufficient, so far as the disposition of this case is concerned. We are of opinion that the finding would have been sufficient to support the judgment, if it had been that but two of the defendants were competitors with each other for traffic. The same may be said as to portions of the lines of the Texas & Pacific Company, and of the St. Louis, Arkansas & Texas Company, which extend from Sherman to Texarkana. We cannot shut our eyes to the notorious and indisputable facts that these parts of the respective lines touch at the same points, and that they are natural competitors for the traffic of a large scope of country.

Under the next succeeding assignments of error it is insisted by counsel for appellants that the agreement in controversy, which establishes the "Texas Traffic Association," is not in violation of section 5, art. 10, of the constitution. In order to determine this question, we will give briefly some of the prominent provisions of the articles of agreement by which the association is created. Among its purposes stated in the preamble is that "of preventing sudden and extreme fluctuations in Texas rates, alike injurious to the public and the transportation companies." Article 1 provides "that the traffic subject to this agreement shall be all freight and passenger business, except express and mail, carried by lines, parties hereto, which has origin or destination within the state of Texas, other than business to or from El Paso, Eagle Pass, and Lareda proper." The managing body of the association is an executive committee, composed of one member from each party to the agreement. They are to elect a commissioner, who is the chief executive officer. "The executive committee shall agree upon the classification and rates covering the

traffic subject to this agreement. No member shall directly or indirectly reduce rates," etc. "Any violation of the agreement is to be reported to the commissioner, who shall check the irregularity if he can." "All rates, rules, regulations, and divisions, when adopted by agreement or by arbitration, shall be simultaneously furnished by the commissioner to the traffic departments of all members of the association for the guidance of all the parties in interest," etc. Without quoting further, we think it apparent that a leading object, if not the sole object, of the association is by the appointment of a common governing committee to fix rates of transportation so as to prevent competition among the several parties to the contract.

We think it also apparent from the language of the section of the state constitution that its leading object was to prevent competing lines of railroad in the state from so fettering themselves by consolidation, lease, or other agreement by which one should in any way subject itself to the control of another, so as to stifle competition for the traffic of the state. The section prohibits any railroad company or the managers of any such company from controlling in any way another company owning a competing line. If one is prohibited from making such a contract, we think two or more are so prohibited; and that when one company enters into an agreement with others, any one of which owns or controls a competing line of railroad, by which it subjects itself to the government of a body appointed by all parties to the agreement, that such company places itself under the control of the other to a definite extent, and acts in violation of the constitution of the state. The manner and extent of the control are immaterial. The language of the constitution clearly evinces that control in any manner and to any extent was intended to be prohibited, provided it was such as is calculated to enable the one railroad, by means of a contract or agreement for an interference in the other's affairs, to keep down competition between them. But it is insisted that, because a unanimous vote of the committee is required to adopt any proposition involving revenue, because the rates are subject to be changed in a certain manner pointed out in the agreement, because any member may withdraw upon giving 90 days' notice, and because no penalty is prescribed for a violation of the articles, the agreement does not subject one road to the management or control of another. But it is apparent that, as long as one company remains a member of the association, it is controlled as to rates by the executive committee, and is not free to enter into competition with its associates for freights. It may be that by its representative's refusing his assent to any proposition fixing rates in the first instance, it could not be controlled in this respect; but, when once fixed, it would be powerless to secure a change without the consent of the representatives of the others. Besides, the executive committee, upon their appointment, are made, to the extent of their powers, managers of all the companies; and hence, when a company subjects itself to the power of the committee by entering the association, it places itself under the control of managers of other railroads. We cannot see that the fact that a member has the right of withdrawal, or that it cannot be punished for a failure to obey the regulations, can make any difference as to this question. If any one of defendants had withdrawn when this suit was filed, the allegation of that fact would have been an answer as to that company to the state's petition. But it is further argued that because it has not been shown that they have made charges for freight or passengers in excess of the limits allowed by law, their action is not illegal; but we do not understand that the state seeks to restrain them for illegal charges made under the direction of the association, but for doing an illegal thing in entering into and carrying out the terms of the agreement for the association. It is not quite clear to our minds that, even in the absence of the constitutional provision we have had under discussion, the defendants' association could not be enjoined, as being in restraint of competition, and contrary to public policy.

But it is further insisted that because the agreement in question concerns interstate commerce neither the state in its political capacity, nor its courts, have any jurisdiction over the matter. We understand the agreement to embrace both commerce within the state and commerce between this state and other states. The former might be enjoined if the latter could not. We are inclined to the opinion that if none of the corporations comprising the association owed their existence to our laws, the state would have no power to prohibit or interfere with a contract of this character, in so far as it regulates charges to and fro between this and other states. *Railroad Co. v. Illinois*, 118 U. S. 557, 7 Sup. Ct. Rep. 4. But we think we have here a very different question. Several of the defendant corporations are chartered under the laws of this state, notably the Gulf, Colorado & Santa Fe Railway Company, and the Houston & Texas Central Railway Company. If we are correct in our conclusion, we think it follows that the defendant corporations who derive their charters from this state are acting in violation of law in entering into this contract of association; some of the members of the association being competing lines of road. We think that the association, being illegal as to some of the defendants, is illegal as to all. It may be that, should the companies which have their charters from the United States or from other states, come into this state and enter into a similar arrangement among themselves, the state would be powerless to interfere, because of its being a matter within the exclusive jurisdiction of the United States. Their contract might not be in violation of our laws, because we could make no laws interfering with interstate commerce. But it does not follow that they would enjoy the immunity of entering into contracts with our own corporations, which are prohibited to the latter, and thus enable them to set at naught the limitations upon their powers. There are certainly many things the state may do in exercise of its police powers which may affect commerce between the states, or between this state and foreign countries; but how far the police power of the state may extend, so far as it affects the question before us, we need not inquire. We are of opinion that the association under consideration is clearly illegal as to some of the parties to it; and that, being illegal as to some, it is illegal as to all, and may be restrained.

The judgment is therefore affirmed.

HART v. EPPSTEIN.

(*Supreme Court of Texas*. November 13, 1888.)

MORTGAGE—DEED ABSOLUTE—VERBAL AGREEMENTS.

Defendant agreed to loan plaintiff's grantor \$450, and take a mortgage on land worth \$1,100. Afterwards plaintiff's grantor executed a deed absolute for the land for the expressed consideration of \$450, which sum was received by him, and gave his note, payable to bearer, for \$456 and interest and attorney's fees. *Held*, that the deed was a mortgage, and that its character could not be varied by verbal agreements at the time of its execution.¹

Appeal from district court, Hunt county; W. C. JONES, Judge.

Suit by N. J. Hart against Max Eppstein to cancel a deed. Plaintiff appeals. *B. F. Looney*, for appellant. *Matthews & Neyland*, for appellee.

STAYTON, C. J. This suit was brought by the appellant to cancel a deed made to the appellee by Lib Hart for 138 acres of land, executed March 31, 1885. Appellee claimed the land through that deed, and the appellant claimed it through a deed executed to her subsequently by Lib Hart. She claimed that while the deed through which the appellee claims was absolute in form, it was

¹Whenever property is transferred as a security for a debt, no matter in what form, it will be treated as a mortgage. *Marshall v. Thompson*, (Minn.) 89 N. W. Rep. 809, and note; *Lipp v. Syndicate*, (Neb.) 40 N. W. Rep. 129, and note.

intended to secure a loan of money made on the day of its execution by E. Eppstein & Co. to her vendor. The answer alleged that Lib Hart, being in need of money, made application to E. Eppstein & Co. for a loan of \$450, and that appellee, as agent for the firm, came from Sherman, where the firm did business, to Greenville, where Lib Hart resided, to negotiate the loan. The answer then alleges that "defendant asked of said Lib Hart security. The said Lib Hart offered to give a mortgage on the land described in plaintiff's petition, to secure the payment of the sum of \$456.75, which was the sum he needed, and desired to borrow from said E. Eppstein & Co. For a long time the said defendant declined to take said land as security for the money, but finally he agreed with the said Lib Hart that he would for the firm of E. Eppstein & Co. lend him said sum of money, and take his note therefor, to become due on the 1st day of October, 1885, said note to bear 12 per cent. interest from date, if said Lib Hart would make him a deed to said land, absolute on its face; and he further agreed, if said Hart should pay said note according to its face and tenor, on or before its maturity, that he would reconvey said land to him, but it was expressly understood, contracted, and agreed then and there that should said Lib Hart not pay said note by the time it became due, that the said Hart should have no further right to said land, but it should become the property of the said Max Eppstein, for the use of E. Eppstein & Co., and said note should be considered settled by said land. That Hart never paid said note or any part thereof, and defendant nor E. Eppstein have ever demanded of him to pay the same, but have treated and considered same paid under the terms of said agreement; and the said Lib Hart never offered or tendered the money before or at the maturity of said note to pay said note, and has always treated the land as belonging to defendant, and the note as settled; wherefore defendant says that said deed was not made by said Lib Hart as a mortgage, but was intended for and was a conditional sale; and said note not having been paid, and the conditions requiring a reconveyance of said land to Lib Hart never having been fulfilled by said Hart, the title to said land to be vested in defendant, for the use of E. Eppstein & Co., wherefore defendant says that the said land belongs to him for the use of E. Eppstein & Co., and here tenders to said Lib Hart his note," etc.

There is no conflict in the testimony as to the agreement made between Lib Hart and the agent of E. Eppstein & Co. It was agreed that the firm would lend to Hart \$450, for which a note bearing interest at the rate of 12 per cent. per annum from date of note, and conditioned to pay 10 per cent. attorney's fees in case resort to suit became necessary to collect it, was to be executed by Hart, and that the land in controversy in this suit should be mortgaged to secure the payment. So stood the agreement when the parties went to a lawyer to have the necessary papers prepared. After reaching the lawyer's office, it appears from the evidence offered for the appellee that a conversation occurred between appellee and the lawyer, after which these persons objected to taking a mortgage in the ordinary form, or with power to sell, on the ground that if the note was not paid, and a sale of the property became necessary, appellee "would be forced to claim title through a sheriff's or trustee's sale, which fact might injure the sale of the land, as farmers are rather suspicious of titles coming through forced sales." The attorney states that he "suggested that Eppstein take an absolute deed to the land, and that he give Hart the right to buy the land back by a date to be agreed on. Hart asked me if that would protect him as well as a mortgage. I told him the difference between the transaction and a mortgage was that, if he paid the sum agreed on by the date fixed, he could enforce a reconveyance of the land, but that if he did not pay by the time fixed, his right to a reconveyance would be lost, and his land would become the absolute property of the grantee, without suit to foreclose and attendant costs." The deed in controversy was executed on March 31, 1885, and in terms conveyed the land to appellee, the con-

sideration stated being \$450. On the same day, Lib Hart executed and delivered his promissory note as follows: "GREENVILLE, TEXAS, March 31, 1885. On or before the first day of October, 1885, I promise to pay E. Eppstein & Co., or bearer, four hundred and fifty-six & 75-100 dollars, with 12 per cent. interest from date until paid, and I agree to pay ten per cent. additional on the amount of this note when due, if collected by legal proceedings, as attorney's fees. LIB HART." This note remained in the possession of appellee, or in possession of E. Eppstein & Co., until tendered in court. The appellee seems not to be a member of the firm of E. Eppstein & Co. The tract of land described in the deed contains 188 acres, and the great weight of the evidence tends to show that it was worth about eight dollars per acre at the time the transaction occurred. Mrs. Hart tendered and paid into court the entire sum due on the note, including interest to date of tender. None of the witnesses were able to explain why the note was taken for more than \$450, which was the sum actually delivered to Lib Hart. There are many assignments of error, but only two of them will be considered.

The court gave the following charge: "If, however, you believe from the evidence that said deed was executed by said Lib Hart under an agreement made between him and Max Eppstein at the time of its execution that, if he, Lib Hart, should pay off and discharge said note at its maturity, he, Max Eppstein, would reconvey the land to said Hart, and in the event that he failed to pay off said note at or before its maturity, said deed should become absolute, and the title to the land should vest in said Max Eppstein, then you should find for the defendant." And this is assigned as error. The true character of the instrument, which on its face purported to be an absolute conveyance of the land, must be determined by the facts existing when it was executed, and not by facts subsequently occurring, or by parol agreements made at the time it was executed. If it was a mortgage at that time, nothing short of a valid subsequent contract can alter its character. "Once a mortgage, always a mortgage," has become axiomatic. To ascertain the character of the instrument we must look to the facts existing when it was executed, and we must regard the note executed at the time the deed was, and relating to the same matter, both as one instrument. If the money delivered to Lib Hart was not intended by the parties to be at the time an actual payment for the land, and nothing else, it must have been a loan. If it was a loan, the deed was made to secure it, and was necessarily a mortgage. The acts of the parties at the time leave no doubt of the fact that the money passed to Lib Hart as a loan. The parties negotiated with reference to a lending of money, and securing its payment, and neither of them then contemplated an absolute sale, nor negotiated for a price at which the one was willing to sell and the other to buy. Lib Hart, to evidence the fact of his indebtedness to the real lenders, executed a note, payable to them or bearer at a future time mentioned. This note was received by their agent to witness what? Such an agreement as the appellee now seeks to maintain? Certainly not; for it contains no such agreement. Was it to be evidence of the fact and amount of indebtedness of its maker to the lenders? This is what it did. It was accepted by the lenders, and Lib Hart would be concluded by it from asserting to the contrary, in the absence of some fact which, at law or in equity, would entitle him to show that it was not his contract. Equally were the lenders bound by it. It was made payable to bearer, and it is impossible to believe that any sane man, not intending to bind himself absolutely thereby to pay to the lenders or such person as they might pass it to, the sum which he thereby bound himself to pay, would have executed it. The lenders received it, and held it. Why? Certainly not to evidence the right of its maker to have the land reconveyed to him; but for the purpose of having evidence, conclusive on its maker, that he owed them so much money. Was it the intention of the payees that they or such person as they might pass the note to should have the right to

enforce its payment by suit, if necessary? That it was is evidenced by the fact that, in addition to taking a solemn promise to pay, they exacted the further promise that the costs which would have to be incurred with attorney in enforcing its collection in the courts should be paid by the maker to the extent of 10 per cent. of the sum due by the terms of the note. The appellee's answer, on its face, shows a lending of money, and makes the deed absolute on its face only a mortgage. Such being its character, when made, such it remains, and cannot be altered by any verbal agreements or understandings made at the time. *Wilson v. Drumrite*, 21 Mo. 325; *Vanderhaize v. Hugues*, 13 N. J. Eq. 244; *Batty v. Snook*, 5 Mich. 231; *Weathersly v. Weathersly*, 40 Miss. 469; *Youle v. Richards*, 1 N. J. Eq. 534; *Morris v. Executor*, 1 How. 118; *Sutphen v. Cushman*, 35 Ill. 197; *Fiedler v. Darrin*, 50 N. Y. 442; *Smith v. Doyle*, 46 Ill. 451; 2 Washb. Real Prop. 496; 1 Jones, Mortg. §§ 263-280; *Loving v. Miliken*, 59 Tex. 423; *Calhoun v. Lumpkin*, 60 Tex. 185. The charge complained of made verbal agreements made at the time of the execution of the deed and note control the rights of the parties, when this should have been made to depend upon the real transaction between them, as evidenced by these papers and the surrounding facts. The relation of debtor and creditor being created by the papers and attendant facts, the deed was but a mortgage, and the right of redemption could not be cut off by any understandings or agreements then made.

A motion for new trial, based on the ground that the evidence clearly showed the transaction only to be a mortgage, was overruled, and we are of the opinion that this was error. We have already stated many reasons why the deed should be considered only a mortgage, and there are others, among which may be noticed the inadequacy of the consideration; and upon the facts stated in the answer of appellee, as well as those stated by himself and the other witness in his behalf, no finding in his favor ought to have been permitted to stand. The judgment, on account of the matters noticed, will have to be reversed, but we deem it proper to say, from the case made, that the persons composing the firm of E. Eppstein & Co. seem to have such an interest in the subject-matter of litigation as requires that they be made parties defendant. Reversed and remanded.

KENNEDY v. EMBRY *et al.*

(Supreme Court of Texas. November 27, 1888.)

1. VENDOR AND VENDOR—EXECUTORY CONTRACT—NON-PERFORMANCE—RESCISSION—NOTICE.

The owner of land conveyed by warranty deed, receiving the grantee's notes secured by mortgage for the consideration. The deed and mortgage were recorded, but the grantee did not take possession, and paid no taxes, and soon after left the state, and remained absent until after the time for payment of the notes had expired. Held, that the contract was executory, and could be rescinded by the grantor without notice, upon failure to pay the notes.

2. SPECIFIC PERFORMANCE—RESCISSION OF CONTRACT—PURCHASER WITH NOTICE.

A purchaser from the grantee with notice of the rescission acquires no title to the premises, nor any right to specific performance.

Commissioners' decision. Appeal from district court, Tarrant county; J. Y. HOGSETT, Special Judge.

Trespass to try title brought by Oliver S. Kennedy against A. R. Embry and W. C. Parker and wife. Plaintiff appeals.

N. G. Shelley, for appellant. *A. W. De Berry*, for appellees.

ACKER, J. J. P. Smith owned block 16, in Tucker's addition to the city of Fort Worth, and on the 2d of July, 1878, conveyed it by warranty deed to W. C. Dismukes, for the consideration of \$250, no part of which was paid, but notes were given therefor in three payments, maturing at one, two, and three years. To secure the payment of these notes Dismukes executed to

Smith a mortgage on the land. The deed and mortgage were filed for record on the 5th day of July, 1878. Dismukes left the state some time in the year 1879 or 1880, and had not returned at the time of the trial. He never took possession of the land, never paid Smith any part of the purchase money therefor, and never paid any taxes thereon. On January 27, 1882, Smith conveyed the land by warranty deed to appellees W. C. Parker and wife, and the deed was filed for record the same day. Appellee Embry was in possession as tenant of Parker and wife. Smith paid taxes on the land up to the time he sold to Parker and wife. On June 1, 1883, Dismukes conveyed the land to appellant for the consideration of \$10 in cash and Kennedy's assumption to pay Smith the purchase money notes given by Dismukes. Appellant tendered to Smith the amount due on the Dismukes notes, and all taxes he had paid since conveyance to Dismukes, which was not accepted. At the time of the trial the land was of the value of \$2,000. Appellant brought this suit, September 4, 1885, in the ordinary form of trespass to try title. Appellees answered by the plea of not guilty. The trial was by the court without a jury, and judgment rendered in favor of appellees. Appellant proved the conveyances by Smith to Dismukes, and by Dismukes to him, and by Smith to Parker and wife. Appellees then proved, over objection of appellant, the execution and non-payment of the notes and mortgage by Dismukes to Smith, and the payment of taxes by Smith, whereupon appellant offered to file with the papers of the cause his written tender of amount due on the Dismukes notes, and of the amount paid by Smith for taxes on the land, and consent that judgment might be rendered against him for said amounts, and in his favor for the land, which offer was refused by the court on objection of appellees. Under numerous assignments of error it is contended that, upon tendering the purchase money and interest due by Dismukes, together with the amount paid by Smith for taxes, appellant was entitled to specific performance of the contract made by Smith and Dismukes; that the conveyance by Smith to Parker and wife, having been made without notice to Dismukes of Smith's intention to rescind, and without any attempt to foreclose the mortgage and collect the purchase money, gave to Parker and wife the right only to receive the amounts of money tendered.

The contract between Smith and Dismukes was executory, and the superior right to the land remained with Smith, subject to being divested by performance upon the part of Dismukes. Under such contract, upon total failure of performance on the part of the vendee, the vendor had the right to either sue for the purchase money and foreclose his mortgage, or he may rescind the contract and recover the land. Where there has been part performance by the vendee, as paying a portion of the purchase money, or taking possession and making improvements under the contract, he would be entitled to reasonable notice of the vendor's intention to rescind. The reason of this rule is obvious. He may be able to give a reasonable excuse for his failure to fully perform; that would entitle him, in equity, to protection to the extent he had performed. If the vendee has actually abandoned the contract, or has so acted as to create the reasonable belief on the part of the vendor that he has abandoned it, the vendor may rescind, without notice of his intention, notwithstanding the part performance by the vendee. Where there has been no attempt to perform any part of the contract, and the time for performance has expired, no equities exist in favor of the vendee, and the vendor may rescind without notice to the vendee of his intention to do so, and convey the land to another, without foreclosing his lien for the purchase money. We think the following authorities, and many others that might be cited, support the principles here announced: *Dunlap v. Wright*, 11 Tex. 597; *Webster v. Mann*, 52 Tex. 416; *Jackson v. Palmer*, Id. 434; *Ufford v. Wells*, Id. 619; *Thompson v. Westbrook*, 56 Tex. 266. Appellant's vendor did nothing towards performing his part of the contract with Smith. He entered into an executory contract of purchase,

and without paying any part of the purchase money or taxes, or taking possession, left the state before the time for performance expired, and remained absent up to the time of trial, nearly five years after the time for performance had elapsed, without indicating any intention to perform the contract. We think Smith was certainly justified in believing that he had abandoned the contract, and in rescinding it without notice, by selling the land to Parker and wife. With notice of the purchase-money notes and mortgage, and of Smith's rescission of the contract by his conveyance to Parker and wife, appellant obtained the conveyance from Dismukes nearly two years after the expiration of the time for performance, and about eighteen months after the contract had been rescinded, and seeks to recover the land, against the holders of the superior title, after the property has enhanced in value from two hundred and fifty to two thousand dollars, without showing any equity in his favor. The questions already discussed must control the disposition of this case. Other questions presented, being of minor importance, will not be considered. We think the judgment of the court below is correct, and should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

BROWN v. BEDINGER.

(Supreme Court of Texas. December 11, 1888.)

EJECTMENT—IMPROVEMENTS—KNOWLEDGE OF DEFENDANT.

Defendant, in ejectment, cannot assert a claim for improvements made in good faith, on the ground that he supposed the *locus in quo* was a vacancy between his survey and plaintiff's, when his own deed, under which plaintiff claims, calls for joining the two surveys, and the evidence shows that the surveyor intended to leave no vacancy, and where, if he had used reasonable caution, he would have discovered that there was none in fact.

Commissioners' decision. Appeal from district court, Johnson county; EUGENE WILLIAMS, Judge.

M. A. Oatts, for appellant.

COLLARD, J. Earl Y. Brown, the appellant, brought this suit against the appellee, H. C. Bedinger, for a strip of land 56 varas wide by 1,300 varas long. Plaintiff claimed under the Bone original survey, and insisted that the Bone extended to the J. G. Hix and Samuel Cooper surveys on the west. Defendant claimed that there was a vacancy between the Bone and the two surveys named. The question is one of boundary. The plaintiff deraigned title to a one-half undivided interest of the land claimed by him from defendant by deed, which called for the south-west corner of the survey as the south-east corner of the Hix survey. The east boundary of the Hix and Cooper was a continuous straight line. One George W. Pierce, deceased at the time of the trial, while showing the owner of the Hix and Cooper surveys, in 1861, his lines, declared to him that the Hix south-east and the Bone south-west lines were identical. The owner of the Cooper testified that he and Brown had agreed on the dividing line between them, which placed the house in which defendant lived a short distance on plaintiff's side of the line. One Maxey testified that he was one of the chain-carriers when the original Bone survey was made. He says Pierce began at the south-east corner of the Hix, and running east closed again on the Hix; that Hix was then living on his survey, and is now dead. The county map shows no vacancy. The county surveyor testified that there was a vacancy between the Bone on the east and the Cooper and Hix on the west; that the surveys are in the prairie, and that no lines or corners are found on the west of the Bone, or on the east line of the Cooper and Hix;

that, running from the known connections of the surveys, the distances shows a vacancy of 56 varas wide. He says: "The only thing I found to indicate that there was no vacancy between the Bone on the east and the Hix and Cooper on the west was the beginning call for the Samuel Cooper survey, which calls to begin at the north-east corner of the Hix survey in the east line of the Bone." He again says the vacant strip, as shown by distance, is 50 varas wide. He says: "To run the north line of the Cooper [which is north of the Hix] from its north-west corner, as it would be established to begin in the west line of the Bone, where plaintiff claims it to be, giving its [the Cooper's] north line its complement of varas, and then a line south to its beginning, would run a line diagonally across the vacancy, and leave defendant's house east of the line." It seems clear to us from the foregoing testimony that the Bone survey was intended in its original location to leave no vacancy between its west line and the east line of the Hix. The most reliable evidence as to what was actually done by the surveyor in making the survey is that of the witness Maxey, one of the chain-carriers, and the declarations of the deceased surveyor who run the original lines. This evidence is not disputed, and it unquestionably makes the south-east corner of the Hix and the south-west corner of the Bone identical. From this point the lines of both surveys run due north, making the west line of the Bone and the east line of the Hix one and the same. The Cooper east line is a continuation of the Hix, and the Cooper south-east corner is called to be at the north-east corner of the Hix in the west boundary of the Bone, from which it runs due north, necessarily with the west line of the Bone. The evidence gives the very acts and intentions of the surveyor, and puts us on his foot-steps. It should not be made to yield to distance, especially where the error of distance is so slight,—only 50 to 56 varas in a line nearly 1,300 varas long. The excess in the survey claimed by plaintiff is small,—6 and 8-100 acres in a survey of nearly 300 acres. The evident intention of the surveyor was to leave no vacancy, and that intention should prevail. The Bone was surveyed after the Hix, and must extend to it. *Moore v. Reiley*, 68 Tex. 669, 5 S. W. Rep. 618. We do not think defendant's claim for improvements made in good faith can be sustained; he fails to show good faith. His own deed, under which plaintiff holds, called for joining the Hix at its south-east corner. He should have exercised reasonable care to ascertain whether there was in fact a vacancy. By the use of such care, he could have learned that the Cooper called to begin in the west line of the Bone at the north-east corner of the Hix. We have no reason to believe otherwise than that he knew the facts by which the law inevitably connects these surveys, and, so knowing, took the risk against the law. Such being the case, or if he could have known the facts by reasonable care and inquiry, he cannot say he acted in good faith in making improvements. *Thompson v. Comstock*, 59 Tex. 318, and authorities there cited. We therefore conclude that the judgment of the court below ought to be reversed, and rendered by the supreme court in favor of appellant, Earl Y. Brown.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and here rendered for appellant.

COLEMAN *et al.* v. LORD.

(Supreme Court of Texas. December 14, 1888.)

PUBLIC LANDS—LEASE OF SCHOOL LANDS—REJECTION OF BIDS.

Although the land board has no authority to increase the minimum price per acre prescribed by act Tex. April 12, 1888, relating to renting public school lands, (*Smitsen v. State*, 9 S. W. Rep. 112,) yet it may make a regulation reserving the right to

reject any or all bids, in order to secure fair competition; and when a bid has accordingly been rejected, although it was for the statutory minimum price, the bidder has no rights under it.

Appeal from district court, Donley county; FRANK WILLIS, Judge.

Action to recover possession of land, brought by Fred. S. Lord against Coleman & Nelson. Judgment for plaintiff, and defendants appeal.

G. A. Brown and Brown & Gunter, for appellants. J. G. Murdock, for appellee.

GAINES, J. There is no controversy about the facts of this case. In April, 1884, the appellants presented to the land board a bid for the lease of the 48 sections of public-school lands described in the petition; their bid being 4 cents per acre for the dry, and 5 cents per acre for the watered, sections, which was the lowest bid allowed by the act of April 12, 1883, under which the lease was attempted to be secured. It was admitted that the bid was previously filed in the proper time with the surveyor of the land district, and that the proceedings taken under it were in all respects regular. Previous to this time, however, the land board had passed a resolution fixing 8 cents per acre for dry, and 10 cents per acre for watered, sections as the minimum price for the lease of all lands under the act. They accordingly rejected appellants' bid, for the reason that it was below the limit fixed by themselves. The appellee subsequently filed with the surveyor a bid of 8 and 20 cents per acre for the dry and watered sections, respectively, which was duly presented to the board at one of its stated meetings for this purpose, and which was accepted. The lands were thereupon leased to appellee. The appellants having taken possession of the lands, appellee brought this suit to recover possession, and obtained a judgment. The sole question presented in the briefs of counsel is whether or not the land board had authority under the law to raise the minimum named in the act of April 12, 1883, for the lease of the university, asylum, and school lands. In *Smitsen v. State*, 9 S. W. Rep. 112, 70 Tex. —, we decided that question in the negative.

But the further question presents itself, whether appellants have acquired such a right under their bid as will enable them to hold the land as lessees from the state. The regulations of the board, made previous to appellant's bid, reserved "the right to refuse to consummate" a lease "for any reason they might deem sufficient." The statute under which they were acting provided that "their regulations shall provide for competition." Laws 18th Leg. p. 89, § 16. And we are of opinion that it was competent for the board to make a regulation reserving the right to reject bids in order to secure fair competition, and thereby protect the rights of the state. To make a lease under this law, there must be a contract with the board, who are made the state's agents for this purpose. Admitting that it was the duty of the board to accept the bid made in this case, and to consummate the lease, can it be said that any contract has been concluded when they have rejected it? We think not. It required the assent of both parties to complete the transaction, and the board having reserved the right to reject any bid, and having rejected this, we cannot hold that any lease was effected. In the case of *Levy v. Pendergrass*, 2 Beav. 415, trustees were empowered under an act of parliament to let certain turnpike tolls by auction. In order to prevent fraud, the act directed that they were to provide a minute-glass, and that immediately after each bidding it should be turned, and when it had run out it should be turned again, until it had run out three times, when, if there were no intervening bids, the last bidder should be the farmer or renter of the tolls. It does not appear that the act provided any other regulations of the manner of conducting the auction. But the trustees announced that they reserved the right of rejection, unless there were as many as three bids, or of putting in a bid themselves. The plaintiff was the only bidder, and before

the bidding was closed he was told that, if there were not more bids, they would be obliged to make a reserve bidding. This, however, was not done, and the glass run out the third time. The trustee leased to another, and upon suit brought against them and the lessee it was held there was no contract, and that the plaintiff could not recover. There was no question made in the case as to the right to reject the bid, and the principle upon which the case was decided seems to be that the right of rejection was reserved, and that, the bid being in fact rejected, the plaintiff acquired no right, although he was the highest bidder under the special provisions of the act. In *Blossom v. Railroad Co.*, 3 Wall. 196, the complainant was the highest bidder at two successive sales of the same property, made by the marshal under a decree of court, and sought to have the latter confirmed, although after his bid the officer adjourned the sale to a later day; but the court held that he acquired no right by his bid, and that the officer had the power to refuse to accept, and to adjourn the sale. In the transaction under consideration in the present case the land board were the agents of the state to lease the land at auction, and in our opinion the state could only be bound by their acceptance of a bid. They may have misconceived their duty in rejecting the bid, yet the fact remains that they did reject, and no contract was made. If an individual had appointed an agent to lease a tract of land, and had given positive instructions to let the premises at auction, provided they brought a minimum price, and the agent had notified the bidders that he reserved the right to reject any bid, and that he would accept no bid which was not for a greater sum than that fixed by his principal, and if a bidder had bid a less sum than that named by the agent, and the latter had declared the bid, could it be seriously contended that this consummated a lease? The principle in this case seems to be the same. The agents in both cases have not obeyed instructions, have not performed their duty, but they have made no contract, and their principals are not bound. This is not like the case of acquiring land by the location of certificates, or under the pre-emption and homestead acts. There the law provides that upon certain things being done, upon certain conditions being complied with, the party seeking the benefits of the law acquires a right, either absolute or conditional, to the land. Here the statute appoints a board to act as agents of the state in leasing certain of its lands, and prescribes, in a general way, the manner in which the lease shall be made. Until the board acts, and until it gives its final assent to a contract of lease, no one can claim to be the lessee of the state under the act. Whether the board can be proceeded against by *mandamus*, and, if so, whether they could have been compelled to make a lease in this case, are questions we are not called upon to determine. In *Campbell v. Blanchard*, 5 Tex. Law Rev. 69, and in *State v. Work*, 63 Tex. 148, it was held that an application to the surveyor to buy land under the act of 1879, and the payment of his fees, did not invest the applicant with a right which could not be taken away by a repeal of the law under which the application to purchase was made.

We are of the opinion that the judgment of the court below is the only proper judgment that could have been rendered in the case, and it is therefore affirmed.

DUPREE *et ux* v. ESTELLE.

(Supreme Court of Texas. December 21, 1883.)

TRUSTS—AGREEMENT TO PURCHASE AT FORECLOSURE—IMPLIED TRUST.

Plaintiff's land being for sale under a deed of trust, he took what money he could raise to defendant, a stranger to him, and requested him to advance the additional sum necessary, and to buy the property for plaintiff. He bought it, but refused to allow plaintiff to redeem. Defendant testified that, learning that the transaction would be a mortgage, he refused to enter into it, whereupon plaintiff asked him to buy it for himself, which he did. On the day following the sale an arrangement was made under which defendant advanced plaintiff money to make his crop with,

and he also gave him a receipt showing that the money given him to pay on the property was held as a deposit. He also testified that plaintiff withdrew the identical money shortly afterwards, and produced receipts therefor. Defendant paid a small amount more than the debt for the property, and the excess he asserted was credited to plaintiff, who claimed it. *Held* to justify a finding that defendant held the property as plaintiff's trustee.

Appeal from district court, McLennan county; J. R. DICKINSON, special Judge.

Action by J. H. Estelle against W. E. Dupree and wife to redeem land under a trust. Decree for plaintiff, and defendants appeal.

Prather & Lindsey, for appellants.

WALKER, J. This is an appeal from a judgment and decree in favor of appellee, establishing a trust in his favor in a house and lot in Waco. Suit was filed February 23, 1885. The petition alleged that January 19, 1882, the house and lot, then the property of Estelle, was advertised for sale by Rogers, a trustee under a trust deed; that Jesse Estelle, father of plaintiff, acting for the plaintiff, on that day agreed and contracted with W. E. Dupree that, upon plaintiff furnishing \$200, all the money he could raise, to Dupree, the latter was to buy in the house and lot at the trust sale, take and in his own name hold same until the next fall, when plaintiff was to have the lot reconveyed to him upon payment to Dupree of the money he should advance in the purchase, and \$100 for the accommodation, etc. It was alleged that plaintiff borrowed the \$200 for the purpose, and that it was delivered to Dupree; that Dupree bid in the property at \$413, and took a deed in the name of his wife. The defendants claimed that the purchase was made with separate money of the wife, denied the trust, and alleged matters in estoppel, etc. The decree was for plaintiff for the lot, but establishing \$263 as owing Dupree, ordering sale, etc.

The testimony is conflicting. Jesse Estelle testified to making the contract with Dupree as alleged, and to payment to him of the \$200 under it; that on the day after the sale Dupree refused to give plaintiff any showing for the lot, claiming it for his wife, etc. Dupree testified in behalf of defendants, admitting negotiations with Jesse Estelle on January 19th, on the subject; his examining the property with reference to the proposal made to him; but, further, that on seeing the property, and consulting his attorney, and learning that the proposed transaction would only be a mortgage, he determined not to make the agreement, and so notified Jesse Estelle, who then urged witness to buy the property, as it had to be sold, and was a bargain, etc. Witness admitted that Jesse Estelle had given him the money for plaintiff as alleged, but stated that it was left with witness on deposit in the name of plaintiff, and had all been withdrawn in a short time after the sale. It further appeared that on the day of the sale Jesse Estelle made an arrangement with Dupree to obtain money for himself and the plaintiff to make their crop, and that on the next day, January 20th, the arrangement was perfected; the Estelles giving an obligation upon their crops, indorsed by their landlord, for \$200 each, for advances to be made when needed. It appears in evidence that Dupree made advancements to plaintiff to amount of \$104, in addition to the \$200 alleged to have been paid him on the 19th on the alleged agreement touching the purchase of the lot; and that suit was brought before a justice of the peace upon the account against plaintiff; judgment and foreclosure upon the crop obtained; and that in the account sued on the \$200 was credited to plaintiff, with the items supported by his receipts, showing that it had been withdrawn; and that no objection was made to the items of this account on the trial. It appeared that Dupree, in buying the lot, paid \$7.50 in excess of the amount necessary to discharge the debt at the trust sale, which amount was credited to the plaintiff, and that he claimed it as subject to his order. There was some conflict in the testimony as to the person to whom, and the hour of the

day at which, the \$200 was delivered by Jesse Estelle to Dupree. Dupree, on receiving it, gave a receipt for it as on deposit; and he testified that he had kept the money apart from other funds, and had returned the identical money to plaintiff at the dates and amounts as given in the account sued on before the justice.

It is evident that upon the issue whether the trust existed the plaintiff's case must stand upon the testimony of Jesse Estelle, with whatever circumstances from other witnesses may support his version of the transaction. The *status* of the property at the time of the sale will determine its subsequent ownership, unless controlled by subsequent acts of the parties. It is well recognized that a trust, to affect the legal title, "must be established with clearness and certainty." *Cuney v. Dupree*, 21 Tex. 219. We must concede to the trial judge, when acting without a jury, the same presumptions of correctness that are accorded to the verdict of a jury. This will be conclusive upon the credibility of the witnesses whose testimony is contradictory. In the conflict of testimony between Jesse Estelle and Dupree, the trial judge followed the testimony of Estelle. It is not disputed that plaintiff obtained a loan of the \$200 for the purpose of securing his lot, then about to be sold. This money was paid or delivered to Dupree, and on the same day negotiations were opened between the Estelles and Dupree by which they were to obtain advances needed in making their crops, and that these were perfected the day after the sale. The parties were strangers before the day of the sale. Dupree was applied to for aid in preventing the sacrifice of the lot about to be sold, and for the further aid for making the crops by the Estelles. The whole transaction is natural and rational, upon the testimony of Jesse Estelle. They furnished to Dupree the \$200 as proposed. Dupree bought the lot for \$413, at a small advance on the debt, the excess credited to plaintiff as cash, the whole advance to be a debt upon the house and lot. On the next day the Estelles made the required security for the further advances.

Now, in this state of facts, it was of no consequence how or from what funds the advances should be made by Dupree. If out of the money paid him to go into the purchase, if withdrawn by plaintiff with full knowledge of the facts, and without the intention of surrendering his right to redeem the lot, it would be a further incumbrance, to be lifted when he should seek to recover the property. Of course, plaintiff had the power to surrender his right to redeem, but the intent to do so will not be presumed from the mere fact of his receiving the money as he is shown to have received it. It was not natural for the Estelles to leave the money with Dupree, and deal further with him for a loan not then necessary, after his repudiation of the agreement, or on his refusal to make it. We conclude, therefore, that the findings of the court upon the material issues are not without or against the testimony.

It is contended that the judgment for \$263 is too small, and that equity has not been done between the parties in the decree allowing Dupree that amount, to be paid by sale of the property. Conceding that the house and lot stands liable for the entire purchase money, with interest from January 19, 1882, the day of the trust sale, and that, as testified to by Dupree, he has expended \$50 upon it, he would then be entitled to recover these sums, with interest. The amount of taxes and insurance has not been shown. He is chargeable with rents upon the property while in his possession.

Taking Dupree's testimony, he has received rents as follows:

Eight months' rent, at \$7 per month,	-	-	-	-	\$ 56 00
Twelve months' rent lost,	-	-	-	-	0 00
Twelve months' rent, at \$10 per month,	-	-	-	-	120 00
To date of trial, October 15, 1886, 30 months and 26 days, at					
\$11.50,	-	-	-	-	354 50
Total,	-	-	-	-	\$530 50

This amount, taken from Dupree's advances on the property, and allowing 12 per cent. interest, will leave a smaller sum (\$196) than he is allowed in the judgment. The appellee, however, does not complain. The sum promised on account of accommodation is not taken into account, as the right to redeem would require the payment of the money loaned and advanced for repairs, with interest.

The judgment will be affirmed.

ROBERTSON v. GARRETT *et al.*

(*Supreme Court of Texas. December 21, 1888.*)

WILLS—CONSTRUCTION—DESCRIPTION OF DEVISEES.

A will gave testator's sister a life-estate, and at her death "her daughters who may be unmarried" were to have the land. If there should be no unmarried daughters at her death, then the lands were to be "equally divided between all her daughters." The sister died, leaving three married daughters, and none unmarried. *Held*, that the three married daughters took the land to the exclusion of the heirs of a married daughter who had died before her mother.

Appeal from district court, Hunt county; J. A. B. PUTNAM, Judge.

Suit for partition, brought by the heirs of Mrs. N. L. Robertson, deceased, by their guardian, against W. H. Garrett and others. Partition was denied, and plaintiff appeals.

E. W. Terhune, for appellant. *Matthews & Neyland* and *Alex. Mason*, for appellees.

STAYTON, C. J. In pursuance of the will of Thomas A. Hawkins, who died testate in the year 1852, the land in controversy was bought, and title thereto taken, as the will directed, to John Norman, trustee. The will provided that the trustee should hold "in trust for the sole and separate use of my said sister, Anne Wallace Gee, whereon, as long as she shall see fit to reside, she shall have the absolute and sole control, free from any control of James H. Gee, or any other husband that she, the said Anne Wallace Gee, may hereafter have." The will then provided that, "upon the death of the said Anne, it is my will that her daughters who may be unmarried at the time of her said death shall have the aforesaid tract of land, * * * to have and to hold, use and enjoy, to their sole and separate use, free from any control of any husband that either of them may hereafter have; and in the event that there should be, at the time of the death of the said Anne, no unmarried daughters of hers, then the aforesaid lands are to be equally divided between all of her daughters, to be by them held, used, and enjoyed for their sole and separate use, free from the control of any husband that any of them may have, or may thereafter have." Mrs. Gee died in 1883, leaving three daughters, all of whom were married women at the time of her death. Mrs. Gee had one other daughter, who married N. L. Robertson and died before the death of her mother. She left children, some of whom assert title in this suit, to a part of the property, and ask partition. The judgment of the court below was that they take nothing by their suit, and from that judgment such of Mrs. Robertson's children as are minors prosecute through their guardian this appeal.

The appellees Garrett claim the entire land through a warranty deed made by Mrs. Gee and her husband, which was subsequently ratified by her three daughters surviving. We think it evident from the terms of the will that the testator intended that, if any of the daughters of Mrs. Gee were unmarried at the time of her death, then such daughter or daughters should take the entire land; but that if none of her daughters living at the time of death were unmarried, that then the land should become the property of her married daughters then living. Effect must be given to this intention. There is nothing in the will evidencing an intention that the children of a daughter of Mrs.

Gee, deceased at the time of her death, should take under the will in any event; and it might as well be claimed that the surviving sons of Mrs. Gee were entitled to take as to claim that her grandchildren are.

There is no error, and it will be affirmed.

HOUSTON *et al.* v. CALAHAN.

(*Supreme Court of Texas.* November 9, 1888.)

TRESPASS TO TRY TITLE—PLEADING—PETITION.

A petition giving the names and residences of the parties, alleging that plaintiff owns in her own and separate right, and was in possession at a date named, of certain land, which is described by metes and bounds with sufficient certainty to identify it, and the county of which is given, and that plaintiff was unlawfully dispossessed by defendant, and praying judgment for the land, and for a writ of restoration, and for relief generally, and indorsed as required in trespass to try title, shows a good cause of action on general demurrer.

Appeal from district court, Hopkins county; J. A. B. PUTNAM, Judge.

Action by C. M. and Nancy Houston against S. B. Calahan. Plaintiffs appeal.

Harris & Milam, for appellants. *A. A. Henderson*, for appellee.

STAYTON, C. J. The petition in this cause gives the names and residences of the plaintiffs and defendant. It describes the premises by metes and bounds with sufficient certainty to identify the same, and states the county in which they are situated. It states that the land described belongs to Mrs. Nancy Houston in her own separate right, and that she was in possession at a date named, and was afterwards unlawfully dispossessed by the defendant. It prays a judgment for the land, with proper writ for the restoration of possession, and for such relief, general and special, as in law or equity she may be entitled to; and the petition was indorsed as, in an action of trespass to try title, the statute requires. Such a petition shows a cause of action, and the court below erred in sustaining a general demurrer to it. We are at a loss even to conjecture the ground on which the general demurrer was sustained. Neither what appeared in the answer nor in the reply to the matters therein set up could be looked to in determining the sufficiency of the petition; for there was no averment of facts in the answer admitted in the reply to it which would destroy any of the averments of the petition. It is not necessary to consider the sufficiency of the matters pleaded by the defendant in bar of the action, for it does not appear that the court below acted upon the exceptions to the answers.

The general demurrer urged by appellee should have been overruled, and for this error the judgment will be reversed, and the cause remanded.

HICKS *et al.* v. OLIVER.

(*Supreme Court of Texas.* November 20, 1888.)

1. APPEAL—BOND—AMOUNT—DISMISSAL.

Under a statute requiring an appellant to file a bond "payable" to the judge, "conditioned," etc., but not providing that it shall be given in any sum, the former statute having required that the amount should be fixed by the judge, a bond is not void because given for a stated amount, and the appeal on which it is given should not for that reason be dismissed.

2. SAME—DESCRIPTION OF JUDGMENT APPEALED FROM.

Where a bond, on appeal from an order for the sale of decedent's real estate, describes the property as a brick store-house and lot, no further description is necessary.

Appeal from district court, Rusk county; J. G. HAZELWOOD, Judge.

Mrs. E. J. Oliver, as administratrix, etc., of R. W. Oliver, was granted, an order for the sale of decedent's realty, and also, as widow, an allowance in

lieu of exempt property, and S. J. Hicks and others, devisees, appealed to the district court. Their appeal was dismissed, and from the judgment of dismissal they appeal to this court.

Drury Field, for appellants. *W. J. Graham* and *Martin Casey*, for appellee.

GAINES, J. This is an appeal from a judgment of the district court of Rusk county, dismissing an appeal from the county court. The appellee, Mrs. E. J. Oliver, as administratrix with the will annexed of the estate of R. W. Oliver, deceased, filed an application in the latter court (in which the estate was being administered) for an order to sell a certain brick store-house and lot belonging to the estate. Appellants, as devisees under the will of the testator, resisted the application. The order was granted, and they gave notice of appeal to the district court. At the same term another order was granted, making an allowance to the administratrix, who was the widow of the deceased, in lieu of exempt property. The granting of this order was also resisted by appellants, and notice of appeal was given. The appellants, in order to perfect their appeal, gave bond in the sum of \$2,500, conditioned as the law directs. The motion to dismiss the appeal was based upon alleged defects in the bond.

The first ground of objection to the bond was that it did not describe the judgment. This ground is not noticed in the brief of counsel, and it may be presumed that the court did not deem it sufficient. If, however, this objection was well taken, the judgment dismissing the appeal would have to stand. But we are of opinion that the bond is sufficient to identify the orders appealed from, and that further particularity was not required. The bond shows that the first order intended to be reviewed was an order for the sale of a brick store-house and lot, and we think no further description of the property was necessary.

The other ground of objection to the bond was that the obligors bound themselves in a fixed sum, namely, \$2,500. The counsel for appellee insist in their brief that, because the statute does not provide that the bond shall be given in any sum, to be fixed either by the amount or value of the subject-matter of the controversy, or the probable amount of the costs, or by any officer, an obligation for a stated sum is not contemplated by the statute, and is therefore void. But we think the proposition cannot be maintained. It is true, as argued, that the word "bond," used in the statute, does not necessarily imply that it shall be given for a penal sum conditioned for the performance of the obligation intended to be secured; but it is also true that in our statutes, as a general rule, wherever a bond is required, such an obligation is meant. The act of 1848, in prescribing the bond for appeal from the county to the district courts, in matters relating to estates of deceased persons, required that the amount should be fixed by the chief justice. Pasch. Dig. art. 1384. The omission of a similar requirement in the existing statute is significant. 1 Sayles, Ann. Rev. St. art. 2201. It admits of the construction that it may have been intended that no sum should be named, so as to avoid the danger of an insufficient security by reason of an insufficient amount being fixed. But it also may have been considered that, if the judge whose decision was sought to be reviewed was authorized to name the amount of the bond, there was danger that it would be fixed at a sum onerous to the party seeking the appeal. It is reasonable, therefore, to presume that the change was made in the interest of the parties appealing, and not of appellees, and that its object was not to prohibit a bond in a fixed sum, beyond which the obligors would not be bound. This consideration is supported by the fact that, where the review of the proceedings of the county court in estate matters is sought by *certiorari*, the district judge who grants the writ is required to fix the amount of the *supersedeas* bond. Id. art. 293. But the

article under consideration says the appellant shall "file with the clerk a bond, with two or more sufficient sureties, payable to the county judge, to be approved by the clerk, conditioned that the appellant will prosecute his appeal to effect," etc. Rev. St. art. 2201. The word "payable" indicates that a sum should be named to be paid, as the word "conditioned" indicates that there was to be an obligation to pay a specified sum, which was to be defeated on condition that the appellant performed the obligation the statute was intended to secure. It follows that, in our opinion, the court erred in dismissing the appeal. It may be that, where a bond is given in a sum which should appear to the district judge to be insufficient, he should, upon motion, under the rule of practice in like cases, require the appellant to give a new bond, and, upon a failure to comply with the requirement, he should dismiss the appeal. But we see no reason to doubt the sufficiency of the amount of the bond in this case.

The judgment is reversed, and the cause remanded.

EAST LINE & R. R. CO. v. SCOTT.

(*Supreme Court of Texas. November 20, 1883.*)

1. MASTER AND SERVANT—CONTRACT OF HIRING—ACCEPTANCE—COMPROMISE.

An agreement by one to accept employment is not necessary to the validity of a promise by another to employ him, made as a part of the compromise of an action.

2. SAME—PERIOD OF SERVICE—DEMAND FOR EMPLOYMENT.

Neither is it necessary that a fixed period of service be agreed upon, the promisee in such case having the right to fix it, but to complete the contract he must fix the period on demanding employment.

3. SAME—TIME OF MAKING DEMAND.

The promisee having been disabled at the time of the promise by reason of injuries for which the action compromised was brought, a demand for employment, made as soon as he is able to discharge the duties of it, is in time, though made more than two years after the promise.

4. FRAUDS, STATUTE OF—CONTRACT TO BE PERFORMED IN A YEAR.

As an agreement to employ, whether for an indefinite period, to be fixed by the promisee, or for life, may be performed within a year, it is not within the statute of frauds.¹

5. EVIDENCE—PAROL AGREEMENT—VARYING TERMS OF JUDGMENT.

A parol agreement forming part of the compromise of an action may be proved, though in fulfillment of the compromise a judgment is entered also, the judgment not embodying or mentioning the parol agreement.

6. PLEADING—PROOF—VARIANCE.

A petition alleging a contract of service, but stating no definite term, will control the right of recovery, though the evidence shows that a term was agreed upon.

7. ATTORNEY AND CLIENT—AUTHORITY OF ATTORNEY—COMPROMISE OF SUIT.

Where an attorney has authority to consent to a compromise judgment, which he does, and the judgment is satisfied, and he compromises other cases arising out of the same occurrence, the jury may infer that he has authority to agree, as part of the compromise, that his client shall employ the person with whom the compromise is made.

Appeal from district court, Marion county; W. P. McLEAN, Judge.

Action by William F. Scott against the East Line & Red River Railroad Company. Defendant appeals.

F. H. Prendergast, for appellant. *C. A. Culberson* and *H. McKay*, for appellee.

STAYTON, C. J. The general nature and result of this action are thus stated in the brief of counsel for appellant: "On November 10, 1886, W. F. Scott filed suit in the district court of Marion county against appellant, alleg-

¹ On the operation of the statute of frauds with reference to contracts not to be performed within a year, see *Sarles v. Sharlow*, (Dak.) 37 N. W. Rep. 749, and note; *Durfee v. O'Brien*, (R. L.) 14 Atl. Rep. 857, and cases cited.

ing that he was injured by the appellant in 1882; that he filed suit for damages, which was compromised in 1884 by the railroad paying him \$4,500, and agreeing to employ Scott as engineer so long as he desired to be employed; that they paid the \$4,500, but when Scott applied for employment on July 1, 1886, they refused to employ him. Defendant denies the agreement, and says if any such agreement was made with Campbell & Taylor they had no authority to make it; that the agreement was void because not in writing, and not to be performed in a year; the agreement was contrary to public policy, and was not incorporated in the judgment which contained the settlement in 1884, and was not mutually binding on both parties, and indefinite. January 14, 1888, judgment for \$2,400 for plaintiff. Defendant appealed."

The petition alleges so much of the compromise agreement as affects the case before us, as follows: It was further agreed "that the said company would thereafter employ plaintiff when this plaintiff should ask for and accept service and employment by the said company in the running and operating its said railroad in the employment of locomotive engineer,—that then being, and still is, the trade, occupation, and profession of your petitioner,—for whatever length of time which your petitioner might desire to retain such employment, and at the reasonable and customary pay and wages of such employe on railroads, which then was and still is from one hundred to one hundred and fifty dollars per month, which settlement and compromise your petitioner did then and there accept in full satisfaction and settlement of all his claim for damages." The petition then alleges that appellee prepared about July 1, 1886, to enter appellant's service as contemplated by the compromise agreement, but that appellant refused to receive his services, or pay for them, and then proceeds as follows: "That the said services and the wages therefor are and would be worth to your petitioner the sum of, to-wit, one hundred and fifty dollars per month from the 1st day of July, 1886, for a reasonable period of about the next ten years; that plaintiff is now a man of about thirty-six years of age, and has reasonable expectation of living and exercising his said trade and profession for the next ten years; and so plaintiff says that he has been damaged by said company in the sum of, to-wit, twenty thousand dollars, wherefore," etc.

The evidence offered for appellee was sufficient to show, if uncontroverted, that E. W. Taylor, who may have been assistant secretary for the company, and Col. Campbell, an attorney representing the company in the defense of that case, may have made an agreement at the time of and as a part of the compromise looking to the future employment of appellee. The statement of appellee in regard to that is: "I finally told them I would take \$4,500 if they would give me a job on the defendant's road; that is, that they would give me the position of locomotive engineer on the road, such as I had, for life. I told Col. Campbell that I wanted it fixed up so that I could not be fired,—meaning that they could not discharge me. He answered that he did not know so much about that. I told him he could fix it that way, and he finally said, 'All right, let it go that way,' and the contract as above stated was agreed upon." Another witness who was present stated that the agreement was "that the road would pay \$4,500, and give plaintiff a position of engineer for life." The testimony of appellee as to his application for employment is that "about June 28, 1886, I applied to Col. E. W. Taylor for work on the road under the contract, and told him I was ready to go to work." He then states that Taylor gave him a letter of recommendation to the company's master mechanic, who referred him to Mr. Clark, his superior in authority, whose business it was to employ engineers. In reference to his interview with Clark he states: "I then saw Clark about it, stating what I wanted, and my case. He says to me: 'You had a suit against the company, didn't you?' I told him I did. He said, 'I have no place for you.' I then told him, 'Good morning,' and left. * * * I would have taken the position of

engineer for life, and I supposed I had an expectation of living perhaps ten years."

The appellant asked the court to instruct the jury that, "there being no proof before you that Campbell had any other authority than as the attorney for defendant, you are charged that an attorney would not have authority to make the contract sued on, merely because he was attorney. Therefore the contract made by Campbell cannot bind the company." This charge was refused, and correctly so, if there was any evidence tending to show with reasonable certainty that Campbell had authority to make the compromise. That he did agree to a compromise judgment which the appellant recognized and satisfied, is rendered clear by the evidence before us. The jury might look to this, although it is not directly shown that he had authority to make that part of the agreement not carried into the judgment, as tending to show that he had authority to make a compromise. Col. Campbell was not alive at the time of the trial, and his testimony seems not to have been taken. While an attorney, by virtue of his employment, has not authority to make a compromise of an action he is employed to prosecute or defend, it is not to be presumed when one so situated assumes the right to exercise such a power, and does exercise it, that this was done without lawful authority, and but slight evidence, in such a case, may be sufficient to authorize the belief that he was clothed with all the power he assumed to exercise. That Col. Campbell agreed to the compromise judgment is not controverted. His power to do that is not questioned, though the manner in which it was conferred is not shown. He reported the compromise judgment, and those who seem to have had general control of the litigation of the company found no fault with his action, but approved it for payment, and the company satisfied it. The inference from the evidence is very strong that in reference to the persons who were injured at the same time appellee was,—of whom there were many,—Col. Campbell may have been given all the power he assumed to exercise. E. W. Taylor testified "that when plaintiff was injured, on August 7, 1882, on the road, many others were also injured, and several were killed. Witness, as agent and interested party, had endeavored to settle and compromise the cases. Col. Campbell represented the defendant in all the cases. The Scott, Harper, Rosser, Tetro, and other cases, and all of them except those of Harper and Tetro, had been settled by Campbell and the witness. Witness and Campbell also had endeavored to compromise the Harper and Tetro cases for defendant, but without success." In view of all these facts we are of the opinion that there was evidence from which the jury might fairly find that Col. Campbell had power to make the compromise, and although there was evidence tending to show to the contrary, it was not error to refuse the instruction asked.

Appellant asked another, a charge which the court refused, and that was: "There being no evidence nor pleadings before you that plaintiff was bound by the contract sued on, nor that he agreed to be bound by it, there was therefore a want of mutuality in the contract, and defendant is not bound by it." Reciprocal promises, made at the same time, and in relation to an agreement furnished, the one for the other, consideration to support a contract, and, if the appellee was relying on such a consideration to sustain the contract, he would fail, for there is no pretense that he promised to render any services whatever for the appellant. On the contrary, his petition shows that it was optional with himself whether he served the appellant. The contract alleged, however, does not rest on such a consideration. The asserted compromise of the pending action, whereby the appellee agreed to accept the judgment rendered and the promise made in satisfaction of his claim for damages, was the consideration on which the contract may well stand. The consideration was sufficient, and the absence of a promise by the appellee to serve is a matter of no importance, except as it may bear on the question whether the contract was sufficiently certain. The promise alleged contained two propositions: (1)

That appellant would employ appellee as a locomotive engineer; (2) that for such services as he should render it would pay to him the compensation usual in such employment. The promise to do these things being binding, had the appellee rendered services in accordance with the contract, he would have been entitled to receive compensation therefor under the contract, and not upon an implied contract. That would be but the ordinary case of a promise by one person to pay to another money when he shall have performed some specified service, which, when done, the contract is held to be executed on one side, the consideration for the promise paid or given, and the contract complete. The charge referred to was not applicable to the case made by the pleadings or proof, and was therefore correctly refused.

The following charge was also asked: "The jury are charged that if there is no pleading nor proof that the contract sued on was for service for any definite period of time, and no evidence that plaintiff ever offered to be bound to work for any definite period of time, then the contract is indefinite, and plaintiff can not recover." This charge was refused. Whether the contract was sufficiently certain as to the period of time appellee should render services for appellant was also raised by the motion for new trial. The petition does not aver that appellant ever contracted to employ appellee for any definite period of time, but distinctly alleges that it did promise to give him employment "for whatever length of time which your petitioner might desire to retain such employment." The petition also alleges that appellee, "about the 1st day of July, 1886, applied to said company for employment, he then having sufficiently recovered from his said injuries," and it then gives an estimate of the value of the services of appellee for a period of 10 years, following the date mentioned; but it nowhere alleges that appellee agreed to serve appellant for any fixed period of time. The evidence tends to show that the promise made on compromise was to give to appellee employment during his life, but it does not show that when appellee sought employment he proposed to render service for any named period, or so long as he might live and be able to perform the services contemplated. We must take the contract as alleged in the petition to be the contract on which appellee must recover, if at all, and, looking to that, there can be no doubt that whether appellee should serve appellant, and the term of such service, depended upon his own will. It is very generally, if not uniformly, held, when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, that either may put an end to it at will, and so without cause. *Harper v. Hassard*, 113 Mass. 187; *Coffin v. Landis*, 46 Pa. St. 431; *Wood, Mast. & Serv.* 133, 136, and citations. When such a state of agreement exists, it is no breach of contract to refuse to receive further services, and a refusal to accept any at all, it would seem, at most would entitle the engaged servant only to nominal damages. If the pleadings of appellee be accepted as true there can be no doubt that there was an agreement that appellant would give employment to appellee, but as the period for which this should be done was dependent on the will of appellee, to be exercised in the future, there was no contract binding appellant to employ appellee for any fixed period; the minds of the parties had not met as to a material element of the contract to which the agreement looked,—the period of service. We are of opinion, however, while this is true, that the agreement made conferred on appellee the right to fix the period for which he would serve; and that, if he had done so when he demanded employment, he would be entitled to recover for the breach of the contract, which would have been thus completed and made certain by the exercise and expression of his will, which, for a valuable consideration paid, he had acquired the right to exercise for this very purpose. It was optional with appellee, when the agreement was made, whether he would serve appellant or not, but by the terms of the agreement he was given the right to fix the period he would serve, if he wished to serve at all. The right to this option could not be sus-

tained on the theory of reciprocal promises as the consideration, for, as we have seen, the appellee, at the time of the agreement, made no express promise to serve, and no implied promise to that effect arises from the agreement; but the consideration, to which we have before referred, was sufficient to support the promise of appellant to permit appellee to fix the period of service, and to have employment during that time, subject, however, to lose the right for inability to discharge the duties of the employment or by misconduct. If, when appellee sought to enter the service of appellant, he had fixed the period for which he would serve, there would have been a complete contract, certain in its terms, by which both parties would have been bound.

In *Railroad Co. v. Dane*, 43 N. Y. 241, it appeared that the railway company, by letter, offered to receive and transport from New York to Chicago railroad iron, not to exceed a certain number of tons, during months specified, at a given rate per ton, and the party to whom the letter was directed merely assented to the proposal, but did not agree to deliver any iron for transportation, and it was held that there was no contract binding on either party, for want of mutuality. The action was brought by the person to whom the offer was made, and, while holding, as above stated, the court said: "Had there been a consideration given to the defendant for such option, the defendant would have been bound to transport for the plaintiff such iron as it required, within the time and quantity specified; the plaintiff having its election not to require the transportation of any." "There can be no doubt but that a contract may be so made as to be optional on one of the parties, and obligatory on the other, or obligatory at the election of one of them," is the declaration of the supreme court of New York. *Giles v. Bradley*, 2 Johns. Cas. 253. We need not go so far as to adopt the entire proposition, but the last branch of it is doubtless correct in all cases in which the option to make an agreement obligatory is supported by valuable consideration.

The case of *Bolles v. Sachs*, 33 N. W. Rep. 862, decided by the supreme court of Minnesota, involved a contract for service supported by consideration other than mutuality of contract, which was wanting in that the period the plaintiff was to serve was not fixed by the agreement. The defendants having declined to keep the plaintiff in their service, he brought an action for damages, and recovered \$1,100. In disposing of the case the court said: "The contract was, perhaps, effectual to give to the plaintiff the option to himself fix the duration of it; but unless he exercised that election, and actually determined the period, so to make certain that which by the terms of the contract was uncertain, he could recover only for the period of his actual service. * * * It is self-evident that courts can neither specifically enforce contracts, nor award substantial damages for their breach, when they are wanting in certainty. Damages cannot be measured for the breach of an obligation when the nature and extent of the obligation is unknown, being neither certain nor capable of being made certain. It does not appear that the plaintiff ever determined that he would continue in this business for any definite period, or that he declared his election in this respect. Had he not been discharged, he might, at will, at any time, after making the contract, have himself abandoned the employment, because of dissatisfaction, or for any other reason. Since the period of his service was thus left to depend upon his mere volition, and never became fixed, it cannot be assumed that he would have voluntarily remained in this employment up to the time of trial,—more than a year,—so as to justify an assessment of damages on that theory. Perhaps the defendants could not, by abruptly breaking the contract, by discharging the plaintiff, deprive him of the right to exercise his option to fix a definite and reasonable period of service. But, though he might have exercised and declared his election, even when he was notified of his discharge, and by then tendering performance under the terms thus reduced to certainty have placed himself in a position to recover damages measured with reference to

the terms of the contract thus fixed, he does not appear to have done so." This seems to us correct, if we do not lose sight of the fact that there is no binding contract for service for a future period until the term of its duration is fixed, while there may be a contract, if supported by a sufficient consideration, which will give the right to one party to make the contract for service complete, by fixing the term during which it becomes obligatory on the one to serve and the other to accept and pay for the services. It is urged, however, by appellee that he did fix the period of service; that he elected to serve for life. He does not say so in his evidence. He states that such was the agreement at the time the compromise was made, but this is inconsistent with his pleadings. He does, in effect, say that by reason of the contract he demanded employment, but does not say that he elected to serve or declared an intention to serve during life, or for any other period certain, or that can be made certain. We are of the opinion that a new trial should have been granted on the ground that we have mentioned, and that a charge upon that subject embodying the views herein expressed, should have been given.

It is urged that the contract set up was invalid under the statute of frauds. If the contract be as alleged in the pleadings or as stated in the evidence, we are of the opinion that it is not subject to the objection urged against it. *Thouvenin v. Lea*, 26 Tex. 615; *Thomas v. Hammond*, 47 Tex. 52; *Bish. Cont.* §§ 1237-1281; *Wood, St. Frauds*, §§ 270-272. In either event the contract might be performed within one year, and the performance complete within the time, intent, and understanding of the parties. It was more than two years from the time the compromise agreement was made until appellee sought service, and it is urged that this delay relieved appellant from obligation to employ, if it ever existed. The evidence shows that appellee sought employment as soon as he recovered from the injuries under which he was suffering at the time the compromise was made, sufficiently to be able to discharge the duties of the employment. Any agreement made must have been made in view of the fact that appellee was disabled at the time by his wounds, and with no expectation that he would resume labor until he could sufficiently recover from them to discharge the duties of engineer.

It is claimed that the court erred in permitting witnesses to state any contract or agreement other than that involved in the judgment; and the ground of this objection is that such evidence tended to vary the effect of the judgment. The agreement of the parties for compromise was oral, and the judgment rendered does not undertake to embody it, nor does it even recite that it was rendered in accordance with an agreement. The question is decided adversely to appellant in *Thomas v. Hammond*, 47 Tex. 52. For the errors noticed, the judgment will be reversed, and the cause remanded.

HUDGINS *et al.* v. SANSOM *et al.*

(Supreme Court of Texas. December 7, 1888.)

PARTITION—OF HOMESTEAD—USE BY MINORS—CONSTITUTIONAL LAW.

Const. Tex. art. 16, § 52, prohibiting the partition of land used as a homestead among the heirs of deceased, so long as the guardian of his minor children may be permitted, by order of court, to use it, does not prevent the homestead from entering into the partition of the estate, providing the right of the minor children to use it during such permission is not infringed by such partition.

Appeal from district court, Johnson county; J. M. HALL, Judge.

Action by Jennie V. Hudgins and others for a partition of the real estate of F. M. Sansom, deceased, brought against M. Sansom, guardian of certain minor devisees, and others interested under the will. From a decree refusing a partition of a tract of land used as a homestead plaintiffs appeal.

Smith & Davis, for appellants. *Crane & Ramsey*, for appellees.

STAYTON, C. J. F. M. Sansom died testate, and by his will gave all his real estate to his daughter, Mrs. J. V. Hudgins, his minor sons, F. M., Otis W., and Leon, and to his grandson Frederick Leggett, each to have one-fifth thereof. To each of his minor sons he gave \$3,000; and to them, his daughter Mrs. Hudgins, and his grandson Frederick Leggett, he gave in equal shares all "notes, accounts, debts, dues, and demands due, or to become due, except the proceeds of an insurance policy, of which he gave to his sons, to be shared by them equally, one-third, and to his daughter Mrs. Hudgins, and grandson Frederick Leggett, the remainder, to be equally divided between them. He also made a provision through which he required each of his beneficiaries under the will, other than his daughter, to give to her, in a certain event, \$1,000 out of the bequests made to them. His minor sons were members of his family at the time of his death, and Mrs. Hudgins became the guardian of their persons, and by order of the probate court was permitted, with the minor sons, to occupy the rural homestead in which the deceased had lived; but for rent of this it seems her husband paid to the guardian of the estates of the minors the sum of \$600 annually. M. Sansom was the guardian of the estates of the three minors. After the estate of the deceased was ready for partition, Mrs. Hudgins, joined by her husband, and by the guardian of the estate of Frederick Leggett, sought in the probate court a partition of the real estate, the other beneficiaries under the will as well as the executors being made parties. The probate court directed all the real estate, except 200 acres, comprising the homestead, to be partitioned, but as to that refused to order partition, on the ground that it had been set apart for the use of the three minors. From that decree an appeal was prosecuted to the district court, where the same judgment was entered, and from that judgment this appeal is prosecuted.

The sole question in this case is whether the 200 acres comprising the homestead should have been placed in partition. The will through which the parties claim does not attempt to make any specific disposition of the homestead, but embraces it under the general words, "all my real estate, wherever the same may be situated." It is therefore unnecessary, in this case, to consider whether a testator could by will so dispose of property used as a homestead as to prevent the occupation of it by a surviving wife, or by guardian with the minor children, under permission of the proper court. The constitution, after providing for the descent and distribution of property occupied as a homestead, declares that "it shall not be partitioned among the heirs of the deceased during the life-time of the surviving husband or wife, or so long as the survivor may elect to use or occupy the same as a homestead, or so long as the guardian of the minor children of the deceased may be permitted, under the order of the proper court having the jurisdiction, to use or occupy it." Const. art. 16, § 52.

The application of this provision of the constitution to the facts before us will determine the rights of the parties; for there is no statutory provision adding to it. The purpose of the constitutional provision quoted evidently was to secure the surviving husband or wife the right to use the homestead so long as he or she might elect to do so, and to protect minor children in a home so long as, in the opinion of the court having jurisdiction over the property and minors, it was necessary that they should use a homestead. It was the right of such persons to occupy the homestead which it was the purpose of the constitution to protect, and it therefore forbids the partition of the homestead so long as given conditions continue. The word "partition" is evidently used in the constitution in its legal sense, and means the act or proceeding through which two or more co-owners cause the thing to be partitioned to be divided into as many shares as there are owners, and which vests in each of such persons a specific part, with the right to possess it freed from a like right in other persons who, before partition, had an equal right to pos-

sess. A proceeding which would result in this is forbidden by the constitution, so long as the surviving husband or wife elects to occupy the homestead, or so long as the proper court shall permit a guardian, with minor children of the deceased, to occupy. It is a partition of the homestead that is forbidden, but it does not follow from this that in the partition of an estate the homestead may not enter into the partition, if that may be made without defeating the right of the surviving wife, husband, or children to occupy the homestead as, under the constitution, they are entitled to occupy.

There is nothing in the will of F. M. Sansom—who seems to have disposed of all his real estate among all his heirs, just as it would have been under the law had he left no will—which indicates his intention that his minor sons, on account of their minority, should have any other or greater interest in his real estate than, by the terms of his will, was given to them and each of the other devisees. He left a good estate, besides his real property, which consisted of 23 separate tracts, situated in different parts of this state. It may be that, in partition, the homestead may be set apart with other property to the minors, or, if this cannot be done, that it may be set apart to one of them, or to one of the other devisees, subject to the right of the guardian of the minors to occupy it so long as the proper court may permit this to be done. We see no reason why the homestead may not enter into the partition of the estate, and be disposed of in any manner which does not take away the right conferred upon the children to occupy it. This right to occupy is the sole right which it was the purpose to protect by the provision of the constitution quoted, and the partition of an entire estate, of which a homestead may be a part, which does not take away the right, neither contravenes the spirit nor the letter of that instrument.

There is a controversy between the guardian of the estate and the guardian of the persons of the minors as to who is entitled to control the homestead while occupied by the guardian of the persons. The guardian of the estate of minors, obviously, is entitled to control all their estate, and, if it yields a revenue, to control that; but, while this is true even of a homestead, such a guardian cannot deprive a guardian of the persons of the right to occupy the homestead with his or her wards, and to use it for the purposes of their home. In such a case, however, the guardian of the persons in possession, with his wards, is not entitled to appropriate to himself profits arising from the use and occupation of the homestead. These, so far as necessary for the support of the minors, may be used for that purpose, but any sum not necessary for that purpose should go to the guardian of the estates.

The judgment of the court below will be reversed, with instructions to that court to enter a decree directing the partition of all the real estate, including the homestead, subject to the right of the guardian of the minors to occupy it with them during their minority, unless the proper court shall sooner withdraw its permission for the guardian so to use it. It is so ordered.

COMER v. STATE.

(Court of Appeals of Texas. November 28, 1888.)

1. INDICTMENT—JOINDER OF SIMILAR OFFENSES—GAMING.

Where several offenses are embraced in the same general definition, and are punishable in the same manner, (as gaming in a tavern or inn, and gaming in a room in and attached to said tavern or inn,) they are not distinct offenses, and may be charged conjunctively in the same count. Willson, Crim. St. Tex. § 1989.

2. GAMING—IN PRIVATE ROOMS—HOTELS.

Pen. Code Tex. art. 356, relating to gaming, provides that "a private room in an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming." *Held*, that a room in an inn, provided for the accommodation of guests, which is engaged temporarily for the purpose of private gaming,

and not for a guest's habitation or abode, is not a "private room;" particularly where the person who so engages it has other apartments in the same inn, which he occupies as his abode.

3. CRIMINAL LAW—APPEAL—REVIEW—OBJECTIONS NOT IN RECORD.

In cases of misdemeanor, the rule is that where no special instructions are requested, and no exceptions reserved to the charge, apparent errors therein will not be revised on appeal, unless they are of a fundamental character.

Appeal from county court, Cherokee county; M. J. WHITMAN, Judge.

Defendant, J. W. Comer, appeals from a judgment of conviction of the offense of gaming.

J. M. Duncan, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. It was charged on the indictment that the unlawful playing at a game with cards was at a "tavern and inn," and again that it was done "in a room in and attached to said tavern and inn;" the conjunctive "and" being used to connect the two offenses. If several offenses are embraced in the same general definition, and are punishable in the same manner, they are not distinct offenses, and may be charged conjunctively in the same count. Willson, Crim. St. § 1989. This indictment was neither uncertain nor duplicitous, and is in all respects sufficient.

Our statute expressly prohibits playing cards in a public place, and expressly names taverns and inns as public houses which come within the inhibition. Pen. Code, art. 355. But it is provided by article 356 of the Penal Code that "a private room in an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming."

It is abundantly established in this case that the playing was done in an inn or tavern, but the contention is that it was done in a "private room," and that the private room in which it took place was not "commonly used for gaming," and that consequently no offense was committed. We may concede that the prosecution failed to show that the room was commonly used for gaming. The evidence was that the card-playing was in bedrooms—guest-rooms—in the tavern or inn. Defendant, and others with him, would go, with permission of the proprietor, into such rooms, when not occupied by guests, close the door of the room, and the general public were not thereafter admitted, and only those engaged in the game occupied the room for the time the game lasted. The parties so using the room for a game paid the clerk of the house for the use of the room.

Mr. Bishop says: "An inn, tavern, or hotel is a place for the general entertainment of all travelers and strangers who apply, paying suitable compensation." Bish. St. Cr. (2d Ed.) § 297. Mr. Webster defines "inn" as "a place of shelter; habitation; residence; abode; a house for the lodging and entertainment of travelers; a tavern." He defines "tavern" as a "public house, where entertainment and accommodation for travelers and other guests are provided." In his definition of the word "guest," in so far as applicable to this case, it is "a lodger at a hotel," and a "lodger" is defined to be "one who lives at board or in a hired room." "Lodging" is "a place of rest for a night, or a residence for a time,—a temporary habitation."

To make a guest-room in a hotel—that is, one appropriated to public use as such—a private room, it must have been taken by a guest or lodger, seeking rest for a night or day, or a residence for a time, or one desiring to use it for a temporary habitation,—that is, a "place of abode." Until so appropriated by a "guest," it is a part of the public house known as "tavern or inn." The term "public place," as used in our gaming statutes, does not mean a place solely devoted to the public as distinguished from private. *Parker v. State*, 26 Tex. 207. A house may be said to be a public house, either in respect to its proprietorship or its occupancy and uses. *Shihagan v. State*, 9 Tex. 430; *Lockhart v. State*, 10 Tex. 275. And so a guest-room in a hotel is a part of the public hotel or tavern, in that it is for the use of the public business of

the house in the entertainment of its guests, and only becomes private after it is appropriated by a guest.

In the case in hand, the evidence, we think, most clearly shows that the room played in was in a tavern; that the parties playing in it only occupied it temporarily, for the purpose of gaming, and for no other purpose; that they did not seek it as a place of habitation, residence, or rest; that, in so far as the room was concerned, they could not be considered as guests of the hotel, who had acquired the use and appropriated it for the usual and ordinary purposes of guests; and that consequently it was not a private room. This may be said with special emphasis, so far as this defendant is concerned, because the facts show that he was a guest of the hotel, having an extensive suite of rooms in another part of the building, where he resided with his family, and where, for aught that appears, he might have played cards whenever he desired without resorting to unoccupied guest-rooms in other portions of the building.

No special exceptions were made and reserved by defendant to the charge of the court as given to the jury, and no special instructions were requested for defendant. This being so, and the case being a misdemeanor, the rule is that, even if errors in it should be apparent, unless they are of a fundamental character, they will not be revised by this court. *Haynes v. State*, 2 Tex. App. 84; *Veal v. State*, 8 Tex. App. 475. We have found no reversible error in the record on this appeal, and the judgment is affirmed.

WOODS v. STATE.

(Court of Appeals of Texas. November 28, 1888.)

1. CRIMINAL LAW—PLEA IN ABATEMENT—INCOMPETENCY OF GRAND JUROR.

The evidence taken in support of a plea in abatement, that one of the grand jurors was incompetent because he had been convicted of felony, did not show affirmatively that the offense for which the juror was convicted was a felony. *Held*, that the plea was properly overruled, even if the statute authorizes a plea in abatement for such cause.

2. WITNESS—COMPETENCY—CONVICTED FELON.

The offense of willfully driving stock from its accustomed range, with intent to defraud, is a felony; and where a defendant is found guilty, and fined for such offense, and takes no appeal, he is a convicted felon, and incompetent to testify, although no formal sentence has been passed upon him. *HURT, J., dissenting.*

3. SAME—PRINCIPAL OFFENDER.

A principal offender in the same crime with the defendant on trial, although indicted separately, is not a competent witness, unless he has been acquitted. *Code Crim. Proc. Tex. art. 731.*

4. LARCENY—OWNERSHIP OF PROPERTY—INSTRUCTIONS.

An indictment for larceny connected A., B., and C. with the ownership and possession of the property, two of whom were special owners. The court charged that the jury should convict if they believed, etc., that the taking was without the consent of A., B., or C., "or either of them." *Held* error, as authorizing conviction if any one of the three failed to consent.

Appeal from district court, Williamson county; J. C. TOWNES, Judge.

Defendant, Bud Woods, was convicted of the larceny of a horse, and he appeals. The indictment alleged that the horse was the property of one Robinson, but had been estrayed by one Ash, who placed it in the possession of one Clifton, to be held for Ash and the owner, and that it was taken from the possession of Clifton.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. Appellant interposed a plea in abatement of the indictment, upon the alleged disqualification and incompetency of one of the grand jurors who presented the bill; the ground of disqualification and incompetency being that he had, before sitting on said jury, been convicted of a felony, (*Code Crim. Proc. art. 353, subd. 5*.) and had not been restored to competency by pardon or otherwise.

Our statute provides that "any person, before the grand jury have been impaneled, may challenge the array of jurors, or any person presented as a grand juror, and in no other way shall objections to the qualifications and legality of the grand jury be heard." Code Crim. Proc. art. 377.

Just after the adoption of our Code of Criminal Procedure, our supreme court, in the case of *State v. Vahl*, 20 Tex. 779, held, in effect, that the provision above quoted abrogated the common-law right, or the right theretofore existing, to attack the indictment on objection to the competency of the grand jurors by plea in abatement, and that the objections to such jurors could only be taken by challenge at the time of the organization of that body.

In *Hudson v. State*, 40 Tex. 12, it was held that the objection that the grand jury was not legally constituted could not be availed of by motion in arrest of judgment, and it was further said in that case that "a challenge is not simply one mode of reaching the objection, but the statute declares, in express terms, that the objection shall be made in no other way."

In *Owens v. State*, 25 Tex. App. 552, 8 S. W. Rep. 658, where a similar question to the one now before us was raised, we said: "A plea in abatement to an indictment is not, technically speaking, provided for in our Code of Criminal Procedure. There are two grounds, and only two, mentioned in our Code, as sufficient on motion to set aside an indictment. Code Crim. Proc. art. 523. Independently of these two grounds, jeopardy and want of jurisdiction are the only other grounds known by which to avoid and vacate an indictment after its presentment."

Appellant's counsel contends and insists that the question he raises is necessarily a jurisdictional one, because, if it should appear on proofs of his plea that the juror was incompetent, then there were in fact only 11 grand jurors organized legally; and that, the indictment being found by a less number of grand jurors than are required by the constitution and laws, such indictment was a nullity, and would not support jurisdiction for trial and conviction. *Lott v. State*, 18 Tex. App. 627; *Smith v. State*, 19 Tex. App. 95. Suppose we concede the correctness of this position, then, as to this particular case, did the court err in overruling the plea in abatement, if treated as one to the jurisdiction? We think not. The defendant's bill of exceptions, taken to the ruling of the court, sets out all of the evidence adduced in support of the plea, but does not set forth the indictment upon which the grand juror had been tried, and there is no positive proof that he was tried and convicted of a felony; and such fact, if a fact, is not made to appear clearly, but, if shown at all, is only made to appear very dimly and inferentially. Neither the verdict nor judgment of conviction shows affirmatively that the grand juror had been tried and convicted of a felony. The plea was not supported by the evidence, and it was not error to overrule it, even if such a plea could have been interposed.

Instead of a plea in abatement, it occurs to us that defendant might, perhaps properly, under the facts contended for, have moved to set aside the indictment in this case for the reason that "a person not authorized by law was present when the grand jury were deliberating upon the accusation against the defendant, or were voting upon the same." This ground for setting aside an indictment is specially provided for by subdivision 2 of article 523 of the Code of Criminal Procedure, and under it defendant might have presented the question raised; because, if the proposed juror was a convicted felon, he would be a person unauthorized and incompetent to be in the grand jury room while they were deliberating and voting upon the finding of bills.

One Mitch Adams had been indicted by separate indictment for the theft of the same animal charged to have been stolen by defendant in this case. He had been tried and convicted of willfully and fraudulently driving said horse from its accustomed range without the consent of the owner, and with intent to defraud the owner, and had been fined in the sum of \$750. Defendant

offered to introduce Adams as a witness in his behalf, and the state objected to his competency, because (1) he was a convicted felon; and (2) because he had not paid the fine assessed against him. The objections were sustained, and the witness was not permitted to testify.

It has been held by this court that willfully driving stock from its accustomed range, with intent to defraud, etc., whether the punishment be imprisonment in the penitentiary or the alternative one of fine, was a felony. Pen. Code, arts. 54, 749; *Campbell v. State*, 22 Tex. App. 262, 2 S. W. Rep. 825; *Guest's Case*, 24 Tex. App. 530, 7 S. W. Rep. 242; *Taylor's Case*, 25 Tex. App. 96, 7 S. W. Rep. 861. It is true, however, that ordinarily a party, under our present statutes, cannot be held to have been finally convicted of a felony until sentence has been passed upon him. Code Crim. Proc. arts. 793, 794; *Arcia's Case*, (this term,) 9 S. W. Rep. 685. In this case, however, it was not necessary, perhaps, to pass sentence upon the defendant, inasmuch as his punishment was a pecuniary fine only. Code Crim. Proc. art. 792. Under such circumstances, the court did not err in holding him incompetent by virtue of the judgment alone,—it being for a felony,—though no sentence had been pronounced. Adams had not appealed from said judgment, and our Code declares that "an accused person is termed a 'convict' after final condemnation by the highest court of resort which by law has jurisdiction of his case, and to which he may have thought proper to appeal." Pen. Code, art. 27. The judgment rendered against him contains all the requisites of a statutory judgment. Code Crim. Proc. art. 791. But the witness Adams was a principal offender in the same crime with the defendant, though indicted separately, and, unless he had been acquitted, he was not a competent witness for his confederate or co-principal. Code Crim. Proc. art. 731. On this ground the court did not err in excluding him as a witness.

We are of opinion that fundamental error was committed by the court in its charge to the jury, and that for this reason, if for no other, the judgment should be reversed. In the indictment Robertson, Ash, and Clifton were all connected, by allegation, with the ownership and possession of the animal charged to have been stolen. It alleged, properly, that the animal was taken "without the consent of the said Clifton, or the said Ash, or the said Robertson, or either of them." This was altogether proper and necessary in order to negative the consent of each and all the parties deprived of the ownership and possession. But the court, in the charge to the jury, instructed them that, if they believed beyond a reasonable doubt, etc., "that said taking (if any) was without the consent of the said Robertson or Ash or Clifton, or either of them, * * * then you will find him guilty," etc. This is manifestly erroneous. It was tantamount to charging them that they might convict, if any one of the parties had not consented, though the defendant might have had the consent of the other two; in other words, that the general and actual owner of the property might have given consent to defendant's taking, and yet he would nevertheless be guilty of the theft if either of the special owners had not given their consent. For this error in the charge of the court the judgment must be reversed, and the cause remanded.

HURT, J., (*dissenting*.) I think the witness Adams was incompetent because indicted and convicted for the same offense, but do not believe his conviction was for a felony, and that thereby he was rendered incompetent. I concur in the opinion that the judgment should be reversed for the reason stated.

ARISPE v. STATE.

*(Court of Appeals of Texas. December 19, 1888.)***1. LARCENY—POSSESSION OF STOLEN PROPERTY—EXPLANATIONS.**

Evidence that defendant was found with others in possession of the stolen horses the next morning, when immediately explained by his statement that one of the other accused persons loaned him the horse, saying that it was his own, which is not disproved, but is corroborated by proof of admissions of the person stated to have loaned the horse, made while defendant had the horse, and before the arrest, will not support a conviction for larceny, in the absence of other inculpatory proof.¹

2. SAME—INSTRUCTIONS.

In such case, after instructing the jury that if a reasonable account of his possession of the horse, consistent with his innocence, was given by defendant when first charged with the theft, the burden was upon the state to show the falsity of the explanation, it is error to add that, if defendant did not reasonably account for his possession of the horse when so accused, the jury should find him guilty.

Appeal from district court, Webb county; J. C. RUSSELL, Judge.

Tomas Arispe was indicted for the larceny of horses. He, with Rosalio Martinez and Trinidad Buetran, were arrested together the morning after the theft, in possession of the horses. Buetran, in addition to the facts stated in the opinion, testified on the trial that Martinez loaned defendant the saddle he was using, and that Martinez told him before the arrest that he loaned defendant the horse he was riding. Verdict of guilty, and judgment thereon. Defendant appeals.

Asst. Atty. Gen. Davidson, for the State. *Coopwood & Son*, for appellant.

HURT, J. This conviction was for the theft of a horse, the alleged property of Luis Telles. The assistant attorney general has confessed error in the case.

When found in possession of the horse in question, defendant and two other persons were present, and near by were four horses grazing. Trinidad Buetran, Rosalio Martinez, and appellant comprised the party supposed to be in possession of the horses. When the officer and *posse* rode up, they were asleep on the ground. The prosecutor states: "Defendant gave an account of his possession of the horse. He said that Rosalio Martinez loaned him the brown horse, which he, defendant, had been riding, and that the others were in the possession of Rosalio. Rosalio was present when defendant said this and remained silent. We arrested Rosalio as a thief. Defendant said that he was innocent of the affair." Witness N. Martinez stated: "When we arrested them defendant was lying down. He got up and shook hands with me. He did not attempt to escape. I took him aside, and told him to tell me who had the horses, and he told me that Rosalio Martinez was the one who had the horses; that he claimed to be the owner of the horses, and that he (defendant) was innocent of the affair, and asked me to let him go."

That Martinez loaned the horse to defendant was not only alleged by him when first found near the horses, but this fact was strongly corroborated by the testimony of Trinidad Buetran, who was one of the parties found near the horses, and arrested with defendant and Martinez. Indeed, there is no inculpatory fact against defendant that is not explained by his statements made when first charged directly with the offense; and, instead of the other facts showing his explanation to be false, they very strongly corroborate his statement. By his explanation, and the testimony of Trinidad Buetran, every fact of apparent guilt is made to consist with his innocence. We therefore conclude that the verdict is against the evidence.

Appellant, when first called upon, having given a reasonable explanation

¹ As to the presumption of guilt arising from the possession of recently stolen property, see *Brooken v. State*, (Tex.) 9 S. W. Rep. 735, and cases cited; *State v. Espinozel*, (Nev.) 19 Pac. Rep. 677, and cases cited.

of his connection with the stolen property, it was necessary for the court to instruct the jury upon this subject. This was done by giving the following charge: "If you believe from the evidence that the animal in question had been recently stolen, and defendant was found in possession of the same, and when his right to the possession of the said animal was first challenged he gave a reasonable account thereof, consistent with his innocence, it devolves upon the state to show that it is untrue." This may be correct, but the charge proceeds upon this subject as follows: "If, however, when his possession was first challenged he failed to reasonably and satisfactorily account for his possession thereof, you will find him guilty as charged in the indictment." This is unquestionably erroneous; it is not the law. The accused may fail to explain his possession, but certainly he would have the right to prove it innocent, though he made no explanation when first called on for one, or whether he ever attempted to make one. Besides, this charge was upon the weight of evidence.

Because of the error in the charge, and because the evidence does not warrant the conviction, the judgment is reversed, and the cause remanded.

BROWN v. STATE.

(Court of Appeals of Texas. December 12, 1883.)

INSURANCE—UNLAWFULLY ACTING AS AGENT—INFORMATION.

Under act Tex. July 9, 1879, prohibiting any person from acting as agent of an insurance company which has not complied with the laws of that state, an information charging that defendant did "solicit insurance on behalf of the Kentucky Mutual Security Fund Company of Louisville, Ky.," and transmit "an application for insurance from said company," etc., is insufficient on motion in arrest of judgment, in not alleging that the company named was an insurance company.

Appeal from county court, Smith county; B. B. BEAIRD, Judge.

Information against W. E. Brown for unlawfully acting as agent of an insurance company, under act Tex. July 9, 1879, §§ 1, 2, which provide that any person who solicits insurance on behalf of any insurance company, whether incorporated under the laws of this or any other state or foreign government, or who takes or transmits other than for himself any application for insurance, or any policy of insurance to or from such company, etc., without such company having first complied with the requirements of the laws of this state, or having received the certificate of authority from the commissioner of insurance of the state, as required by law, shall be guilty of a misdemeanor.

J. M. Duncan, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. In the information it is charged that the defendant did "on or about the 1st day of January, 1888, in the county of Smith and state of Texas, solicit insurance on behalf of the Kentucky Mutual Security Fund Company of Louisville, Ky., and did then and there take and transmit for H. P. Smith an application for insurance from said company, and did then and there receive and collect from H. P. Smith the premium upon said policy; and that the said W. E. Brown was not then and there a citizen of this state, who arbitrated in the adjustment of losses between the insurers and the assured, nor to the adjustment of particular and general average losses of vessels and cargoes by marine adjusters who had paid an occupation tax of \$200 for the year in which the adjustment was made; and the said W. E. Brown was not then and there a practicing attorney at law in the state of Texas, acting in the regular transaction of his business as such attorney at law, and who was not a local agent and acting as adjuster for any insurance company; and that said company had not complied with the requirements of the laws of the state of Texas, and had not received a certificate of authority from the commis-

sioner of insurance, statistics, and history of the state of Texas, as required by law."

It is evident that the information was drawn under the act of July 9, 1879, defining who are insurance agents, and prescribing punishment for acting as such agents unlawfully, (Willson, Crim. St. §§ 642, 648;) and it was for the offense denounced by that act that the defendant was convicted. A motion in arrest of judgment was made by the defendant, and was overruled by the court. The special ground of the motion in arrest is that the information is insufficient because it does not aver that the "Kentucky Mutual Security Fund Company," of which the defendant is charged as acting as agent, was then and there an insurance company.

There is no express averment in the information that said company was an insurance company. Is such averment essential? We are of the opinion that it is, in an information or indictment framed under the act referred to. Under that act it is not an offense to act as agent for any other than an insurance company. A careful reading of the act will make manifest the correctness of this conclusion. If this prosecution was under the act of 1875, (Pen. Code, art. 387,) it might not be necessary to allege more than that the defendant did transact the business of life, fire, or marine insurance in this state as agent, stating the acts which he performed, and the name of the company for which he acted. But that article, and the statute under which this conviction was had, are materially different, and cannot be construed as one statute. They prescribe different penalties, and different elements, and cannot be regarded as embracing but one and the same offense.

In all other particulars than the one mentioned the information is sufficient, (*Smith v. State*, 18 Tex. App. 69;) and it would perhaps be sufficient in this particular if we could be permitted to indulge in inference. From the statements in the information it might be inferred that the company named was an insurance company. But inferences and intendments cannot be indulged in testing the sufficiency of an indictment or information. The facts which constitute the offense must be directly and explicitly averred, and this rule is imperative, and not to be disregarded. Everything should be stated in an indictment or information which it is necessary to prove. Code Crim. Proc. art. 421. In a prosecution for this offense it would certainly be necessary to prove that the defendant acted as agent for an insurance company, and yet it is not alleged that he did so act for an insurance company, but merely that he acted for the Kentucky Mutual Security Fund Company, which may or may not have been an insurance company. *Kerry v. State*, 17 Tex. App. 178; *Pierce v. State*, Id. 232.

Because, in our opinion, the information and the complaint upon which the same is based are substantially defective, the judgment is reversed, and the prosecution is dismissed.

LANGHAM v. STATE.

(Court of Appeals of Texas. December 12, 1888.)

LARCENY—OWNERSHIP OF PROPERTY—DESCRIPTION.

On conviction for theft under an indictment alleging that the article stolen was the property of some person to the grand jurors unknown, a new trial will be granted where it does not appear that reasonable diligence was used to discover the name of the owner, and the defendant offers newly-discovered evidence corroborative of the evidence of ownership given on the trial.

Appeal from district court, Limestone county; S. R. FROST, Judge.

Indictment for theft of a colt. A witness for the state testified that on the day alleged in the indictment defendant requested him to go with him to hunt for a horse; that they found the horse and the colt described in the indictment together, and that defendant said he bought the colt for \$35; that they drove the animals to witness' house, and while there defendant told witness' half

brother, who also corroborated witness in this statement, that he had "hooked" the colt from a man who hooked it below the town of Groesbeck, and that he might as well have it as that man. Two other witnesses saw defendant hunting the colt, and he told them that he got it by trade. None of the state's witnesses knew who owned the colt. S. Pursley testified for the defense that he owned the colt, and that he told one D. Hankins to look out for it, and bring it back to him. Hankins testified that he did so, and that defendant told him there was such a colt on his premises, and he requested him to take it up and keep it for him, and that a few days afterwards he got it from defendant, and took it to Pursley. There was evidence that the character of defendant for honesty was good, and that the reputation of S. Pursley and D. Hankins for veracity was bad. Defendant moved for a new trial on the ground of newly-discovered evidence, in that E. Hankins and one Crouch would testify that they heard S. Pursley tell D. Hankins to look out for and bring him the colt described, and that B. Pursley would testify that the colt described in the indictment was the property of his brother S. Pursley.

Kimbell & Kimbell, for appellant. *Asst. At'y. Gen. Davidson*, for the State.

WHITE, P. J. Appellant was tried and convicted upon an indictment for the theft of a colt, the property of some person to the grand jurors unknown. At the trial the evidence showed that the colt was the property of one Pursley. There is no effort to show what, if any, diligence was used by the grand jury to discover the owner before finding and returning the bill of indictment. "It is a well-settled rule that, when the grand jury could have ascertained the name of the owner of stolen property by the use of reasonable diligence, it is their duty to do so, and, failing in this duty, a new trial should be granted." *Atkinson v. State*, 19 Tex. App. 462, citing *Jorusco v. State*, 6 Tex. App. 238; *Williamson v. State*, 13 Tex. App. 514; *Brewer v. State*, 18 Tex. App. 456.

Sell Pursley testified that he owned the colt; that it got away from the range, and he told Dave Hankins to hunt and get it up for him; that Hankins did bring it back to his (witness') house; and that the colt is now at his place. Hankins testified that he told defendant, Langham, to take the colt up, and keep it until he (witness) could come and get it; and that he got the colt from defendant, and took it to Sell Pursley. Unless both Pursley and Hankins swore falsely, there is no question as to the identity of the animal. Defendant may have lied or joked about his having "hooked" the animal. He proved a good character for honesty. In the light of this evidence, we do not think the conviction should be permitted to stand. In view of it, we are clearly of opinion the court should have granted a new trial for the newly-discovered evidence. The judgment is reversed, and the cause is remanded.

Ex parte JONES.

(Court of Appeals of Texas. December 19, 1888.)

BAIL—WHEN ALLOWED—INDICTMENT FOR MURDER.

Relator was arrested for the murder of a locomotive engineer, effected by wedging slats torn from a cattle-guard on the track. The track was intact an hour and three-quarters before the disaster. Relator lived half a mile from the cattle-guard, and tracks corresponding with his were found near the guard, and followed in the direction of his house. Relator had made threats against the railroad company on account of its rejection of a claim for a colt killed on the track. Former unsuccessful attempts to wreck trains at that point were shown, relator having been seen near by when one of them was discovered. Relator, some two hours before the disaster, was seen going towards the track, though not directly towards the cattle-guard. A woman testified that relator had asked her to testify that she spent that night with him at his house. Another witness testified that relator had asked him to write a note for the railroad authorities to the effect that the criminal had left the country; also that before the disaster relator had found a bull of witness' dead near the track, and had proposed to break its legs, so as to found a claim against

the railroad. Relator attempted to prove an *alibi*, but the evidence was conflicting and unsatisfactory. *Held*, not such proof evident as would justify the refusal of bail.

Appeal from district court, McLennan county; E. WILLIAMS, Judge.

A train of the Houston & Texas Central Railway was wrecked by obstructions placed upon the track near the town of Ross, in McLennan county, Tex., on the evening of August 7, 1888, at (as well as the record can be deciphered) 52 minutes past 8 o'clock. The result of the said wreck was the killing of G. R. Moses, the engineer, by the locomotive. The relator, James Jones, was charged with having placed the obstructions on the track, and, by indictment, with the murder of the said Moses. On the evidence adduced this court reverses the ruling of the lower court, and awards bail in the sum of \$2,500.

Stated briefly, the state proved that the train was wrecked, and Moses killed, by the wedging on the track by some person of slats torn from a "cattle-guard." The conductor of the train which last passed the cattle-guard before the wreck testified that the said guard was intact at 45 minutes past 5 o'clock; and a state's witness, who passed it at 10 minutes past 7 o'clock, testified that it was then intact. The defendant, a negro, lived in Battle's field, between 700 and 800 yards from the cattle-guard. The tracks of a man, which tracks corresponded in size and appearance with the defendant's shoes, were found near the cattle-guard, and followed 200 yards in the direction of the defendant's house. Those tracks were not found going to the cattle-guard. It was proved that some months prior to the wreck a three-weeks-old colt of the defendant was killed by the railway, and that the defendant filed with the stock agent of the company a claim of \$100 for a two-year-old colt, 17 hands high, and refused to accept as compensation the sum of \$30, offered by the company, and afterwards said that "before the company got through with him they would wish they had paid him." One of the state's witnesses, a detective, testified that evidence gathered by him showed that as many as five unsuccessful attempts had been made to wreck the train at the same point, before the fatal August 7th. Another state witness, who lived near the scene of the disaster, testified that in the preceding July he found a railroad tie wedged on the track, near the cattle-guard, and about the same time saw the defendant in Battle's field, squatting behind a bush, as if answering a call of nature. He removed that tie, throwing it at least 10 feet from the track. Returning later on the same day, he found that the same tie had been replaced on the track, and he again removed it. Another witness testified that while in the vicinity of the cattle-guard, between 6 and 7 o'clock on the fatal evening, he saw the defendant going towards the railroad track, through Battle's field, but not directly towards the cattle-guard near which the wreck occurred. Another witness testified that on August 5th, two days before the wreck, he saw removed from the track two ties that had been placed on it as obstruction. One Lou Clayton, a female, testified for the state that she spent the fatal night sick in bed at Ed Oliver's house. After the tragedy the defendant requested her to testify in his behalf that she spent that night with him at his house, which witness declined to do. A defense witness stated on cross-examination that some time after the wreck, and before his arrest, the defendant requested him to write for him a note to the railroad authorities to the effect that "the man who wrecked the train is not here now, but has left the country." He explained to the witness that he proposed to drop that note on the track, and thus induce the railroad men not to molest him. The witness refused to write the note. The same witness testified that the defendant, five or six months before the wreck, told him of finding the dead body of one of his (witness') bulls, which he said he thought the railroad killed, although the body was not on the track nor the dump, and he proposed to take an ax and break the dead animal's legs, to evidence a killing by the railroad, and thus enable the witness to make a claim for damages.

The defense relied upon was an *alibi*. Three or four witnesses located the defendant at Battle's house, 1,000 or 1,200 yards distant from the cattle-guard, from early in the evening until a short time before the wreck. Their testimony was purely speculative, and conflicting as to whether or not the defendant had time, after he left Battle's house on that evening, to go to his house, and thence to the guard, and place the obstructions, by the time the wreck occurred. The time testified to by these witnesses was only estimated. These witnesses, who found defendant at his house as soon as they could reach it, after the wreck, doubted that defendant could have gone to the guard since he left Battle's house, placed the obstructions, and returned to his house, and gone to sleep, as he appeared to have done. They estimated the lapse of time to have been about 25 minutes. Experts testified that an ordinary traveler could make the trip within 15 minutes. The defendant's mistress testified that defendant came direct to his house from Battle's house, and did not leave home afterwards. She also testified that Lou Clayton spent that night at defendant's house, and was there when defendant arrived. She was contradicted by three witnesses, who testified that Lou Clayton spent that night in a sick-bed at Ed Oliver's house.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. After his indictment for the murder of G. R. Moses, and arrest thereunder, appellant sued out a writ of *habeas corpus* for bail, and, the same coming on for hearing before the Hon. EUGENE WILLIAMS, district judge, bail was refused him. From that judgment this appeal is here taken.

We have given the evidence, as shown in the record, a most careful consideration, and in our opinion appellant is entitled to bail. Wherefore the judgment is reversed, and appellant will be released from custody upon his execution of a bond with good and sufficient security, conditioned as the law directs, in the sum of \$2,500, for his appearance to answer to said indictment for murder. The judgment is reversed, and appellant admitted to bail in the sum of \$2,500.

SIMMONS v. STATE.

(Court of Appeals of Texas. December 5, 1888.)

CRIMINAL LAW—NEW TRIAL—ABSENT WITNESSES.

On conviction for perjury in testifying to an act of sexual intercourse with the prosecuting witness, she being the only witness who testified to the falsity of the statements, and being only circumstantially corroborated by evidence going to show that defendant could not have been at her house at the time he testified, and that, after giving his testimony, he forthwith left the county, a new trial should be granted to obtain evidence which would explain his reasons for leaving the county, and circumstantially corroborate his statements of his whereabouts at the time in question, while explaining the strongest corroborating testimony for the prosecution, although a continuance to obtain the same testimony was properly denied on account of defendant's lack of diligence.

Appeal from district court, McLennan county; E. WILLIAMS, Judge.

Indictment of R. L. Simmons for perjury. Defendant was convicted, and appealed from an order refusing a new trial.

Nettie H. Simmons sued her husband, N. C. Simmons, (the father of this appellant by a former wife,) for divorce. In his cross-action for divorce, the respondent, N. C. Simmons, alleged an act of adultery on the part of N. H. Simmons with this appellant; and on the divorce trial, the defendant, as a witness for the respondent, testified that he went to the house of N. H. Simmons on the evening of September 9, 1887, arriving at that house a little before sundown, and finding no person at the said house but Mrs. Simmons; that within a short while after his arrival Mrs. Simmons invited him into her peach orchard, and there requested him to act the part of a husband to her; that he consented, she laid down on the ground, and he had carnal inter-

course with her; that he went to Mrs. Simmons' house by the direct or main road from Bruceville, and that the carnal act occurred about sundown. This testimony is the perjury assigned against the appellant.

On this trial Mrs. Simmons testified that the said testimony of the defendant on the divorce trial was absolutely false; that the defendant was not on her premises on the said September 9, 1887, nor for a week or 10 days before that time; that the daughter of Mrs. Abernathy, who lived on the main road between her house and Bruceville, spent the larger part of the day of the said September 9th at her house; and that Mrs. Whaley and Mrs. Leavett came to her house early on the morning of the said day, and left it at sundown, and returned to Bruceville by the main road, over which the defendant testified that he came to the house, and that, as the said ladies were leaving the house, N. C. Simmons, her then husband, was seen in the distance, coming to the house, where he arrived within a very few minutes. The corroborating witnesses were Mrs. Abernathy, Mrs. Whaley, and Mrs. Leavett, the theory of the state being that if defendant went to Mrs. Simmons' house by the main road, as he testified, he must necessarily have passed Mrs. Abernathy's house; and that, if he reached Mrs. Simmons' house, and joined her before sundown, as he testified, he must have done so while Mrs. Whaley and Mrs. Leavett were there.

Mrs. Abernathy testified that neither the defendant nor any other man passed her house on the main road going towards Mrs. Simmons' house from the direction of Bruceville, at any time on the said September 9th. She saw a man, whom she took to be N. C. Simmons, driving a wagon towards Mrs. Simmons' house from another direction than Bruceville; and about the same time—it then being a little after sundown—Mrs. Leavett and Mrs. Whaley passed her house in a buggy, traveling the main road towards Bruceville.

Mrs. Whaley, corroborated by Mrs. Leavett, testified that she and Mrs. Leavett spent the day with Mrs. Simmons, and left the house about or a little after sundown; that they traveled the main road, via Mrs. Abernathy's, to Bruceville, and that they did not meet the defendant nor any other person *en route*, and that she did not see the defendant on that day. These and other witnesses testified that Mrs. Simmons' reputation for chastity was good.

The state proved that the defendant disappeared from McLennan county immediately after he had testified in the divorce case, and was arrested subsequently in a distant county. The state also proved that the "main road" from Mrs. Simmons' place to Bruceville was the road through her field, via Mrs. Abernathy's house, to its confluence, near the corner of Bruce's field, with the Bruceville and Mooresville road, and thence to Bruceville over said road. It was shown by both the state and the defense that a person could travel the Bruceville road and get to Mrs. Simmons' house without going by Mrs. Abernathy's house. To do so such person would pass beyond the point near Bruce's corner where the Bruceville road was intercepted by the road through Mrs. Simmons' field to a certain spring, a quarter of a mile distant, and thence across a small prairie to the lot at the rear of Mrs. Simmons' house, that route being three-quarters of a mile longer than the "main road."

N. C. Simmons testified, for the defense, that he left home (the house of Mrs. Simmons) on the morning of September 9th. He went to Eddy, three miles and a half distant, in a two-horse wagon, taking with him a load of lint cotton to be ginned. He remained in Eddy all day. About sundown he bought two bottles of beer in Whaley's saloon in Eddy, and about dark left Eddy, with a bale of cotton, and the seed therefrom, in his wagon. He got home after night, and found the defendant there. Defendant told him that he came from Lorena, and that he met Joe Lockard at the spring on the Bruceville and Mooresville road. Defendant left the house next morning. Witness was under indictment for subornation of perjury in the divorce suit. Orr, the proprietor of the gin in Eddy, testified that N. C. Simmons got a bale

of cotton ginned by him on September 8th or 9th, and left Eddy with it about sundown, going towards his home. Witness was not positive whether that was September 8th or 9th, but to his best knowledge it was the 8th. Bob Whaley testified that N. C. Simmons was in his saloon in Eddy, and bought two bottles of beer, about sundown on September 8th or 9th. He then had a bale of cotton in his wagon. He went off towards his then home.

George Lawrey testified for the defense that the defendant spent the night of September 8th with him, and all of the 9th, until near sundown, when he left Bruceville, saying that he was going to Mrs. Simmons' house, to stay all night. He rode off on horseback towards Mrs. Simmons' house. Defendant came from Carter's house, in Dallas county, to testify on the divorce trial, leaving his saddle and horse with Carter, for whom he was then at work.

Joe Lockard testified for the defense that one evening early in September, 1887,—a few days before he heard of the trouble between Mr. and Mrs. Simmons,—he met the defendant at the spring on the Bruceville road, mentioned by the previous witnesses. It was then about sundown. Defendant said that he was going to Mrs. Simmons' house to spend the night, and rode off across a small prairie in that direction.

This trial was had on May 11 and 12, 1888. The diligence and the substance of the absent testimony disclosed in the application for continuance was as follows:

Defendant showed in his motion for a continuance that on the 7th day of April, 1888, he secured an attachment for Ernest Cox, of Webb county, Tex., returnable on the 10th day of May, 1888. That said attachment was returned from Webb county unexecuted. Defendant in said motion showed that the said Ernest Cox would testify that on the evening of the said 9th day of September, 1887, he (the said Ernest Cox) met appellant in the vicinity of the residence of Mrs. Nettie Hough Simmons, near night, and that affiant was going towards said residence, and told witness that he was going to said residence for some cattle, and would remain there all night. Defendant also showed in said motion that on the 7th day of April, 1888, he secured an attachment for Finley Nelson, of Parker county, Tex. That said last-named attachment was duly forwarded to the sheriff of Parker county, Tex., and was returned without any execution, or any reason for a failure to execute, noted upon the process. Defendant set forth in said motion that he expected to prove by said Finley Nelson that he (witness) met N. C. Simmons after dark on the 9th day of September, 1887, and that the said N. C. Simmons was then coming from the direction of Eddy, and going towards the Mrs. Nettie Hough Simmons place. An attachment was sent to Dallas county for the witness Carter, but had never been returned. Defendant expected to prove by Carter that he was in Carter's employ in Dallas county, and went from his house to Waco to testify on the trial of the divorce case, leaving his saddle and horse in the care of Carter, and that immediately after the said trial he returned to Carter's house, and remained in his employ as long as Carter had any work for him to do.

Pearce & Boynton, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. We are of the opinion that the testimony of the absent witnesses, as set forth in the application for continuance, is, in view of the evidence adduced on the trial, both material and probably true. It would tend strongly to destroy the force of the circumstantial testimony adduced by the state in corroboration of the testimony of Mrs. Hough, who was the only witness that testified to the falsity of the statements of defendant upon which perjury is assigned. Carter's testimony would explain, at least tend to explain, why defendant left McLennan county soon after testifying in the divorce suit, and tend to show that defendant had not fled from McLennan county to escape this prosecution. The testimony of the other two witnesses

would tend to contradict and disprove the theory of the state that the defendant was not at Mrs. Hough's house, or on her premises, at the time he testified he had sexual intercourse with her, and would tend to explain the most potent—in fact, the only—evidence corroborating Mrs. Hough, in a manner that might render such corroborating evidence, in the estimation of a jury, of no force or weight whatever. It is true that defendant's application for a continuance does not show legal diligence to obtain the testimony of absent witnesses, and, because it was in this respect insufficient, the court did not err in refusing to grant the continuance.

But in reviewing the matter on defendant's motion for new trial the question of diligence should have been disregarded, and the only inquiry in the mind of the court should have been, is the absent testimony material to the defendant, and is it probably true? If the evidence adduced on the trial demands an affirmative answer to such inquiry, a new trial should be granted the defendant, notwithstanding his application for a continuance was properly refused. Willson, Crim. St. § 2186; *McCline's Case*, 25 Tex. App. 247, 7 S. W. Rep. 667; *Cordway's Case*, 25 Tex. App. 405, 8 S. W. Rep. 670. Such answer is, in our opinion, demanded by the evidence, and the court erred in not granting the defendant a new trial.

We find no material error in the charge of the court, nor in any ruling or action of the court, except the one above mentioned. We shall not discuss the sufficiency of the evidence to sustain the conviction. On another trial the facts proved may differ materially from those now before us.

The judgment is reversed and remanded.

OWEN v. HOWARD INS. CO.

(Court of Appeals of Kentucky. December 4, 1888.)

1. INSURANCE—ACTION ON POLICY—SUIT IN ONE YEAR—SUNDAY.

Where an insurance policy requires suit to be brought within 12 months after a fire occurs, and the last day of such 12 months falls on Sunday, suit brought on the following Monday is in time.

2. SAME—VENUE.

An action on an insurance contract, made in the county in which the assured resides and the property is located, but in which the company, whose principal office is in another state, has no agent, may be brought in another county in which the company has a local agent; Code Ky. §§ 71, 72, providing that an action against an insurance company may be brought in the county in which its principal office is situated, or, if it arise out of a transaction with an agent, in the county in which the transaction took place, and that, except in those actions, an action against a corporation which has an office in this state must be brought in the county in which such office is situated, or such officer resides, or, if upon a contract, in the above-named county, or the county in which the contract is made or to be performed.

Appeal from court of common pleas, Jefferson county; HENRY STITES, Judge.

Action by Joseph V. Owen against the Howard Insurance Company on an insurance policy. The contract was made in Henderson county, in which plaintiff resided, and the property was located. At the time of bringing suit defendant had no agent in that county, but had a local agent in Jefferson county. Defendant appeared specially and demurred to the jurisdiction of the Jefferson court of common pleas, because Jefferson county was not the county "in which its principal office or place of business was situated," nor the "county in which the transaction" took place; its principal office being in New York. The demurrer was overruled. Sections 71 and 72 of the Code are:

"Sec. 71. * * * An action against an incorporated bank or insurance company may be brought in the county in which its principal office or place of business is situated; or, if it arise out of a transaction with an agent of such corporation, it may be brought in the county in which such transaction took place.

"Sec. 72. Except in the actions mentioned in sections * * * 71, an action against a corporation which has an office or place of business in this state, or a chief officer or agent residing in this state, must be brought in the county in which such office or place of business is situated, or in which such officer or agent resides; or, if it be upon a contract, in the above-named county, or in the county in which the contract is made or to be performed; or, if it be for a tort, in the first-named county, or the county in which the tort is committed."

A demurrer to one of the grounds of defense was overruled, and plaintiff appeals.

Bullitt & Shield and *Turner & Cunningham*, for appellant. *A. F. Willson* and *Baker, Smith & Baker*, for appellee.

BENNETT, J. The tenth clause of the policy which the appellant claims was issued to him by the appellee provides: "This company hereby limits its liability under this policy, and it is hereby expressly provided that no suit or action against this company, for the recovery of any claim by virtue of this policy, shall be sustainable in any court of law or chancery until an appraisal shall have been obtained, fixing the amount of such claim above provided, nor unless such suit or action shall be commenced within twelve months next after the fire shall have occurred; and, should any suit or action be commenced against this company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of any such claim, any statute of limitations to the contrary notwithstanding." On the 16th day of March, 1885, the appellant instituted this action in the Jefferson court of common pleas, for the purpose of recovering the amount for which the appellee, as alleged, insured his store-house situated in Corydon, Henderson county, Ky., which store-house it is alleged was destroyed by fire on the 16th of March, 1884. The appellee, as one ground of defense, relied upon the contract limitation, above set forth, of one year, as a bar to the appellant's right to maintain his action. The appellant demurred to this defense upon the ground, among others, that the last day of the year in which he was allowed to bring his suit was Sunday, which was not a secular day; and as he was allowed by the terms of the contract a whole year from the destruction of the store-house by fire in which to bring his suit, and as the last day of the year was Sunday, and as it was unlawful to bring his suit on that day, he was entitled to bring it on the day following, Monday. The demurrer was overruled, and, the appellant declining to reply, the allegations of this paragraph were taken as true, and the action was dismissed.

If the ground of demurrer above mentioned was well taken, it is needless to notice other grounds urged for sustaining the demurrer. That ground we will proceed to investigate. It is to be kept in mind that the limitation of one year, relied on by the appellee, was the result of contract, and must be fairly and equitably construed in order to effectuate the intention of the parties to it. It is clear, therefore, that it was the intention that the appellant should have 365 days—one year—in which to bring his suit, and that Sundays should be counted to make up said number of days; but that the appellant should have at least 365 days in which to make his proofs of loss, etc., and to bring his action for the recovery of the amount of the policy; that he should be as much entitled to the last day for the performance of these things as to the first day; that no laches should be imputed to him if he waited until the last of the 365 days in which to bring his suit; that it was not contemplated that he should bring his suit on Sunday, because it was not lawful for him to do so; that he should not be deprived of any one of said days in which to bring his suit, and, if the last of the 365 days fell on Sunday, he should not be compelled, in order to bring his suit at all, to bring it on Saturday,—the day preceding,—for that would deprive him of one of the 365 days in which

he, by the contract, was entitled to bring his suit; but, as the courts were not open to him on the last day, he should have the following day in which to bring his suit.

At the time of making the contract, had it occurred to the minds of the parties that the last day for bringing the suit might be a Sunday, we can imagine a conversation concerning it as follows: The appellant said to the appellee: "You are to allow me twelve months, or three hundred and sixty-five days, after the fire in which to bring suit? Yes. This is my absolute right under the contract? Yes. Suppose the last day is Sunday; I cannot bring suit on that day,—what then? Bring it on Saturday. No, by the terms of the contract you allow me three hundred and sixty-five days, and it is not fair that you should require me to lose one of these days by bringing the suit on Saturday. Why not fair? Because you, if the house should be destroyed by fire, will owe me the amount of the policy, and the debt will be as just and equitable on the last of the three hundred and sixty-five days as on the first day, and I am by this contract binding my right to sue you within said time, and it seems to me to be equitable and fair that I should have every minute of the agreed time; and if on the last day I am obstructed in my right to bring my suit, you, and not I, should lose the day. But the other Sundays in the year are to be counted, why not deduct them as well as the last one? Because they do not obstruct my right to sue. The last day, (Sunday,) by the terms of the contract, belongs to me, but I have no right to use it for the purpose of suing you. Therefore I am entitled to sue you on the following day."

So it seems that, the last day in which the appellant had the right to sue being Sunday, a fair and equitable construction of the contract would entitle him to sue on the day following. The following cases illustrate the foregoing views: *Hammond v. Insurance Co.*, 10 Gray, 307. The insured in that case contracted to pay his premium quarterly, and not later than noon of the quarter day, and a failure to do so forfeited his policy. One of the quarter days came on Sunday, and the insured died in the afternoon of that day. It was held that, as it was unlawful to transact business on Sunday, a tender of the premium on the day following was a compliance with the contract.

In *Edmundson v. Wragg*, 104 Pa. St. 501, where the right to recover usury paid was limited to six months after the payment of the usury, it was held that, the last day of the six months being Sunday, the party had the right to bring his suit on the following day.

In *Sands v. Lyon*, 18 Conn. 28, 29, where a testator devised to his son a tract of land upon condition that he paid, within a year after the testator's death, certain legacies, and the last day of the year being Sunday, it was held that a tender on the following day was sufficient to save his right to the land.

The case decided by this court (2 S. W. Rep. 900) of *Association v. Miller* does not militate against the foregoing views, but is in harmony with them. It was held in that case that a holiday appointed by the president of the United States, or by the governor of this state, was not regarded as Sunday, except for the purposes respecting the presentment for payment or the acceptance of bills of exchange, bank-checks, and promissory notes placed upon the footing of bills of exchange, and the giving of notice of the dishonor of the same. For all other purposes a holiday was a business day, if persons chose to transact business on that day; and, as the company's office was open on that day for the transaction of its business, it was Miller's duty to pay his premium on that day, the same being the last of the 30 days in which he was allowed by the contract to pay it.

Under the Code of Practice the Jefferson court of common pleas had jurisdiction of this case.

We deem it unnecessary to notice the other questions made in the case.

The judgment is reversed, with directions for further proceedings consistent with this opinion.

BRASSFIELD *et al.* v. BURGESS *et al.*

(Court of Appeals of Kentucky. December 15, 1888.)

1. JUDICIAL SALES—BOND BY PURCHASER.

The court may order a purchaser at commissioner's sale under a decree in equity to execute a bond for the price, the purchaser having been summoned to show cause why such rule should not issue, and having failed to present any excuse or defense.

2. APPEAL—REVIEW—PRESUMPTIONS.

Where on appeal from proceedings resulting in a rule made absolute, portions of the pleadings or evidence are omitted from the transcript, they will be presumed to sustain the action of the lower court.

Appeal from circuit court, Whitley county; R. BOYD, Judge.

In a suit by G. C. Brassfield and others against J. C. Burgess and others a decree directing goods to be sold was made. Lewis Adkins became a purchaser at said sale. He failed to execute bond for the purchase price. On motion of its commissioner the court awarded a rule against Adkins to show cause why he should not be compelled to execute a bond. Adkins demurred to the rule, and appeals from an order overruling his demurrer, and making the rule absolute.

R. S. Crawford, for appellant.

HOLT, J. The appellant, Lewis Adkins, purchased some goods at a commissioner's sale under a decree in equity. Failing to execute bond for the price, the lower court, upon the motion of the master commissioner, who had previously been ordered to collect the same, issued a rule against the appellant and another purchaser, upon whose part there had been a like failure, "to show cause, if any they have, or can, why they shall not execute bonds for goods purchased by them at commissioner's sale in this case." The appellant demurred to the rule as too indefinite; also upon the ground that there was no judgment or commissioner's report authorizing it, nor was the master commissioner entitled to it by virtue of any order of the court. The demurrer was overruled, and the appellant failing, as the order recites, to answer further, the rule was made absolute, and he given until 4 o'clock P. M. of that day to execute the sale bond. All this is embraced in one order, and from it this appeal has been taken. Nothing further was done by the lower court. It is true, its action upon the demurrer and in making the rule absolute is all embraced in the same order; but we must presume that between the overruling of the demurrer and the further action of the court a reasonable opportunity was afforded the appellant to plead, because the order recites his failure to do so. Moreover, it does not appear that there was any request or offer by him to do so.

Where one becomes a purchaser under a chancery decree he thereby submits himself to the jurisdiction of the court in that suit as to all matters connected with the sale, or relating to him as such purchaser. It may order him to comply with the terms of the sale by executing a bond, or by paying the money into court, according to the conditions of his purchase. This is all the court has done in this instance. It has taken no action upon any failure to comply with the order requiring the appellant to execute a sale bond. It has not even intimated that it would attempt to enforce its order by the imprisonment of the appellant, as was formerly done when one could be imprisoned for debt. Undoubtedly, if one purchase property under a decree, he is so far subject to the order of the court in the suit that in the absence of a sufficient reason his estate would be made liable for the price of whatever he has thus obtained, or in case he refuses to take the property for the difference between his bid and what it might bring upon a resale. But no such question is now presented, because the lower court has, in the absence of any excuse or defense, merely ruled the purchaser to execute bond for what he purchased.

The appellant has appealed upon a partial transcript. This he may do, but

at his peril. If upon the hearing here it appears that portions of either the pleadings or the evidence bearing upon the question have been omitted from the transcript, we must presume that if before us they would sustain the action of the lower court; and the judgment must be affirmed as upon an appeal in an ordinary action when all of the evidence is not presented, and it is not a question upon the pleadings merely. *Terrell v. Rowland*, 4 S. W. Rep. 825. In this instance, if the decree under which the sale was made, and the report of it, were a part of the transcript, it would doubtless appear to whom the sale bonds were to be executed, and the amount of the appellant's purchase.

Judgment affirmed.

CITY OF FRANKFORT v. GAINES *et al.*

(Court of Appeals of Kentucky. December 18, 1888.)

1. MUNICIPAL CORPORATIONS—TAXATION—SEPARATE BUSINESS.

Under section 18 of the city charter of Frankfort, authorizing the councilmen to tax certain property, "and any capital or other property belonging to any other corporation or citizen of any other place, employed in said city," distillers may be taxed on whisky stored in their warehouses, and owned by them, though they have paid a tax on the business of wholesale liquor merchants, carried on by them separately from the distillery; it not appearing that the whisky used in that business was removed from their warehouse, or manufactured at their distillery.

2. SAME—PROPERTY ON STORAGE.

The distillers cannot be taxed on whisky which has been sold by them, though it is still in their warehouses.

Appeal from circuit court, Franklin county; W. MONTFORT, Judge.

Action by W. A. Gaines & Co. to enjoin the taxation of certain whisky by the board of councilmen of the city of Frankfort. An injunction was perpetuated as prayed for, and defendants appeal.

George C. Drane, John L. Scott, and W. C. Herndon, for appellant. *D. W. Lindsey and Wm. Lindsay*, for appellees.

LEWIS, C. J. W. A. Gaines & Co. instituted this action to enjoin the board of councilmen of the city of Frankfort from taxing for municipal purposes any part of 27,000 barrels of whisky assessed as the property of that firm for the year 1884 at the value of \$216,000, or of 26,889 barrels assessed in the same way for the year 1885 at \$215,000, and also the marshal and collector of the city from selling their property levied on to pay such taxes; and, judgment having been rendered perpetuating the injunction as prayed for in the petition, the defendants have brought this appeal. It appears that W. A. Gaines & Co. previous to and during the years named owned and operated, within the corporate limits of Frankfort, a very large distillery, connected with and contiguous to which, as required by law of congress, are bonded warehouses for storing the whisky manufactured until the taxes due the United States government are paid.

The evidence in this case shows, however, that of the 27,000 barrels in the warehouses January 10, 1884, all except 4,502 barrels had been sold, and of the 26,889 barrels there January 10, 1885, all but 6,852 barrels had been sold. But though it appears from the evidence the purchasers of the whisky are non-residents of Frankfort, it is not shown by the assessor's book, nor does any one for the firm undertake to state, who the owners of any part of the whisky sold were at either date mentioned; and it is probable, as the warehouse receipts evidencing ownership are assignable, the fact cannot be readily ascertained.

By an act passed in 1882, the city council of Frankfort was authorized to cause all stores, groceries, and business houses within said city to be classified, and to tax each wholesale store not exceeding \$250; provided that goods in such stores so taxed, according to their class, shall not be valued and in-

cluded in the assessment of property for taxation in said city. It appears that W. A. Gaines & Co. own and occupy a store-house in a ward of the city different from the one in which are the distillery and warehouse buildings, where, as shown by the license issued to them, they carry on the business of wholesale liquor merchants; and, because a license tax of \$250 was paid by them on that business each of the years named, it is contended that the board of councilmen is precluded from collecting an *ad valorem* tax on the whisky manufactured at the distillery and stored in the adjacent bonded warehouses.

It is to us clear that in fact, as well as in contemplation of the statute, the business of wholesale liquor merchants, as carried on by the firm of W. A. Gaines & Co., is entirely distinct from that of manufacturing whisky. The evidence is that there is never at one time more than 100 barrels of whisky in the store-house, and it does not follow that any part of even that comparatively small quantity was manufactured at the distillery in Frankfort, nor would it be either practicable or lawful to remove any of it from the warehouses to the store-house before payment of the internal revenue tax, which may be delayed three years, though any or all of it may be sold without such removal. It would therefore be unreasonable and unjust to treat the payment of a license tax of \$250 on the business of wholesale liquor merchants as a full discharge of taxes due under the city charter on nearly one-quarter of a million dollars in value of whisky annually manufactured at the distillery, and shipped from the bonded warehouses to purchasers, without ever being in the store-house.

Whether the whisky in question, or any part of it, is subject to the taxation attempted to be imposed by the board of councilmen, depends upon the meaning of section 13 of the city charter, passed March 16, 1869, as follows: "That the board of councilmen shall have power to assess annually, levy and collect, a tax not exceeding two dollars and fifty cents on the one hundred dollars worth of property, exclusive of the school tax and tax authorized to pay principal and interest of the bonds of the city issued for school purposes, on all real estate within the limits of said city, and all bank stocks, bridge stocks, manufacturing stocks, or any other kind of stocks, money, notes, or bonds of cities, towns, corporations, or states, choses in action, and all personal estate of every kind, not exempt by law from execution, belonging to citizens of the city of Frankfort, and any capital or other property belonging to any other corporation or citizen of any other place employed in said city."

Counsel differ in argument about the meaning to be given to the word "employed," it being contended for appellant that it was intended to be used and understood, in its application to personal property of non-residents, as a substitute for and in the sense of "having an actual *situs*." On the other hand, it is argued it was intended to apply to capital or personal property of such persons that may be used or employed to accomplish some purpose, as contradistinguished from being stored or deposited. But it seems to us not necessary in this case to determine in what sense the word was used and intended by the legislature to be understood; for the whisky that was unsold and still the property of W. A. Gaines & Co., on the 10th day of January of the years 1884 and 1885, was clearly liable to the tax imposed, and we are unable to perceive upon what ground the lower court perpetuated the injunction as to it. The *situs* of it was in the city of Frankfort; the owners of it, or at least one member of the firm, were residents; and it was as much liable to city taxation as any other personal property within the corporate limits.

But W. A. Gaines & Co. are not responsible for taxes upon that portion which the evidence shows had been sold, and was no longer owned by the firm when it was assessed as their property, although still in their bonded warehouses. It is true this court in the case of *Com. v. Gaines*, 80 Ky. 489, held that whisky in the possession of distillers, belonging to non-residents of the state, or other persons whose names were unknown to the assessing offi-

cer, was properly assessed against the distillers having the possession. But it was so held because it was expressly provided by section 4, art. 4, and section 11, art. 5, c. 92, Gen. St., that the person owning or possessing estate taxable for state revenue should list it with the assessor, and remain bound for the tax, notwithstanding he may have sold or parted with it. There is no authority given by the city charter to the board of councilmen to authorize property to be listed by, or taxes to be collected from, any other person than the owner, much less to levy upon the property of another to pay taxes due from such owner; and as all the power in reference to taxation for municipal purposes which the board of councilmen possesses is to be found in the city charter, and not elsewhere, it seems to us the right to assess the whisky in question, or that portion already sold, against W. A. Gaines & Co., and to enforce the collection of taxes thereon from them, does not exist.

In our opinion, therefore, the lower court properly enjoined the collection from appellees of so much of the taxes as were assessed against them on the whisky they did not own, but erred as to that which they had not sold, and the judgment is reversed for further proceedings consistent with this opinion.

STEWART *et al.* v. MULHOLLAND *et al.*

(*Supreme Court of Kentucky.* December 15, 1888.)

1. WILLS—REVOCATION BY MARRIAGE—RE-EXECUTION.

A holographic will, revoked under Gen. St. Ky. c. 113, § 9, by the subsequent marriage of testatrix, is not revived by its recognition and preservation by testatrix during coverture, though with her husband's consent, as by section 11 such a will can be revived only by re-execution thereof, which must be in the same manner as is essential to its original execution.

2. SAME—ANTENUPTIAL SETTLEMENT.

Such a will, made two days before the marriage of testatrix, pursuant to an antenuptial contract reserving to her the right of testamentary disposition, and delivered to a third party on the day of the marriage for safe keeping, with the husband's consent, is not revoked by her marriage, though the written contract was not executed until the day of the marriage, as the execution of the will and of the contract is virtually one transaction.¹

Appeal from court of common pleas, Jefferson county; EMMET FIELD, Judge.

Proceedings instituted in the county court of Jefferson county for the probate of the will of Mary H. Stewart, *nee* Jacob. The will was propounded by James R. Stewart, her husband, and others, and contested by James C. Mulholland and others, her next of kin. The county court having refused probate, an appeal was taken by proponents to the common pleas, where the decision was affirmed, and proponents again appeal.

Brown, Humphrey & Davie, for appellants. *James S. Pirtle*, for appellees.

PRYOR, J. Mrs. Mary Hall Jacob, being about to intermarry with James R. Stewart, was desirous of entering into an antenuptial contract by which she could secure to herself the right to hold and own her property as her separate estate, and to make such disposition of it as she saw proper by last will and testament. She communicated her wishes to her intended husband, and, obtaining his consent, prepared a will in her own handwriting, by which she devised her estate,—one-half of it to her future husband, Stewart, and the remaining half to her two nieces, excluding from the general devise an interest in a dwelling-house in Elizabethtown that she devised to her nephew. She had three brothers and a nephew who were not made the beneficiaries

¹ Respecting the revocation of wills by subsequent marriage, see *Baldwin v. Spriggs*, (Md.) 5 Atl. Rep. 295, and note; *Blodgett v. Moore*, (Mass.) 5 N. E. Rep. 470, and note; *McAnulty v. McAnulty*, (Ill.) 11 N. E. Rep. 897, and note.

by that instrument, and who are now contesting its probate. A sister of Mrs. Jacob had died many years before the date of the will, leaving children, and among them two infant daughters, one eight days old, and the other two years of age. These children were taken charge of by Mrs. Jacob, and raised to womanhood, and are made, together with her husband, the objects of her bounty in the disposition she has made of her estate. The will is dated on the 9th of January, 1876. The marriage contract seems to have been written on the 11th of January, two days after the will was written, and signed by the contracting parties on the 12th of January, the next day, and the same day on which the marriage ceremony was performed. After the ceremony was over, and the parties made man and wife, the wife, on her way from Elizabethtown to Louisville, on the same day she was married, handed the paper inclosed by an envelope to a friend of hers, telling him to keep it safely; that it was her will. This was in the presence of her husband. This friend, the husband of her deceased sister, took charge of the paper, and placed it in the vaults of a bank, where he kept it for three or four years; and Mrs. Stewart, having removed to Wisconsin, it being her husband's home, wrote after the lapse of three or four years to her friend to send her the will. This he did. The will was received by her, and kept in a tin box in her custody and that of her husband until offered for probate. The paper is identified by Samuels, the friend with whom it was left, as the same paper he had the custody of, he having read it, and is identified as the same paper received by Mrs. Stewart from Samuels, and the same taken from the tin box after her death. That she spoke of her will often while living in Wisconsin, is abundantly established, and that the paper offered for probate is the paper alluded to by her, is settled beyond controversy. The preparation and the execution of this paper by Mrs. Stewart on the eve of her marriage is not in fact contradicted, or, if denied, is a fact well established.

The propounders of the paper as the last will of Mrs. Stewart are met with the objection by her three brothers, who are the contestants, that the marriage of their sister with Stewart revoked her will by reason of an express provision of our statute in regard to wills, and the court below, adopting that view of the case, denied its probate. The ninth section of chapter 113, Gen. St. tit. "Wills," provides: "Every will made by a man or woman shall be revoked by his or her marriage, except a will made in the exercise of a power of appointment, when the estate thereby appointed would not, in default of such appointment, pass to his or her heir, personal representative, or next of kin." Section 11 of the same chapter also provides: "No will or codicil, or any part thereof which shall be in any manner revoked, shall, after being revoked, be revived, otherwise than by re-execution thereof, or by a codicil executed in the same manner hereinbefore required, and then only to the extent to which an intention to revive the same is shown thereby." It is manifest under these two sections of the statute that a will once revoked can only be revived by a re-execution of the instrument in the manner pointed out by the statute. It is, in fact, the making of another will, and must be executed in the same manner in which the original will was required to be executed.

The will offered for probate is all in the handwriting of the testatrix, who at the time of its execution was the widow of Jacob; and, it being holographic, it is contended that its preservation by Mrs. Stewart for so many years, and her frequent recognition of the paper as her will, so often made during a long period of time, amounts not only to a republication of the paper as her will, but such a re-execution of the instrument as makes it a complete will. There can be no doubt from the testimony of those intimately acquainted with the testatrix, that she always, from the date of the execution of the paper until her death, regarded it as her last will, and as having given her property to those whose claim upon her affections made them the objects of her bounty. This manifest intention, however plain on the part of Mrs.

Stewart, will not be permitted to override the plain letter of a statute that was enacted for the purpose of preventing a litigation over the question of intent, and admitting to probate a paper already revoked, that has no stronger proof of its validity than the mere intention of the maker to impart a new life to the instrument.

The statute in regard to wills, and particularly the two sections referred to, with their meaning and purpose properly understood, leaves but little room for construction. This court, in the case of *Porter v. Ford*, reported in 82 Ky. 191, where testatrix executed a paper in her own handwriting, purporting to be her will, while she was a married woman, and after she became covert not only recognized the paper as her will, but made indorsements upon it to that effect, held that, as she was then capable of making a will, such a recognition made it a valid instrument, and, being all in her own handwriting, there was nothing in the statutes requiring the paper to be rewritten or resubscribed by her after her disability was removed in order to make it a testamentary paper. It was also held in that case, in construing the section of the statute in regard to revocation, that the section did not apply, because the paper at no time during the coverture was valid, but absolutely void, and its recognition after the death of her husband gave to the paper for the first time legal vitality. That case, relied on as authority in this case in support of the will, is not analogous, because the question here involved is whether this will of Mrs. Jacob had ever been revoked; for, if revoked, new life could never be imparted to it by mere recognition or a republication, because the statute requires where a will has been once revoked there must be a re-execution, and the will of Mrs. Jacob cannot well be held to be the will of Mrs. Stewart, if that paper was revoked by the marriage with Stewart.

By the rule of the common law the marriage of a woman revoked a will previously made by her, because, if allowed to stand, it would affect the marital rights of the husband, and during marriage no power existed by reason of the disability of the wife either to revoke, alter, or make another will. At common law, however, where the wife had the right of disposing of her separate estate by an antenuptial agreement, her will previously made was not revoked by her subsequent marriage, and in this state a married woman may dispose of her separate estate by last will and testament. Section 4, c. 113, tit. "Wills." In this case the power to make a will during the marriage, and the creation of a separate estate in the wife, was, by reason of the antenuptial contract between Mrs. Jacob and her intended husband, executed on the 12th of January, 1876, the day on which the marriage ceremony was performed, and two days after the date of the will. It is therefore contended that as the will of Mrs. Stewart, then Jacob, was executed on the 9th of January, it was revoked by the marriage, and, not having been re-executed, her estate descends to her heirs at law. This position is based on the section of the statute referred to, by which a will made prior to the marriage is revoked unless made under a power to dispose of property, that would not, if undisposed of, pass to the heirs and representatives of the donee of the power; the argument being that it is immaterial how the power to make such a will is conferred, whether by a contract between the wife and a stranger, or by reason of an antenuptial contract, if the property disposed of by will before the marriage is the property of the wife, the subsequent marriage revokes it; that the statute is imperative, and no contract by which a will is made prior to the marriage can affect its provisions, although the will is made by the consent of the husband, and under a contract that fixes definitely the marital rights of the husband and wife.

It must be conceded that the wife at no time, from the date of the will until her death, was disqualified by the disability of coverture or from any other cause, so far as appears in the record, from making a valid disposition of her estate by last will and testament; and, while this same fact exists in regard

to her husband, we perceive no reason why the parties, when about to consummate the marriage, may not agree that the wife may by will dispose of her estate as she sees proper, or that a will already made may retain its legal virtue after the marriage, and particularly in a case like this. The will was executed by the intended wife in pursuance of the antenuptial contract. It was made and published by the consent of the husband, he having by the marriage contract relinquished all interest in her estate. It was executed as if the contract had been signed, and the marriage ceremony performed, and was so directly connected with those two events as to time, place, and circumstances as to make the whole but one transaction. The intended husband, before he left his home in the north-west to consummate the marriage, had agreed that the wife's estate should be secured to her. On the 10th of January, 1876, after reaching her home in Kentucky, she told him that she was then writing her will, or had written it. The antenuptial contract is dated on the 11th, but executed by both parties on the 12th, the day on which the ceremony of marriage took place. After the marriage, and on the same day, as she was leaving her home, the wife, in the presence of her husband, confided her will to the custody of her friend in Kentucky, in pursuance of the contract, and we must presume with a full knowledge of the statute on the subject of the revocation of wills; and from the date of the marriage until the death of the wife, the paper in question was recognized by both as the will of the wife, although the husband was not aware of its contents.

Giving to the statute in question a reasonable construction, is there any rule of law that would require a court to sever the dates of the two writings and the date of the marriage with a view of determining that the will of the wife was revoked by the marriage, and the testamentary disposition, made by the wife under such circumstances, disregarded? The will was in execution of the marriage contract. That contract was signed on the day the marriage took place. It was delivered, although dated on the 9th, to the friend of the wife on that day for safe keeping, and must be regarded as a part of the entire transaction. The reason for the enactment of the statute was to prevent fraud upon the husband or wife by reason of a will executed by the one or the other prior to the marriage, and the disturbance or change that would necessarily arise from such an act on the marital relation in so far as it affected the right of property; and, in case of an unmarried woman, for the additional reason that after the marriage the wife would be incapable of making, revoking, or altering her will. In this case the marriage never deprived Mrs. Stewart of the power to revoke the will made, or the power to make a new will. This right she could have exercised at any time; and when the husband surrenders at the same time his marital rights, even if these transactions cannot be said to have taken place on the day of the marriage, who has the right to complain but the husband? His marital rights are preserved or relinquished at his own instance, and by the agreement, and the statute cannot apply, because the very reason for its enactment has been removed.

It is not a question here whether the will was properly executed, for its validity prior to the marriage ceremony is not controverted, nor does the question arise as to whether or not a holographic will, once revoked, can be revived by a republication, when the statute requires a re-execution; but the question is, was the will of Mrs. Jacob revoked by her marriage with Stewart? It is conceded that by a contract the property rights of either could be regulated and fixed; but when a will is made in pursuance of that contract, and in this instance, where it is directly connected with the act of marriage, we are asked to say that the marriage revoked the will because dated two days prior to the antenuptial contract and the marriage ceremony. The marital rights having been settled (and we are proceeding now on the idea that we cannot but regard the entire action of the parties from the 9th to the 12th as one, so far as these contracts are concerned) by their agreement, and no one else

being interested directly or indirectly, but the husband, why should the will of the wife be revoked? It could have no affect on after-born children, because by section 24 of chapter 113 they, and not the devisee, take the estate, unless the child should die under age, and unmarried and without issue.

Was the statute intended to apply to any such case as this? It is argued that the exception made by its provisions excluded the idea of any other exception. Should such a construction be given its provisions? If there had been no exception, then the language of the statute might have been held to embrace every will made by a married woman, whether under the exercise of a power or not; and to remedy this the statute was enacted making an exception where the marital rights could not be affected by the execution of the power. It was to protect the marital rights of the parties that the statute was enacted, and it was never designed to prevent parties by written contract from fixing their marital rights, and to give to one or both, by an antenuptial contract between the two, the power to dispose of their estate by will. It is idle to say that by a deed evidencing a marriage contract the parties about to consummate it can before marriage fix and determine their right to property by reason of the marital relation that is binding on both, and cannot under the same contract agree that the one or the other shall dispose of their property by a will already executed, if made as the statute requires. The will made by the wife in this case was as much a part of the marriage contract as if it had been inserted in it.

In the case of *Phaup v. Wooldridge*, reported in 14 Grat. 382, relied on by counsel for the appellee, the testator made his will, that was properly signed and attested, in the year 1852. Some two years thereafter he intermarried with Mrs. Bass, and by an antenuptial contract she surrendered all interest in his estate. The question in that case, under a statute similar to ours, was whether the marriage to Mrs. Bass revoked the will of Phaup. The wife was not a party to the litigation, but the will was assailed by the heirs. The court held that the marriage did revoke the will, and that the recognition by the testator, in the presence of one of the witnesses of the instrument, as his will, was not a re-execution; the court further holding that marriage alone (save in the exception made) was an absolute revocation, and that the marriage settlement in nowise affected the construction to be given the statute. While the construction in that case sustains the views of counsel and the judgment below, the facts are not at all analogous to the case being considered. There the will of Phaup was made long before his marriage; and when he was about to marry Mrs. Bass, two years after, an agreement was entered into by which the wife was empowered to devise her estate, and in consideration of that fact relinquished all interest in his estate. She made no will, nor was she asserting any claim to his property, nor did they contract with reference to the will already made by her future husband. It was a naked proposition submitted to the court as to whether or not the marriage revoked the will. If Mrs. Bass in that case, in pursuance of the power given her to make a will by the marriage contract, had, in the exercise of the power, and on the eve of the marriage, executed her will, we are inclined to doubt that the court would have permitted the husband to have asserted his marital rights, and held the will void because dated two days before the marriage, when made in pursuance of the antenuptial agreement; still the reasoning of the court in that case, and the construction given the statute, would lead to the conclusion that the will would have been held to have been revoked.

In the case of *Osgood v. Bliss*, reported in 141 Mass. 474, 6 N. E. Rep. 527, the parties were married in the state of Indiana, and on the eve of the marriage made an antenuptial contract, by which it was agreed that the marriage should not revoke a will that had been made by the intended wife. The husband had never seen the will, and knew nothing of its contents, yet he signed the agreement. The statute of Indiana contained no exceptions, but provided:

"After the making of a will by an unmarried woman, if she shall marry, such will shall be deemed revoked by such marriage." The wife dying, the husband claimed about \$12,000 in money or choses in action that she had disposed of by her will, on the ground that the marriage rendered the instrument a nullity. The supreme court of Massachusetts held that the marriage did not revoke the power to make the will. It is true, in that case the court draws the distinction between the execution of a power and the execution of the will, and bases its conclusion on that distinction. They proceed to say that the reason given for holding that marriage is deemed to be a revocation of a woman's will is because by the marriage she divests herself of the power of revoking it, and destroys the power to change or alter it. It is argued that such reasoning does not apply to an appointment by will, and for that reason it was held that the marriage was not a revocation. The argument is well founded, and based on the common-law rule, and the statute but follows it; and as such reasoning cannot apply to the exercise of the right by a married woman to make a will when she at all times before and after the marriage had the legal capacity to make a will, that case supports directly the principle recognized in this case. Besides, the marital rights of both the husband and wife are fixed by the very contract under which the disability of coverture, in so far as it stands in the way of the execution by her of a will, is entirely removed.

We are satisfied that a proper construction of the statute should not confine the court to the one exception of the exercise of a power to make a will by a married woman when disposing of the property of another, or of property that would not pass to her heirs, but that the contract rights of husband and wife determining the right of property and fixing the *status* of the marital relation in that respect before the marriage, although it may recognize the execution of a will then made, if properly executed, should be regarded, and that such cases are not embraced by the statute.

The statute of Wisconsin provided in reference to such wills: "Excepting only that nothing contained in this statute shall prevent the revocation implied by law from subsequent changes in the condition of the testator." The court held that "the revocation implied by law" evidently means such as would be implied at common law,—*"the marriage of a woman was the revocation of her will previously made."* Ann Ward, living in Wisconsin, made a will during her second marriage, by which she gave her property to her children by her first husband. She had no issue of the second or third marriage. By the laws of that state a married woman has the right to dispose of her estate by will. Having made the will during her second marriage, she married Ward, her third husband, and shortly after died. Her will was admitted to probate, the supreme court, to which the appeal had been taken, saying: "To hold that marriage of itself revoked a former will of the wife, under the circumstances here presented, when on the next day after the marriage she had the power to reinstate the same writing as her last will and testament, would seem to be absurd." *Will of Ward*, 70 Wis. 257, 35 N. W. Rep. 731.

In view of our statute it seems to us that it would be trifling with the rights of the husband and the devisees of Mrs. Stewart to so construe its provisions as to destroy the testamentary act of the testatrix, and, if no other reason exists for denying the probate of this paper, it should be admitted to probate as the last will of Mrs. Stewart, formerly Jacob.

The judgment is reversed, and cause remanded for proceedings consistent with this opinion.

STIRMAN v. SMITH.

(Court of Appeals of Kentucky. December 18, 1888.)

1. EXEMPTIONS—ILLEGAL LEVY—COW AND CALF.

Under Gen. St. Ky. 1883, p. 431, exempting from levy, among other property, two cows and calves belonging to a *bona fide* housekeeper with a family resident within the commonwealth, a levy on the only cow and calf of such a housekeeper is illegal, though he has heifers not exempt primarily, and does not offer to deliver them or any other property to the officer, in lieu of the cow and calf, before the sale.

2. SAME—SELECTION BY DEBTOR—APPRAISAL.

Gen. St. Ky. 1883, p. 931, providing that if a debtor select a horse worth more than \$100, or a cow and calf worth more than \$30, the same shall be appraised, and sold if appraised at more than that sum, and that amount paid to the debtor, does not apply where a debtor owns only two cows and calves, as they are exempt regardless of their value, and no selection is required of the debtor.

3. SAME—OF HOUSEHOLDER ABOUT TO REMOVE.

Such a housekeeper having determined to remove from the state, whose family have already gone, who still remains at his home for business reasons, intending soon to follow his family, is entitled to the exemption mentioned.

Appeal from circuit court, Davless county; G. W. WILLIAMS, Special Judge.

Action by W. T. Smith against J. S. Stirman, a constable, for an illegal levy. Judgment for plaintiff, and defendant appeals.

Weir, Weir & Walker and Owen & Ellis, for appellant. *R. W. Slack and B. W. Hines*, for appellee.

HOLT, J. Prior to November 5, 1884, the appellee, W. T. Smith, had been for many years a *bona fide* housekeeper with a family of this commonwealth; but at the time named he determined to move to Florida, and accordingly sent his wife and children there,—he remaining at his old home for certain purposes, but intending to soon follow them. While thus situated he was the owner of a cow and her calf and two heifers. Neither of the latter had ever been bred; and on November 21, 1884, the appellant, J. S. Stirman, as a constable, levied an execution upon the cow and calf, and subsequently sold them. The appellee did not know of the levy when it was made, but, although informed of it before the sale, he never offered to deliver either of the heifers or other property to the officer in lieu of the cow and calf. He now sues to recover their value, upon the ground that they were exempt.

It was held in the case of *Anthony v. Wade*, 1 Bush, 110, that an avowed intention of a debtor to leave the state, and a packing up for that purpose, does not deprive him of the character of a *bona fide* housekeeper, if he had it before; and he is still entitled to his exempt property, and that this right continues even while he is in transit. This construction accords with the liberal legislative spirit in which the exemption statute was enacted; and, although given to it over 20 years ago, it has been acquiesced in ever since without legislative amendment. The appellee has not, therefore, deprived himself of the character of a housekeeper, and hence was entitled to the exemption incident thereto.

It is insisted, however, that under the case of *Winfrey v. Zimmerman*, 8 Bush, 587, the exemption statute must be construed as equally applicable to the heifers as to the cow; and, as all three were not exempt, the officer had the right, according to *McGee v. Anderson*, 1 B. Mon. 187, to seize any one of them before an election by the debtor; and that the latter could not thereafter elect to keep the one levied on, unless he either tendered to the officer one of the other two, or enough other property to satisfy the debt, or as was at least equal in vendible value to the one then held by the officer.

The two cases cited were, however, unlike in circumstance to the one now presented. When the last-named one was decided, the statute then in force exempted one work-beast or a yoke of oxen. The debtor in that case was

the owner of two horses and a yoke of oxen. They were all of the character named in the statute. One came as fully within its description as the other. They were all of a character to supply the then need of the debtor and his family. One was not primarily exempt any more than either of the others. No reason existed why it should be so regarded, and upon this state of case this court held as above indicated.

In *Winfrey v. Zimmerman* the statute, which then exempted, as it does now, "two work-beasts, or one work-beast and one yoke of oxen," was construed in a case where the debtor had only a mare and a colt to include them both. This was upon the idea that the legislature, by the terms used in creating the exemption, intended to embrace an animal of the horse kind, which could be rendered fit for service, as well as one then in actual use. It was not a question whether, if the statute had exempted one "work-beast," it would have been as equally applicable to the colt as the mare.

The reasoning in that case as to the construction to be given to the term "work-beasts" applies also to the exemption of "two cows and calves." The term "cow" includes "heifer," (section 11, c. 21, Gen. St. ;) and the debtor who does not own a cow and calf, but owns two heifers, would, if a resident of this commonwealth with a family, be entitled to claim them as exempt, although they may never have been bred or milked. The object of the statute must, however, be regarded in construing it. Its purpose was to provide the debtor and his family with milch cows. Its language is, (as then in force:) "The following property shall be exempt from execution, attachment, distress, or fee-bill against a *bona fide* housekeeper with a family resident within this commonwealth, viz.: Two work-beasts, or one work-beast and one yoke of oxen; * * * two cows and calves." Gen. St. Ky. 1883, p. 431. It looks to their support, and evidently regards their present need. The cow is therefore designated by the statute. It also exempts her calf, because it is an incident to her as the giver of milk for the purpose of the exemption. The need of the debtor will continue, however; and hence, looking to the future support of the family, if there be no cow, a heifer is exempt in lieu of her. Plainly, however, this does not give the debtor all that the statute intended. It looks to the future only, and does not provide for the present. It is therefore unreasonable to suppose it was intended that, where a debtor has a milch cow and two heifers, an officer may at his own will, and even without the knowledge of the debtor, seize the cow, and leave the heifer; thus depriving the family of their present need, and forcing them, even as to future support, to wait upon the course of nature, however uncertain. This cannot be so if the main object of the statute was to provide for the present, daily wants of the family.

In such a case the cow is primarily exempt; and, being so, the officer must take notice of it without word from the debtor. He cannot seize the property which is exempt for a particular purpose—that which falls within not only the spirit, but the very letter, of the statute—because the debtor has other property, which perhaps will, in the course of time, supply the wants of his family. Such an exemption would often be a mere mockery to the needy, and utterly fail to fulfill the object of the statute. If a man has two cows and calves, and also two heifers, by the very terms of the statute, as well as the spirit and purpose of it, the cows and calves, and not the heifers, are exempt; and if he has but one cow and her calf, and also two heifers, the officer cannot seize that which is primarily not liable, and which is exempt by the express terms of the statute. If he could, then, where the debtor has two work-horses and two colts, he could seize the horses and leave the colts. It cannot reasonably be contended that this is the law, and yet this presents the appellant's case.

If in this case the officer had levied, as he should have done, upon one of the heifers, and the debtor had elected to keep that one, and had so notified

the officer, then the rule laid down in the case of *McGee v. Anderson* would have applied; and according to it he would have been bound to surrender to the officer the other heifer for sale, or sufficient property to pay the debt, or equal in value to the one held by him under the levy. In that case the right of the debtor to substitute one horse—one "work-beast"—for another was involved. They were "two of a kind," both falling within both the letter and spirit of the statute, and specifically alike. Such would be the case here, if the controversy related to the two heifers. When the debtor has the property which is capable of supplying the present need contemplated by the statute, the officer must take notice that it is what is exempt by the spirit and letter of the statute, and act accordingly, or otherwise he will be treated as a trespasser *ab initio*. It must be regarded by him as, at least, *prima facie* exempt. The question whether, where a debtor has two cows and two heifers, he may elect to keep the two heifers, is not presented in this case. Undoubtedly he may make an election, where the property is specifically alike, by doing so in the proper manner, if it has already been seized by the officer.

Prior to May 3, 1880, two cows and their calves were exempt to the debtor housekeeper without regard to their value. At the time named, however, the legislature provided that, if the debtor should select a horse worth more than \$150, or a cow and calf worth more than \$60, the officer levying thereon should have the same appraised, and, if appraised at more than the value above named, he should then sell the same, and pay the debtor out of the proceeds the sum above named. Gen. St. 1883, p. 931. It is now contended that, as it was admitted in this case that the cow and calf were worth \$100, the officer had the right to make the sale, and that under the statute the debtor must make a selection. It, however, in our opinion, looks to a case where he has more than two horses, or two cows and their calves; and if he has but the two of the specific kind named, and which are primarily exempt, then the law makes the selection, and the officer must regard it, and proceed according to the statute, or he is liable. In this instance there was no appraisal. The property was sold for less than \$60, and there was no offer even to pay what was realized to the appellee. The officer failed to obey the statute, and, however honestly he may have acted, he did so at his peril, and individual right requires remuneration.

Judgment affirmed.

ENTERPRISE IMP. & MANUF'G CO. v. UNDERWOOD.

(Court of Appeals of Kentucky. December 18, 1888.)

Appeal from circuit court, Carter county; JOHN M. BURNS, Judge.

This was a suit by Mrs. Mary Underwood, widow of Gideon Underwood, against the Enterprise Improvement & Manufacturing Company, etc., to recover of defendants her dower interest in certain tracts of land. Dower was allotted to the plaintiff by commissioners appointed by the trial court, and from an order confirming said commissioners' report of allotment the said company appeals. No briefs for the appellant were filed in this court.

H. L. Stone and *T. D. Theobald*, for appellant. *E. F. Dulin*, for appellee.

PRYOR, J. On this appeal we find nothing that precludes the widow from asserting her right to dower. If dower was improperly assigned, there is nothing in this record establishing that fact. The husband was seized in fee during the marriage, and died, and no question can arise, as between the widow and the purchaser from her husband, as to her right. It is in fact admitted, and therefore there is no case here for revision.

Judgment affirmed.

BOTTS et al. v. SIMPSONVILLE & B. C. TURNPIKE Co. et al.*(Court of Appeals of Kentucky. December 12, 1888.)***1. CORPORATIONS—CONSOLIDATION—BY STATUTE—CHARTER RIGHTS.**

In a suit to enjoin the consolidation of two turnpike companies, under act Ky. Feb. 20, 1884, one provision of which is that, when the agreement between the two companies shall be entered into and ratified by a majority of the stockholders of the two companies, the consolidated company shall have all the powers previously enjoyed by both, where defendants answer, which was not denied, alleged that the consolidation was made as provided by statute, but failed to allege that this was done with the consent of plaintiffs, thereby showing that a majority consented, and not the whole, the consolidation, not being authorized by the companies' charters, was void.

2. SAME—DIRECTORS—ULTRA VIRES—SUIT BY STOCKHOLDERS.

Where the action of the boards of directors of two corporations is alleged to be *ultra vires*, stockholders may bring suit to restrain the two corporations from consolidating.

3. SAME—CHARTER—CONSTRUCTION.

A clause in a charter that the company, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not be construed as conferring or implying power to compel a stockholder to consent that the corporation of which he is a member shall be united with another.

Appeal from circuit court, Shelby county; S. E. DE HAVEN, Judge.

John Botts and others, who are stockholders in the Simpsonville & Buck Creek Turnpike Company, brought this suit against the Simpsonville & Buck Creek Turnpike Company and its directors, and against the Simpsonville & Fisherville Turnpike Company and its directors, to enjoin and prevent a threatened consolidation of the two defendant turnpike corporations. Plaintiffs were granted a temporary injunction, which was dissolved after answer had been filed by defendants. From the order dissolving the injunction plaintiffs appeal.

J. G. Gilbert, for appellants. *J. C. Beckner*, for appellees.

PRYOR, J. The appellants are members as stockholders of the Simpsonville & Buck Creek Turnpike Company. On the 20th of February, 1884, the legislature of the state passed an act authorizing the consolidation of the corporation of which they are members with another company styled the "Simpsonville & Fisherville Turnpike Company." The appellants, in order to prevent a consolidation of the two companies, filed their petition in equity against the directors of both corporations, and against each corporation, asking for an injunction preventing the merging of the two companies into the consolidated company. An injunction was granted, and afterwards dissolved, on the answer filed by the defendants, to the effect that the consolidation had been made, as provided by the act, by the two boards of directors, and ratified by the stockholders, and nothing remained to be done but the election of directors for the consolidated company. The appellee maintains that, this answer or its averments not being denied, a dissolution of the injunction on the pleadings necessarily followed. The act under which the consolidation was made provided that, when the agreement between the board of directors of each company was entered into and ratified by a majority of the stockholders of the two companies, the consolidated company is to have all the powers heretofore enjoyed by both companies. The answer nowhere alleges that these appellants ever consented to the consolidation, and the statement that it was ratified by the stockholders must be taken as the act of the majority and not the whole. The stock of the appellants in one company has been transferred to another, or both merged into one, and the court will not imply, from an averment that it was ratified by the stockholders, that it was by the unanimous consent of all; for, if so, it should have been so pleaded, and the statement made must be construed as meaning that a majority voted for the con-

solidation; in other words, that the provisions of the act were complied with.

It is further argued that these stockholders have no right to maintain the action, because the suit is for the corporation itself, and must therefore be brought in the name of the corporation, or some legal or equitable reason given for making the corporation a defendant instead of plaintiff. We do not understand, in a case like this, that the stockholders, or any of them, are denied the right to sue. The action of the board of directors in this case is alleged to be *ultra vires*, beyond the authority conferred on them by the charter; and in all such cases the stockholder may bring his action without consulting those who manage the legitimate affairs of the corporation. This is the rule recognized in *Hawes v. Oakland*, 104 U. S. 450, and in *Shawhan v. Zinn*, 79 Ky. 300. Here the directors are attempting to transfer the stock of these appellants by a majority vote of the stockholders to a corporation of which they are not members, or to blend the stock and make one corporation out of both. This cannot be done without the consent of the stockholder, and is in plain disregard of his contract rights when he becomes a member of the corporation. There is no authority in the charter of the company to which he belongs authorizing a consolidation with any other company, and in such a state of case there is no authority holding that his property or rights in one company can be transferred, against his will, to another company.

The clause in the charter that the company, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not be construed as affecting rights that are fundamental, and under it a power conferred or implied that will compel a stockholder to abandon his contract already entered into, and make a contract with others against his will. The stock in the one company may be worth greatly more than the stock in another company, or, if worth the same, the joint enterprise might be such as would deter the stockholder from taking his investment from the one company and placing it in a joint stock company. Mr. Morawetz, in his work on Private Corporations, when treating of the consolidation of companies, says: "This can never be effected without the unanimous consent of the members of each company, and such consent cannot be inferred as an implied condition of their charter or articles of association." Section 197. See note to the left, with numerous adjudged cases.

Whether a consolidation could be authorized, under a general power reserved by the legislature to alter or annul the charter, is not necessary to be decided. It is certain that it cannot be done when it affects the rights of the stockholders by increasing their liability as such, or diminishing the value of their stock, and with such a radical change the burden would be placed on the consolidated company to show that no harm could be done the stockholder entering his protest. Whether the appellants would be injured by this change does not appear in this record, and, if it did, this court would be reluctant to hold, in the absence of authority in the charter, where one has become a stockholder in a turnpike road of a certain description, and for a certain purpose, that the legislature could unite him as a stockholder in another corporation, and for other or additional objects in view than are to be found in his original contract. In so doing his contract is destroyed, and another made for him, against his consent.

In our opinion, the act of consolidation in this case is void, unless made by the unanimous consent of the stockholders.

Judgment reversed, and remanded for proceedings consistent with this opinion.

HENNING v. BARRINGER *et al.**(Court of Appeals of Kentucky. December 20, 1888.)*

1. PARTITION—SALE OF LAND—PARTIES—MINORS.

Under Code Ky. § 490, providing that land held jointly may be sold on application of plaintiff, though an infant, if division would materially impair the value of the land, or of plaintiff's interest, where a widow, who was the statutory guardian of all her infant children but one, united them as plaintiffs with her in a petition for the sale of land, the mother suing not only as guardian but also as next friend, all the parties were before the court, and it appearing that no division could be made without injury to each child's interest, the sale was properly ordered, and the title passed to the purchaser.

2. INFANCY—SUIT BY MINORS—APPEARANCE BY GUARDIAN—AFFIDAVIT.

Where the mother's right to sue for her children appeared before the purchaser acquired title, the fact that she did not make affidavit of such right, as required by Code Ky. § 37, is not such a jurisdictional fact as will render the judgment void.

Appeal from Louisville chancery court; I. W. EDWARDS, Chancellor.

Appeal by J. W. Henning, questioning the validity of a sale of land held jointly by Sophia B. Barringer and her children.

Barnett, Noble & Barnett, for appellant. *Brown, Humphrey & Davis*, for appellees.

PRYOR, J. The widow and children of Frederick Barringer, who died intestate, filed their petition in the Louisville chancery court, seeking to sell some unimproved real estate in the city of Louisville, for the reason that no division could be had between them without materially impairing the value of the property as well as the value of each interest. The action is brought under section 490 of the Civil Code. The mother was the statutory guardian of all the infant children but one, and united them as plaintiffs with her in the petition, making some of the adult children defendants. The intestate left at his death nine children and his widow. One of the children, Frederick, was born after the death of his father, and it seems that he had no statutory guardian until after the sale of the land; one having been appointed (his mother) before the sale was confirmed. This infant is united also as a plaintiff with his mother and his brothers and sisters, counsel in drafting the petition supposing that the mother was the statutory guardian of all of the infants. The mother sues not only as guardian, but as the next friend of all the infant plaintiffs, including Frederick, who had at the time no guardian. This appeal is by the appellant, who was the purchaser, questioning the validity of his title under the proceeding.

Section 490 provides two states of case in which land held jointly may be sold, not only on the application of adults, but by a plaintiff, although of unsound mind, or an infant; that is, (1) where the share of each owner is worth less than \$100; (2) where the division, if made, would materially impair the value of the land, or the value of the plaintiff's interest. In this case it appears that each child's interest would not exceed 10 or 12 feet front of the realty, and that no division could be had without materially impairing the value of each one's interest; and upon the proof the chancellor properly ordered the sale, and, if the parties were before the court, the title passed to the purchaser. They were all before the court, because in this particular state of case an infant may bring the suit for the sale and, under the Code, can sue by his guardian or next friend; and that he sues both by his guardian and next friend would only be the subject of special demurrer, and could afford them no ground for a reversal, unless it appeared that the rights of the infant had been prejudiced by the proceeding.

It is said, however, that the mother had no right to sue as the next friend of the infant, because she had not made the affidavit required by section 37 of the Code. This affidavit is to the effect that there is no guardian,—no one else to sue; but in this particular case, when the fact is made to appear of the

existence of the right to sue before the purchaser acquires the title, it is not a jurisdictional fact, such as would destroy the judgment and render it void, but would be held bad on demurrer at the instance of the parties to the action. In this case the fact appeared before confirmation that no guardian had been appointed, and the mother was appointed guardian, and then comes into court and asks that the sale be confirmed. No bond was necessary to be executed before the sale, and the law created the lien for the purchase money; and before the guardian can obtain it, bonds must be executed, as seems to have been done in this case.

All the parties were before the court, and no error exists of which the purchaser can complain. The judgment is therefore affirmed.

MILLER *et al.* v. COMMONWEALTH.

(Court of Appeals of Kentucky. December 20, 1888.)

1. HOMICIDE—SELF-DEFENSE—EVIDENCE—THREATS.

Where there is a conflict of evidence as to whether deceased was approaching defendant with an open knife when the fatal shot was fired, evidence of a threat made by deceased to kill defendant, though not communicated to him, is admissible, as tending to show who was the aggressor.¹

2. CRIMINAL LAW—TRIAL—EVIDENCE—REBUTTAL.

Where the prosecuting attorney has endeavored, though unsuccessfully, to make a witness acknowledge that his son, who saw the shooting, was bribed to leave the state, and has made prominent the fact that witness and his son were employed by a company of which the defendant, who is alleged to have bribed him, is a member, it is error to exclude evidence that that defendant advised the son not to go.

Appeal from circuit court, Laurel county; R. BOYD, Judge.

W. O. Bradley, for appellants. P. W. Hardin, for appellee.

LEWIS, C. J. Henry Miller and John Bosse, having been jointly indicted for the murder of Larkin Bird, and convicted of manslaughter, prosecute this appeal. It appears the deceased, whose reputation was proved to have been that of a quarrelsome and dangerous man, had, a short time before getting to the place he was killed, drawn his pistol on three men, and fired at another. Unless the result of the aimless wandering of a restless drunken man, for he was under the influence of liquor, there is nothing to satisfactorily show why the deceased stopped at the particular place he did, which was about 150 yards from the dwelling-house of Bosse. The evidence is that, soon after getting there, he, being alone, commenced to fire his pistol; some of the shots, of which there were three or four, being fired in the air, or at random. One of them, as a witness states, was fired at his own hat, which he threw up for the purpose. Another shot struck in the yard of Bosse, and, as his wife stated at the time, came near hitting her. There is also evidence he called the name of Bosse in a disrespectful manner. Immediately after his wife cried out she was near being struck, Bosse went into his house, and got two guns and a pistol, and started with them towards the deceased, intending, as he testified, to give one of the guns to his son. But Miller took one of them, and together they approached the deceased; and when they got near to him, Bosse, as he states, presented his gun, and commanded the deceased to lower his pistol, and, it being done, he then lowered his gun also. Either just before or after Miller and Bosse arrived, about which there is some conflict in the testimony, a man named Williams, who had previously been in company with the deceased, and was also offended at him, appeared, and took his pistol from him, and, according to the testimony of Bosse and Miller, snapped it at him. But, Williams' horses just at that time becoming frightened, he left the place in pursuit of

¹ On the admissibility in evidence, on trials for homicide, of threats made by the deceased, see *Johnson v. State*, (Miss.) 5 South. Rep. 95, and note; *White v. Territory*, (Wash. T.) 19 Pac. Rep. 88, and note; *State v. Rider*, (Mo.) 8 S. W. Rep. 723.

them, and in a short time thereafter Miller shot and killed the deceased. No one was at the place when the shot was fired, except Bosse, Miller, and the deceased, though several witnesses testify they had a clear view of the parties at the time. The evidence is uncontradicted that the deceased, after the pistol was taken from him, still had a knife, the blade of which was open. Both Bosse and Miller testify that when shot the deceased was approaching Miller with his open knife held in a threatening position, and making an effort at the same time to seize Miller's gun. They are corroborated by other witnesses as to the deceased having his knife opened, and approaching Miller. But one or more witnesses stated the deceased was at the time he was shot making no movement or demonstration towards Miller.

Appellants during the trial offered to prove, and avowed the witness, if permitted to answer the question propounded, would state, the deceased told him the day before the homicide he intended to kill appellant Miller on sight. But, there being no proof that or any other threat against him by the deceased was previously communicated to Miller, objection to the question was sustained, and it was not permitted to be answered.

In the process of forming an opinion, in the absence of positive and convincing evidence as to what has been, as well as in conjecturing what will be, the conduct of a particular person in a given state of case, the first and most natural inquiry is, what motive had or has he for doing it? Thus, in determining, in the absence of eye-witnesses, or where the evidence is contradictory and uncertain, as to who of two persons began a conflict resulting in the death of one of them, it is not only material, but often of vital importance, to ascertain which one of them, if either, was actuated by motive of gain or revenge; and it is often sufficient, to discredit the positive testimony of witnesses, to show that a person charged with an offense had no motive for committing it, or a strong motive for not doing it. In this case the guilt or innocence of Miller materially depends upon whether, at the time he shot, the deceased was advancing upon him with a drawn knife, and consequently whether he had reasonable grounds to believe, and did believe, he was then in danger of losing his life, or suffering great bodily harm, or whether he shot wantonly, and without legal excuse. In determining that question of fact, about which the contradictory testimony of the witnesses was calculated to create some doubt that might have been resolved against the accused, it seems to us it was entirely pertinent to show threats by the deceased against the accused; for if the former was possessed of a feeling of hatred towards the latter, and had formed a determination to take his life, the inference would be at least reasonable that he was the aggressor. There is a distinction between the inquiry whether the slayer of his fellow-man was induced to do the deed by a reasonable apprehension, founded upon threats made by the deceased, communicated and known to him, and the question of fact whether the one or the other commenced the conflict; for in the latter case the inference the deceased began it may arise from the existence of his hatred and revenge, whether known to the other or not. The competency of such evidence has been expressly recognized by this court in *Hart v. Com.*, 2 S. W. Rep. 673.

One of the witnesses made the following statement obviously in answer to questions by the commonwealth's attorney: "My son was standing near me when the killing took place. He is going on 21 years of age. He is in Arkansas. He bought his own ticket to go. He worked under me and another man, and I was employed by the Star Coal Company, of which defendant Bosse is a member, and we paid him. He did not go away to keep from being a witness. He had been talking of going away for a year before the killing, and was waiting to make money to go on. He was a witness on the examining trial of this case." The answers of the witness show the commonwealth's attorney was persistent in his endeavor to show the witness had been by bribery, or in some other improper way, induced by Bosse to leave the state, to

prevent his giving damaging testimony against himself and Miller; and, although the witness protested his son left voluntarily, still the facts that Bosse was a member of the coal company, that Miller was an inmate of his family, and the father of the absent witness was his employe, all being got prominently before the jury, were calculated to induce the suspicion, if not belief, that the witness had been improperly induced to absent himself, because he would, if present, have testified to facts prejudicial to the defense. We therefore think the court erred in refusing to permit the witness Hammons to state, as he would have done, that "Bosse advised his son not to go, and that Kentucky was a better state than Arkansas."

For the errors indicated, which we think were prejudicial to the substantial rights of the defendants, the judgment as to both of them is reversed, and cause remanded for a new trial.

GILLILAND v. GILLILAND.

(Supreme Court of Missouri. December 20, 1888.)

1. TRUSTS—RESULTING TRUSTS—PRESUMPTION—REBUTTAL.

Where a conveyance of land is made to a wife at the husband's instance, the presumption of a resulting trust in his favor is rebutted, though he furnished the purchase money.

2. HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—LIABILITY FOR HUSBAND'S DEBT.

A sale of the land, and the investment of the proceeds in other land in the wife's name, gives the husband no interest therein, subject to his debts, under the Missouri married woman's act, though he receives such proceeds, and places them in bank in his own name, pending the purchase of the other land.

Appeal from circuit court, Johnson county; NOAH M. GIVAN, Judge.

Action by James A. Gilliland against Mildred S. Gilliland. Judgment for defendant, and plaintiff appeals.

Samuel P. Sparks, for appellant. O. L. Houts and Krum & Jonas, for respondent.

SHERWOOD, J. The defendant is the widow and relict of W. K. Gilliland, who departed this life May 20, 1885. In February, 1870, the decedent purchased, with his own means, 160 acres of land in Vernon county, and had the title conveyed to his wife, by deed in ordinary form, which was recorded in May next thereafter. At that time the husband was not indebted, and had, after paying for the land, some \$1,700 in cash, and some \$500 in personal property, and there is an entire absence of any intention on his part to defraud subsequent creditors. In October, 1874, the husband executed a note for \$285, to plaintiff, upon which judgment was obtained in February, 1885, and the next month this proceeding was instituted, having for its object the subjection of 120 acres of land in Johnson county, the legal title whereof was in the wife to the payment of the debt aforesaid. This 120 acres was bought by the wife with the greater portion of the proceeds of the sale of the 160 acres of Vernon county land, and the conveyance was made to the wife, and \$200 of money arising from the sale of the Vernon county land, as well as \$100 of the wife's money, were applied in part payment of the purchase money of 60 acres of land bought at the same time from Farnsworth, who deeded the 60 acres to the husband, and took a deed of trust on the same to secure the residue of the purchase price. This transaction occurred in August, 1883, and the respective deeds were duly recorded. Upon these facts, thus briefly outlined, the court below found and gave judgment for defendant, and plaintiff appeals.

The purchase money being furnished by the husband for the purchase of the Vernon county land, and the conveyance being made to her at his instance, the transaction is *prima facie* an advancement, and rebuts the resulting trust that would otherwise arise in favor of him who pays the money.

1 Perry, Trusts, § 143; 2 Story, Eq. Jur. § 1201; *Darrier v. Darrier*, 58 Mo. 222. The deed, then, to the wife, of the Vernon county land, establishes all that is necessary in her behalf, so far as that tract is concerned.

Then we come to the proceeds of the tract, afterwards invested in the tract in controversy. The effect of the first deed was to give the wife a title under the married woman's act. The sale of that tract did not give the husband any right to the proceeds of such sale, or any interest therein. He had no *jus mariti* in those proceeds by reason of the operation of that act. Whenever that act operates, the rights of the husband at common law in the property of his wife, except to the limited extent preserved by sections 3295 and 3296, forthwith perish. The distinction between the rights of the husband at common law, in equity, and under the married woman's act, as to his wife's real and personal property, has been very frequently pointed out by this court. *Silvey v. Sumner*, 61 Mo. 253; *Rodgers v. Bank*, 69 Mo. 560; *Mueller v. Kaessmann*, 84 Mo. 318; *Blair v. Railroad Co.*, 89 Mo. 383, 1 S. W. Rep. 350; *Wilson v. Albert*, 89 Mo. 537, 1 S. W. Rep. 209. It results from these statutory provisions and authorities that the reception by the husband of the proceeds of his wife's land in Vernon county, and the placing them in the bank in his own name, before transferring them to Farnsworth, from whom the wife had bought the 120 acres, had not the slightest effect in conferring on the husband any interest in such proceeds. The only way that the husband could acquire any interest in such proceeds was by the method prescribed in the sections above mentioned. As it was, he was to be regarded in the same light as any stranger whom the wife might have employed to transact her business for her; and, inasmuch as he could not have appropriated the funds arising from the sale of his wife's land, his creditors could not do more than he could. Judgment affirmed. All concur. RAY, J., absent.

HUMPHREYS v. ATLANTIC MILLING Co. et al.

(Supreme Court of Missouri. December 20, 1888.)

1. CREDITORS' BILL—BEFORE JUDGMENT—REMEDY AT LAW—GARNISHMENT.

Where two, to whom jointly another is indebted, make a draft upon him payable to one of them at a future day, and the payee, who is solvent, gives his note to the president of his co-drawer for the latter's share of the debt, and the president assigns the note for collection and for payment of certain creditors of such co-drawer, of whom plaintiff is one, and both drawers and the assignee are within the jurisdiction, plaintiff, who alleges that the assignment of the note is void for fraud, cannot maintain a suit in equity before judgment to have the draft applied to his debt, his remedy being at law by garnishment, under Rev. St. Mo. § 2541, providing for issues on which the alleged invalidity of the assignment can be adjudged, and section 2540, allowing the garnishment of a debt not due.

2. PLEADING—EVIDENCE—VARIANCE.

Variances between the allegations that the note was made by the president of the payee, and that the assignee procured its discount, and evidence that it was made by the payee, and no negotiation of it was made by the assignee, are not fatal.

3. EQUITY—ADEQUATE REMEDY AT LAW—PLEADING.

Where plaintiff has an adequate remedy at law, it need not be pleaded, in order to oust a court of equity of jurisdiction.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Bill by William S. Humphreys against the Atlantic Milling Company and others for the application of the proceeds of a draft to the payment of a debt to plaintiff. Plaintiff obtained a decree, and defendants appeal. The cause was transferred from the St. Louis court of appeals. Rev. St. Mo. § 2541, provide that "if the garnishee disclose in his answer and declare his belief that the debt * * * has been sold or assigned to a third person, and plaintiff" contests the validity, etc., "of such sale or assignment, the court shall make an order upon the supposed vendee or assignee to appear" to sustain his claim, and, if he fails to appear, "the garnishee's averment of such sale or assignment shall be disregarded; but if he appear, and * * * claim under such

sale or assignment, a trial of his right shall be had * * * upon an issue made thereon. * * *

Hough, Overall & Judson and C. M. Napton, for appellants. *Dyer, Lee & Ellis and John G. Chandler*, for respondent.

BLACK, J. This, and four other suits of a like character, were tried at the same time. The suit is one in equity, and the defendants are the Atlantic Milling Company, George Bain, who is president and managing officer of that company, the Victoria Milling Company, A. H. Smith, who is managing officer of the last-named company, the White Line Central Transit Company, and F. N. Judson. The two milling companies are corporations doing business in St. Louis. The evidence discloses these general facts: Plaintiff is a general creditor of the Atlantic Milling Company to the amount of \$2,046, for wheat sold in December, 1883. In the spring of 1883 that company failed, and suspended business. It resumed business in November of that year, most of the old debts having been extended. Towards the middle of December that company became indebted, and was pressed on account of these new debts, called the debts of the "new running." Plaintiff's demand is of this class. The Atlantic Milling Company and the Victoria Milling Company had a demand against the transit company for rebates on shipments, and Mr. Bain, for the Atlantic Milling Company, promised to pay the proceeds of his share of this claim to the creditors of the "new running." The result of several trips to New York was that Bain and Smith drew their individual and joint draft, of date 12th January, 1884, on Darling, manager of the transit company, for \$12,327.54, payable at Buffalo in 60 days, to the order of the Victoria Milling Company, which draft Darling accepted. The Victoria Milling Company then made its note of the same date for \$9,818.24, payable to Bain in 60 days. This note represents the interest of the Atlantic Milling Company in the rebates. There was a verbal agreement that the payment of this note should be conditioned upon the payment of the draft. On the 14th January, 1884, Bain indorsed the note, and delivered it to Mr. Judson, for the purpose, and with the understanding, that he should collect it, and pay the proceeds, *pro rata*, to the November and December creditors.

The petition alleges that the draft upon Darling was drawn by Bain and Smith, in their individual names, for the purpose of defrauding the creditors of the Atlantic Milling Company; that in furtherance of such purpose Smith executed to Bain his note for the \$9,818.24; that for a like purpose Bain indorsed the note to Judson, who procured a discount of it, taking a check therefor, with the understanding that the check should not be paid until the draft was paid; that these transactions were all thus made to defraud creditors. The prayer is that defendants be restrained from collecting the draft, or disposing of it; that it be delivered into court; the appointment of a receiver; and that plaintiff be paid out of the proceeds of the draft. The defendants denied all the allegations of fraud, and set out a history of the transactions as they are before stated, and as they appeared on the trial. Various creditors, both old and new, interpleaded for the fund, and ask that the petition of the plaintiff be dismissed.

The court granted a temporary injunction, ordered the acceptance to be collected by a receiver, and the \$9,818.24 is in court. On the final hearing the plaintiff prevailed.

The proofs show that Bain, Smith, and the Atlantic Milling Company were insolvent. Judson and the Victoria Milling Company are solvent. The note to Bain was made by the last-named company, and not by Smith, as stated in the petition. Mr. Judson made no negotiation of the note, nor did he attempt to do so. Much is said about these variances between the petition and proofs. We do not regard them as fatal to the plaintiff, though the real facts are to be kept in mind. The proof is clear that Bain and Smith drew the draft on

Darling in their individual names, because the transit company refused to settle in any other way. There is no proof of any fraudulent purpose in the settlement with the transit company, or in taking the draft payable to the Victoria Milling Company. It is clear, too, that Mr. Judson took the note from Bain in good faith, and for the purposes before stated, without any knowledge of any fraudulent purpose on the part of Bain, if any there was.

As to the other questions of fraud in fact, it is sufficient to say, in the view we feel bound to take of this case, that there is much evidence tending to show that Bain urged the settlement of rebates for the sole purpose of paying these new creditors, that he had agreed with them to pay their debts out of this collection, and that he placed the note with Mr. Judson for that purpose alone. The evidence shows that he was guilty of deception to some of these creditors, after he had given the note to Judson, in this: that he did not tell them who had the note, and that he said he had a check for it, when in fact he had no check. Bain says he made these statements because he wanted the matter of his getting the rebates kept quiet. Smith, however, did give the plaintiff a copy of the draft, and he endeavored to aid Smith in negotiating it, but the draft seems to have had no commercial standing.

That the plaintiff's demand is just and due is conceded; but it stands in the shape of an open account, and the first question is whether he can maintain this suit in equity. The general rule is that a creditor, before he can maintain a creditors' bill, must show that he has exhausted all remedy at law; and this because a court of equity will not entertain such a suit where the plaintiff has a complete and adequate remedy at law. In general, it must be shown that judgment has been recovered, and that execution has been issued and returned *nulla bona*, but there are exceptions to this rule. Thus, where judgment has been recovered, and the debtor is insolvent, the issuance and return of an execution will be dispensed with. *Turner v. Adams*, 46 Mo. 95. It is sufficient that the demand be allowed by the probate court where the debtor's estate is insolvent. *Merry v. Fremon*, 44 Mo. 518; *Lyons v. Murray*, 95 Mo. 23, 8 S. W. Rep. 170. In *Pendleton v. Perkins*, 49 Mo. 565, the debtor had absconded, and left money in the city treasury, but the city treasury could not be reached by statutory garnishment, and it was held that the creditor could maintain a suit in equity to subject the money to the payment of his debt, which had not been reduced to a judgment. The general doctrine is there stated that where the debtor has absconded, so that no personal judgment can be obtained against him, and there is no statutory proceeding by which his property can be reached, a creditors' bill will lie in the first instance. These cases all proceed upon the principle that the creditor has exhausted or has no adequate remedy at law.

In the present case, the creditor, the Atlantic Milling Company, is within and subject to the jurisdiction of the court; and, if the allegations of fraud are true, then that company could be sued in attachment, and its property in the hands of others could be garnished. It is urged, however, that the process of garnishment would be of no avail in this case, because the transit company owed the debt to the two milling companies jointly, and that it could not be garnished as the debtor of one of them. The answer to this is that the debt had been adjusted and the draft was made payable to the Victoria Milling Company, which is perfectly solvent. The transit company was bound to pay only to that company or its order. There can be no pretense of any fraud in that transaction. Indeed, it is this draft which the plaintiff seeks to impound. There was no occasion for a garnishment on the transit company. The Victoria Milling Company, by becoming the payee of the draft, became bound to account to the Atlantic Milling Company for the amount going to it. The Victoria Milling Company was therefore subject to the process of garnishment. It was also solvent. The fact that the amount going to the Atlantic Milling Company was not yet due is of no moment, for a debt not yet due may be garnished. Section 2540, Rev. St.

Nor does the fact that the Victoria Milling Company had made its note to Bain affect the case. If that transaction was made in fraud of creditors, its invalidity could be adjudged on issues between the plaintiff and the garnishee. Section 2541. This statute also gives the court ample power to compel the production of the note, whether in the hands of Bain or Judson. Again, the note was the property of the Atlantic Milling Company, though payable to Bain; and, if the plaintiff desired to question the validity only of the assignment of the note by Bain to Judson, then Judson could have been summoned as garnishee, and the issue as to the validity of that transfer could have been tried. We see no reason why the plaintiff could not have compelled both Judson and the Victoria Milling Company to have appeared and answered interrogatories at the same time. The machinery of the attachment laws affords a speedy and ample remedy in all such cases. *Lee v. Tabor*, 8 Mo. 322; *Eyerman v. Knieckhaus*, 7 Mo. App. 455; *Lackland v. Garesche*, 56 Mo. 267; *Hazell v. Bank*, 95 Mo. 60, 8 S. W. Rep. 178.

It is suggested that Judson could not be held as a garnishee, because he holds the assets in trust for a designated class of persons. Plaintiff does not seek to enforce that trust, but he says there is no such a trust; that the transfer of the note to Judson was a void act, because in fraud of creditors; and that these issues cannot be tried on issues between plaintiff and the garnishee. Doubtless there are cases where courts of equity have jurisdiction, though a statute may furnish a remedy by an action at law, and there are cases where there is a concurrent jurisdiction; but we do not understand this case to belong to either class. Mr. Pomeroy says: "It is a necessary result, from the whole theory of a creditors' suit, that jurisdiction in equity will not be entertained where there is a remedy at law." 3 Pom. Eq. Jur. § 1415. This succinct statement of the law is in accord with the prior rulings of this court. While it is not necessary in all cases that the creditor's demand should be first put in judgment, it is essential for him to make out a case which shows that he has no adequate remedy at law. That has not been done in the present case.

The answer does not, in terms, plead remedy at law, and hence it is argued that defendants have waived all such questions; and in support of this we are cited to *Blair v. Railroad Co.*, 89 Mo. 388, 1 S. W. Rep. 350. The petition in that case contained two counts or causes of action,—one, an action at law to recover damages for personal injuries; the other, a suit to set aside a release in aid of the action at law. What we said in respect of a failure to plead remedy at law must be considered in connection with the facts before the court. This observation applies to the cases there cited from 2 and 4 Johns. Ch., and from 2 Dev. & B. Eq.; for in each of these cases the court found grounds upon which to give equitable relief without regard to the failure to plead adequate remedy at law. We certainly did not design to say that a court of equity would proceed to grant relief where the case made did not warrant equitable relief, and in which it appears clearly that the plaintiff has a full, complete, and adequate remedy at law. "It is often said by the courts and elementary writers that, unless the objection that the plaintiff has a perfect remedy at law is taken by demurrer, as on a preliminary question, it will be regarded as waived, and cannot be raised at the hearing; but we apprehend this is not generally true." Story, Eq. Pl. (Rev. Ed.) § 481a. *Foley v. Hill*, 1 Phil. Ch. 399, was a bill for account. On a hearing it appeared that the account consisted of three items only,—two on one side, and one on the other. The lord chancellor dismissed the bill, on the ground that such an account was not the proper subject for a bill. His decree was affirmed in 2 H. L. Cas. 28. As we understand the case, no plea of remedy at law was made. It seems to be the uniform practice in the federal courts, when the remedy at law is plain, adequate, and complete, to dismiss the bill, though the question is not raised by defendant in his pleadings. *Hipp v. Babin*, 19 How. 271, and cases cited; *Lewis v. Cocks*, 23 Wall. 466. In the case last cited, it is said:

"In the present case, the objection was not made by demurrer, plea, or answer, nor was it suggested by counsel. Nevertheless, if it clearly exists, it is the duty of the court *sua sponte* to recognize it and give it effect." The federal judiciary act provides that suits in equity shall not be maintained where a plain, adequate, and complete remedy may be had at law; but in the cases last cited it is held that this statute is merely directory, and that it made no change in the pre-existing law. Other courts apply the same rule. *Kriebbaum v. Bridges*, 1 Clarke, (Iowa,) 14; *Hins v. City of New Haven*, 40 Conn. 478. See *Higgins v. Ferguson*, 14 Ill. 269. This court held in *Rutherford v. Williams* that where there is no equity as the ground of relief, or there is an adequate remedy at law, a court of equity will dismiss the bill, and remit the plaintiff to his action at law and a jury trial. 42 Mo. 18. To entitle the plaintiff to the equitable interposition of the court, he must show a proper case for the interference of a court of chancery, and one in which he has no adequate or complete relief at law. *Magwire v. Tyler*, 47 Mo. 115. Under our practice act, the petition in a suit in equity, as well as an action of law, must contain a concise statement of the facts, with a prayer for relief. The old jurisdictional clause in bills of equity was but a conclusion of the pleader, and would not give the court jurisdiction. The facts stated must show a case for equitable relief. Story, Eq. Pl. § 34. The jurisdictional clause has no proper place under our practice act. So, if the answer sets up new matter, the facts, not conclusions, must be stated. If the defendant can show to the court that the case is not one of equitable cognizance by making denials, and setting up other and different facts, and making proof thereof on the hearing, then this he may do. That was done in this case. Since the case made was one for which there is a full and complete remedy at law, the bill must be dismissed. Parties in cases like this have a constitutional right to a jury trial, and the courts cannot abridge that right. Of course, if a court of equity can retain the case for any purpose, it will proceed to do full justice; but that is not the case before us.

The judgment is reversed, and the cause remanded, with directions to the circuit court to enter up a decree dismissing the bill for want of equity, and further to make an order turning the fund in court over to Mr. Judson.

RAY, J., absent. The other judges concur.

STATE v. MATTHEWS.

(Supreme Court of Missouri. December 20, 1888.)

1. HOMICIDE—EVIDENCE—DECLARATIONS—RES GESTÆ.

On a trial for murder, evidence that while defendant was going directly from the place of the homicide he asked a man going towards the place where the latter was going, and after reply, said, "You had better go, and that damn quick," and then took his gun from his shoulder, is admissible.

2. CRIMINAL LAW—EVIDENCE—SYSTEM OF CRIMINAL ACTS.

Evidence that defendant and others had previously taken and whipped one killed at the time of the homicide in question, and had taken a witness from the house, is admissible as showing that the crime was one of a system of criminal acts, and that defendant was implicated in that crime as a part of the system.

3. SAME—COMPETENCY.

A question to a witness, who was a member of the criminal society to which defendant belonged, and was present at a meeting of it before the murder, and who has fully detailed his connection with the case, whether he has employed counsel, is properly excluded as immaterial.

4. SAME—TRIAL—INTERROGATORIES BY JUDGE.

The court may interrogate a witness to ascertain whether he understands a question asked him, and has answered it according to his understanding.

5. SAME—EVIDENCE—CO-DEFENDANT SUBPENAED BY STATE.

It is proper to refuse to allow defendant to show that a co-defendant has been subpoenaed by the prosecution, and is in court.

6. SAME—ACCOMPLICES—INSTRUCTIONS—ASSUMPTION OF GUILT.

An instruction that "accomplice" means any person aiding, etc., defendant in the killing, and cautioning the jury as to the weight to be given to an accomplice's testimony, is not erroneous as assuming defendant's guilt, where that interpretation cannot fairly be given to it when read in connection with the whole charge.

7. SAME—INSTRUCTIONS—EVIDENCE TO SUSTAIN.

A refusal to give instructions as to murder in the second degree, manslaughter, or justifiable homicide, is not error where there is no evidence upon which to base them.

8. WITNESS—COMPETENCY—CRIMINAL TRIAL—CO-DEFENDANT.

Under Rev. St. Mo. §1918, providing that no person on trial shall for that reason be incompetent, but such person may testify in his own behalf or in the behalf of a co-defendant, a defendant, on a separate trial, may call as a witness his co-defendant, who is not on trial.

9. CRIMINAL LAW—TRIAL—ARGUMENTS OF COUNSEL.

Under section 1919, prohibiting any unfavorable influence to be drawn from the omission of a defendant or of his wife to testify, it is not cause for reversal for the prosecuting attorney on the argument to refer to defendant's omission to call a co-defendant who is not on trial.

10. SAME—APPEAL—OBJECTIONS TO EVIDENCE—ASSIGNMENT OF ERROR.

Where no objection or exception is taken to testimony in response to an unobjectionable question, and no reason for excluding it is stated, error is not well assigned to its admission.

SHERWOOD, J., dissenting.

Appeal from circuit court, Christian county; WALTER D. HUBBARD, Judge.

Indictment against Wiley Matthews for murder. William Walker, John Matthews, and others were jointly indicted, but were tried separately. The case of *State v. Walker* is reported in 9 S. W. Rep. 646, and that of *State v. John Matthews*, ante, 30. There was evidence that defendant and the witnesses Abbott and Nash were members of the organization known as "Bald Knobbers," and that the witnesses were present at the meeting mentioned in the *Walker Case*. The twenty-third instruction was "that the word 'accomplice' or 'accomplices,' as used in these instructions, means any person or persons present and participating in, or aiding, or abetting, or advising, or inciting, or counseling the defendant, or others with him, in the killing of Charles Green or William Edens, or who, whether present or absent, conspired with the defendant or any one with him in such killing, or who advised, or in any way counseled or intentionally encouraged, others in the killing. And the jury shall determine from all the facts and circumstances in evidence in this case whether or not any witness testifying in this case is an accomplice within the meaning of this instruction; and if you find any witness was such accomplice, then, in considering his testimony, you are to be guided by the rule as to weighing the testimony of accomplices, laid down in another instruction in this case. But any one not an accomplice is not subject to the rule for weighing accomplice's testimony." Defendant was convicted, and appeals. Rev. St. Mo. 1879, § 1918, provides that "no person shall be incompetent to testify as a witness in any criminal cause or prosecution by reason of being the person on trial or examination, or by reason of being the husband or wife of the accused, but any such facts may be shown for the purpose of affecting the credibility of such witness: provided, that no person on trial or examination, nor wife or husband of such person, shall be required to testify; but any such person may, at the option of the defendant, testify in his behalf or in behalf of a co-defendant, and shall be liable to cross-examination as to any matter referred to in his examination in chief, and may be contradicted and impeached as any other witness in the case. * * *

Boyd & Delaney and *Travers & Payne*, for appellant. B. G. Boone, Atty. Gen., and R. F. Walker, for the State.

BRACE, J. The defendant, Wiley Matthews, with William Walker, John Matthews, and 13 others, were indicted in the circuit court of Christian county, for killing Charles Green on the night of the 11th of March, 1887. The de-
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fendant, upon a separate trial, was convicted of murder in the first degree. William Walker and John Matthews were also, on separate trials, each convicted of murder in the first degree, and their cases brought by appeal to this court, and in each of them, at the present term, decisions have been rendered, sustaining their conviction. The record in this case is substantially the same as in those, and as all the points except those hereinafter noted were ruled adversely to the defendant in each of those cases, those only will be noticed that are peculiar to this case.

1. Charles Graves, a witness for the state, in delivering his testimony, after having testified that immediately after the shooting defendant came out of Edens' house, where Green was killed, to where he was, and that he went down the railroad with him, testified: "He [defendant] hollered to a man who was walking up the railroad in the direction of where the killing was done, about 175 or 150 yards of Edens' house, I would suppose. *Question.* What was said there? *Answer.* Some one hollered at this man who was walking up the railroad, and asked him where he was going. Some one in the lead hollered, 'Stop that man, or else kill him,' and the defendant, Wiley Matthews, hollered at him and says, 'Where in the hell are you going?' and the man on the railroad answered, 'I am not going far;' and he says, 'You had better go, and that damn quick;' and just started and turned his gun right down off his shoulder, and Joe Inman caught the gun and said, 'You shan't shoot that man at all.' I had a conversation with him myself right along directly after that a few minutes. I don't suppose we had walked more than 15 or 20 steps until he said he had got him a man that night to save his Uncle John; that he shot him in the back with a shotgun, and he showed his hand up on his back something similar to that. He said it was William Edens."

George W. Green, the man above spoken of, testified that he believed the man who ordered him to stop was the defendant, although he would not swear positively to it. It is contended that the admission of this evidence was error, for the reason that it tended to prove an independent crime, *i. e.*, an attempt to shoot Green. Conceding that it does, the question asked was unobjectionable. There was no objection made to the evidence contained in the answer, and no exception taken to its admission, and no reason assigned for its exclusion, and under repeated rulings of this court the error, if any, could avail the defendant nothing on appeal, as was held in the case against Walker, to which could be added numerous others, if necessary. The evidence, however, was admissible. The defendant and his companions were going directly from the scene of the homicide just perpetrated. Green was going towards it. The defendant's halting him was an act, the character of which not only illustrated the character of the principal act in the tragedy as part of a system of criminal acts, but was so intimately connected with it as to make it a part of that very transaction, and to identify the defendant as an actor therein. *Whart. Crim. Ev.* §§ 31, 32, 38, 46, 47. *State v. Sanders*, 76 Mo. 35; *State v. Beauchleigh*, 92 Mo. 490, 4 S. W. Rep. 666; *State v. Rider*, 95 Mo. 485, 8 S. W. Rep. 723.

2. There was no error in admitting the evidence that in November preceding the killing, one of the deceased, William Edens, was taken out by a body of men and whipped, and that defendant was one of the number; or that the defendant and others once took the witness Graves out of the house. The evidence introduced tended to show that the crime in question was one of a system of criminal acts, and implicated the defendant in that crime, and this evidence tended to prove that he was concerned in the commission of this extraneous offense as a part of that system. *Whart. Crim. Ev.* § 48, and note 4.

3. There was no error in the ruling of the court that it was immaterial whether the witnesses Abbott and Nash had employed counsel in their own behalf. They had fully detailed their whole connection with the facts of the

case, and the relation they sustained to it as witnesses was fully and obviously before the jury.

4. The court committed no error in interrogating the witness Graves for the purpose of ascertaining whether he understood a question asked him, and had answered it according to his understanding; nor in refusing to permit the defendant to show by the sheriff that the witness Inman had been subpoenaed by the state, and was in court. If he was in court, the defendant could have called him. The fact that he was a co-defendant in the same indictment prevented the state from calling him as a witness, without having first entered a *nolle pros.* as to him, which the court had no power to compel, and which the prosecuting attorney could not do except under a sense of his official duty; and the defendant was entitled to no unfavorable deductions from the mere fact that he was not called by the state under such circumstances.

5. The instructions given in this case cover the whole law of the case, and do not differ materially from those given in the case of William Walker, and John Matthews, and it is unnecessary to review them. The criticism upon No. 23, that it assumes the guilt of the defendant, has nothing to rest upon when that instruction is read in connection with the other instructions given, and when it is considered that this instruction is not treating of the question of defendant's guilt or innocence, but is confined to pointing out to the jury the evidence by which they may determine who of the witnesses testifying may be deemed accomplices, and to a cautionary instruction as to the weight to be given to the testimony of such witnesses. Instructions are to be read together as a whole, and, when consistent, their meaning is to be collected from the whole context, and not from detached instructions or phrases in them, and if, when so treated, their meaning is obvious, the legal principles announced, correct and applicable to the case, they are safe guides for a jury.

6. The refused instructions in this case are substantially the same as those refused in the preceding cases mentioned, and in regard to them it is only necessary to say, as to such as are peculiar to this case, that, as in the case of John Matthews, no evidence was found upon which to base an instruction for murder in the second degree, manslaughter, or upon the hypothesis of a homicide committed by the defendant in the lawful defense of his uncle, John Matthews.

7. It is assigned for error that Mr. Hammond, one of the attorneys prosecuting for the state, in his address to the jury misstated the law in the following language, used by him: "The defense put in no evidence except to contradict Mr. Green by Mr. Allen. Why are not the other defendants here to tell you all about this in behalf of this defendant? They know what occurred in the house, and they might have been put on the stand to testify in this case, and tell you what took place in the house." In the cases of *State v. Choyo Chtagk*, 92 Mo. 396, 4 S. W. Rep. 704, and *Same v. Chyo Goom*, 92 Mo. 418, 4 S. W. Rep. 712, it was held under the provisions of section 1918, Rev. St. 1879, that on the separate trial of one defendant, his co-defendant, not on trial with him, was a competent witness for the defendant on trial, and that he had the right to call such co-defendant not on trial as a witness, and have him testify in his behalf. The statement of Mr. Hammond is in harmony with the law as thus laid down. When two co-defendants are on trial at the same time it is optional with each of them whether he will go upon the stand, and testify in behalf of himself and his co-defendant, and neither can require the other to so testify. Where but one is on trial it is optional with him whether he will go on the stand and testify, or whether he will call his co-defendant, or any other witness, to testify in his behalf. If he does not avail himself of his privilege to testify in his own behalf, section 1919 provides that his failure to do so "shall not be construed to affect the guilt or innocence of the accused, nor shall the same raise any presumption of guilt, or

be referred to by any attorney in the case, nor be considered by the court or jury before whom the trial takes place." By section 1918 the husband or wife, as the case may be, of the defendant on trial is made a competent witness in his behalf, and by section 1919 any reference to the failure of the defendant to call the husband or wife is prohibited, but no such prohibition is extended to the failure to call a co-defendant not on trial. Of course, such co-defendant, when called, would have the same right as any other witness to refuse to give testimony that might criminate himself; but this is his personal privilege, and has nothing to do with the question of the right of the defendant on trial to have his co-defendant not on trial called to testify, to which right the statement was limited. Two other statements of the attorneys prosecuting were excepted to, but, so far as the connection can be seen in which they were used, their impropriety is not apparent.

Finding no reversible error in the record of this case, the judgment of the circuit court is affirmed.

All concur, except RAY, J., absent, and SHERWOOD, J., who dissents.

MORRISON v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Missouri. December 20, 1888.)

TAXATION—TAX SALE—STATEMENT OF DELINQUENT TAXES.

A clerk's statement for delinquent taxes for two years, stating those of each year, and the items of each, separately, is valid, though a portion of the items for one of the years is excessive.

On motion for rehearing. For a statement of the case, see 9 S. W. Rep. 626. *Bennett Pike*, for motion. *Dinning & Byrns* and *F. M. Estes*, opposed.

BLACK, J. We have re-examined the record, regardless of the abstracts, and find these to be the facts as to the levies: Taxes were levied by the county court upon the assessment of the property of the railroad company on the 17th of August, 1876, and readjusted on the 26th of that month on the motion of this defendant. Taxes were levied on the 26th May, 1876, against other property. Both of these levies are for the same period of time, namely, from August, 1875, to August, 1876, and the rate of taxation is precisely the same in both cases. As to the taxes levied for the year from August, 1876, to August, 1877, there is this difference, and this only, in the levies: On property in general the levy for county interest is .10 on the \$100 valuation, while as to the defendant's property the levy for the same purpose is .30 on the \$100 valuation. The levy on property in general for the county sinking fund is .30 on the \$100 valuation, while the levy for the same purpose on the defendant's property is .40 on the \$100 valuation. The five other items are the same as to property in general and the defendant's property. The statement issued by the clerk, which is made, in effect, an execution, is valid on its face, and would certainly be a perfect protection to the officer who executes it. Again, the law is well settled that, where part of a tax is legal and part is illegal, the legal part will be sustained if the parts are capable of being distinguished. 2 *Desty*, Tax'n, § 118; *Cooley*, Tax'n, 295, 296. Now, in this case, the entire tax for 1875 is separately stated and set forth in the writ, both as to the items and as to the aggregate amount. The various items of the tax for 1876 are also separately stated in the writ, so that these two excessive levies are readily and easily distinguished from the other items for that year. The execution was therefore not void. On the contrary, it was a perfectly valid writ for all the taxes of 1875 and the taxes of 1876, lest it be the two items, in which there is an excessive levy.

The motion for a rehearing is overruled.

RAY, J., absent. SHERWOOD, J., not sitting. The other judges concur.

ALLEN v. LOGAN *et al.*

(Supreme Court of Missouri. December 20, 1888.)

1. PARTNERSHIP—FIRM AND INDIVIDUAL ASSETS—EVIDENCE.

The common source of title in ejectment was a conveyance of certain property to three brothers individually. Plaintiff derived title through a sheriff's sale of one undivided third interest, under judgment against one of the brothers for an individual debt. Defendants claimed under a later purchase from the three, made in payment of a debt from them as partners, averring that the land was firm assets, and that the sheriff's sale was void. The partnership was alleged to have been originally formed long before, in Illinois, but in none of their transactions, notes, or deeds was there any firm name used. Before acquiring the land, they, with others, were engaged for several years in Texas in the cattle business. Upon leaving Texas, they adjusted their respective interests, owing no debts, and removed to Missouri, where they bought the land; their former associates having no interest in it. *Held*, that the evidence did not support the finding that the land belonged to a partnership.

2. APPEAL—REVIEW—EQUITABLE DEFENSES—EVIDENCE.

Upon the filing of an answer in ejectment, raising an equitable defense, the proceedings are thereafter governed by the rules of equity, and an appellate court may inquire into the sufficiency of the evidence to support the trial court's conclusions of facts.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Ejectment by Charles W. Allen against William G. Logan, Henry W. Nelson, John C. Sherwood, Thomas Pearson, S. M. Pearson, and Thomas Menown, for land in Jackson county. An equitable defense was made, and the court found and decreed for defendants. Plaintiff appeals.

Karnes & Ess, for appellant. *Bryant & Holmes*, for respondents.

SHERWOOD, J. In August, 1881, Joseph, Solomon, and Lewis P. Vail bought the land in controversy, two and one-fourth acres, now known as "Logan's First Addition to the City of Kansas City." The deed was made to them individually, and not as partners. In June, 1882, Charles F. Link was approached by Lewis P. Vail, and asked to lend him some money; Vail indicating to him the location of the property aforesaid, and saying that he owned it, and wanted the money to pay his license, as he was about to engage in the saloon business, and did not wish to mortgage the property for so small a sum. Link thereupon, believing Vail's statement as to the ownership of the property, loaned him the money, \$185, all he had. Vail failing to repay him, Link brought suit before a justice of the peace, recovered judgment, and filed a transcript thereof in the office of the circuit court, on the 21st of August, 1882. After a return of *nulla bona* upon an execution issued on the judgment of the justice of the peace, execution issued from the circuit clerk's office, was levied upon the said land, and the interest of Lewis P. Vail in the same sold, and Link became the purchaser, receiving a sheriff's deed. This sale occurred in June, 1883, and the sheriff's deed is dated the 30th of that month, and recorded on the 14th day of July next thereafter. On the day last mentioned Link conveyed what he had purchased to Lithgow, and on the 23d day of the same month the latter conveyed to Allen, the plaintiff, the deed being recorded the next day. The Vail Bros., to whom the land was deeded as aforesaid, are the common source of title. On the 8th day of September, 1882, 19 days after the transcript of the justice was filed, creating a lien on the land, Lewis P. Vail, on his own behalf, and as attorney in fact of his brothers, for an expressed consideration of \$2,000, conveyed by general warranty deed the land to John Vail and Leander Vail, his uncle and nephew, and the deed was recorded on the same day. On September 27, 1882, 13 days after the execution of that deed, John Vail and Leander Vail executed a warranty deed for the premises to the defendant William G. Logan. This deed expresses a consideration of \$2,400, was acknowledged in Pike county, Ill.,

and placed on record October 4, 1882, since which time Logan and the other defendants claiming under him have been in possession of the premises in dispute. In September, 1883, the plaintiff brought ejectment for the one-third interest in the land aforesaid. In October, 1883, Joseph, Lewis P., Solomon, Leander, and John Vail were made parties defendant, on their own motion, and filed their amended answer, as follows:

"OCTOBER TERM, 1883.

"*Charles W. Allen, Plaintiff, vs. Wm. G. Logan et al., Defendants. (Ejectment.)*

"Lewis P. Vail, Solomon Vail, Joseph Vail, and Leander Vail, defendants herein, in answer to plaintiff's petition filed in this cause, say that they are the persons from whom and through whom Wm. G. Logan, Henry W. Neilson, J. C. Sherwood, Thomas Pearson, and S. M. Pearson, his wife, and Francis Menown, the present occupants of the land in controversy in this suit, and co-defendants herein, claim title under deeds of general warranty. That Lewis P. Vail, Solomon Vail, and Joseph Vail were in the month of August, 1882, and prior thereto, partners, and that said partnership continued and existed on and up to the month of December, 1882, and prior and subsequent to the 5th day thereof. That as partners, and with partnership funds, and for partnership purposes, the said Lewis, Solomon, and Joseph Vail did, on the 29th day of July, 1881, or thereabouts, purchase the land now sought to be recovered by plaintiff in this suit, and described in his petition. That Lewis, Solomon, and Joseph Vail, in the month of August, 1882, and prior and subsequent thereto, were, as partners, indebted to John and Leander Vail, for money advanced them for partnership purposes, in the large sum of two thousand dollars or more, and that said indebtedness existed in the month of December, 1882, as and prior and subsequent to the 5th day thereof, on the part of the said Lewis, Solomon, and Joseph Vail, as partners, to the said John and Leander Vail. That at the dates and time named, to-wit, August and December, 1882, the liabilities of the said Lewis, Solomon, and Joseph Vail, as partners, were in excess of their partnership assets. That some time in the month of September, 1882, Lewis, Solomon, and Joseph Vail conveyed to John and Leander Vail, creditors of the partnership, the property now in controversy in this suit, to pay partnership indebtedness with, by a good and sufficient warranty deed, which was duly recorded in office of the recorder of deeds for Jackson county, Mo., in the month of September, 1882. That prior to the deeding of said property to John and Leander Vail the said Lewis, Solomon, and Joseph Vail, as partners, had an amicable accounting among themselves of the firm's assets and liabilities, and the interest of each individual member, and found that Lewis P. Vail was indebted to the firm, in the month of August, 1882, and prior thereto, in a large sum, to-wit, seven hundred dollars, for money withdrawn by him from the firm in excess of his contributions or profits to or in the said partnership. That no part of the said seven hundred dollars thus found to be due was paid on or before the months of August and December, 1882, nor has yet been paid, by the said Lewis P. Vail, or by any one else in his name, or for his account. That in the month of August, 1882, or prior thereto, Lewis P. Vail became indebted to Chas. F. Link in the sum of one hundred and eighty-four dollars. That said debt was contracted on the part of Lewis P. Vail as his own individual debt. That no portion of it was used by or contributed to the partnership. That at the time of the contraction the partners of Lewis P. Vail, Solomon and Joseph, were in ignorance of it, did not authorize it, nor did they at any time thereafter confirm his act, or assume the responsibility for its payment. That in the month of August, 1882, or prior thereto, the said Chas. F. Link obtained judgment against Lewis P. Vail for the said indebtedness, before A. W. Allen, a justice of the peace, and in the month of December, 1882, caused a transcript of said judgment to be filed with the clerk of this court. That

execution was issued to the sheriff of Jackson county, Mo., who levied upon and sold the property described in plaintiff's petition in the month of June or July, 1883. That at the time of said sale these defendants, by their Atty., J. J. Davenport, publicly announced at the door of the court-house, where the sale was about to take place, in the presence and hearing of said sheriff, and the said Link, and one named Lithgow, and many others then there. That Lewis, Solomon, and Joseph Vail were partners at the time this land was purchased, and that they had in good faith conveyed the same to John and Leander Vail, creditors of the partnership, who were then in possession of same under deed of record, and that the claim of Link was for an individual debt, for which the partnership assets were in no manner liable. Defendants say that plaintiff, prior to his purchase, had both actual and constructive knowledge of defendants' possession, claim, and title to the land in controversy in this suit. Defendants deny each and every allegation contained in plaintiff's petition, except what is hereinafter admitted. Wherefore defendants ask judgment, and for such other and further relief as may be proper.

J. J. DAVENPORT, Atty. for Defts."

The reply of the plaintiff to this answer was, in effect, a general denial.

What the answer of the other defendants was, who were brought in by summons, the record does not disclose, nor whether there was any reply to the same. Both parties seem to have treated the answer of those defendants who came in of their own motion as the answer of all the defendants. At any rate, the court below found for the defendants, in accordance with the allegations of the answer already set forth, and entered a decree declaring the lien of the judgment in favor of Link, the deed of the sheriff to him, the deed of Link to Lithgow, the deed from Lithgow to plaintiffs, null and void, and of no effect, as against all the defendants except Lewis P. Solomon, and Joseph Vail. Costs were also assessed in favor of the defendants, and against the plaintiff, etc.

The correctness of that decree is brought in question by this appeal. Before discussing the merits of the decree, a preliminary point must be disposed of. It is urged that this is an action at law, pure and simple, and in consequence of this that the whole case is to be treated as one at law, notwithstanding the interposition of an equitable defense, and that in consequence, as the declarations of law were correct, that this court will not examine the evidence in order to determine its weight or sufficiency. This idea is incorrect. When, as here, an action of ejectment is brought, and the answer interposes equities which, if established, nullify the plaintiff's legal title, and prevent a recovery by him, then, of necessity, the existence of those equities must be first determined, and determined unfavorably to the defense, before the conceded legal title can prevail. If, upon examination, it be found that those equities raise a barrier which the legal title cannot overlap, then that result puts an end to the legal title, and it becomes subordinated to the paramount equities of the case. But while the examination is in progress the case possesses all the attributes and features of a case in equity, and is to be determined and adjudicated, to all intents and purposes, in precisely the same manner as if the equities in the answer had been embodied in a petition, and made the basis of original affirmative relief. This principle must be the guide in the present instance.

2. There are some cases involving equitable questions, where we have deferred somewhat to the findings of the lower courts upon questions of fact, and there are other cases where, notwithstanding a certain deference paid to those courts in this regard, we have yet felt constrained to arrive at conclusions from the evidence totally at variance with those reached below. In the case at bar, the testimony is largely in the shape of depositions, and therefore the advantages of observing the demeanor of the witnesses when testifying was denied to the lower court; so that an equal opportunity is afforded to

this as to that court of determining what probative force to give to the testimony of the witnesses then testifying.

3. It will be observed that the answer is bottomed upon the alleged existence of a partnership known as "Vail Bros." or "Vail & Bros.;" that the property in controversy was bought with partnership funds, and for partnership purposes; that the conveyance made to John Vail and Leander Vail, in September, 1882, was made for the purpose of paying a partnership debt, and that the judgment recovered by Link was for the individual debt of Lewis P. Vail. Reading the testimony in the cause, there is room for serious doubt whether, in truth and fact, there ever existed such a firm or partnership as Vail Bros. or Vail & Bros. It would be quite natural where several brothers are engaged in business, and running up the usual accounts incident to supplies for their business, that they should be designated on the books of their creditors, as a short method of description, as above stated. The testimony on the subject of partnership existing between Lewis P., Solomon, and Joseph Vail, from 1857 to 1882, must be regarded as too vague, shadowy, and unsatisfactory to warrant being made the basis of a decree; and this view is much strengthened when it is noted that in none of the business transactions of the supposed firm, though said to continue for such a long space of years, neither in the promissory notes of the three brothers, nor even in their muniments of title, is mention made of, or allusion to, the alleged firm name. The law presumes that business is conducted in the usual and ordinary way, (*Fitzgerald v. Barker*, 85 Mo. 13, and cases cited,) and this presumption does not favor the claim of the defendants concerning a partnership.

4. But granting that such a firm as Vail & Bros. existed from a remote period down to a date comparatively recent, still it does not follow that it continued to exist as late as 1882, when the deed was made by the three brothers to John and Leander Vail, within a few days after the property conveyed had been bound by the lien created by the filing of the transcript from the justice of the peace; for it is quite certain that the alleged original firm which originated in Pike county, Ill., and had its habitat there, ceased to exist when removed to Texas, in 1879, and admitted to its membership several other persons; and this fact is established by the testimony of Down, who testifies that he was one of the partners, and that Petrie, the two Morrisons, and the three Vail Bros. were the others,—the business being buying and selling cattle; and that, when he sold out to the Vail Bros., they went into partnership with Petrie in the cattle business. Joseph Vail himself, one of the three, says that the firm in Texas was composed of the three brothers and a man by the name of John Petrie, and that the partnership was dissolved in June or July, 1881; that they sold out then in Texas; owed no debts; brought to Kansas City \$6,000 or \$7,000; and that Petrie had no interest in the Kansas City land. This witness is sustained in his testimony as to Petrie being the firm with them in Texas, but that they settled with him, and bought him out, by the testimony of the two other brothers, Lewis P. and Solomon. There is no pretense that after the settlement with Petrie, and his interest was purchased, any other firm was formed, after the dissolution and after selling out in Texas. Solomon Vail, when speaking of the money realized by the sale in Texas, says: "We held it in common, and invested it in common, as common stock,—common money." No principle is better settled than that the addition or subtraction of a member from a firm creates a new firm, and operates as the dissolution of the old firm, even though the business be continued under the old firm name. *Spaunhorst v. Link*, 46 Mo. 197; 1 Lindl. Partn. (Ewell's Ed.) 231, 392, and cases cited.

Hence nothing can be clearer, from the facts above stated, than that the firm of Vail Bros., conceding its existence in Illinois, expired when it underwent the successive mutations disclosed by the record. But, apart from that, the new firm expired, as already seen, in June or July, 1881, and it then

owed no debts. Of course, after its dissolution, no power lay in the former partners to create any new indebtedness. The former partners must therefore, in any event, be regarded just as they appear on the face of the deed made them, as tenants in common of the realty conveyed to them, and not as partners therein, even within the purview of a court of equity. Under the provisions of section 3949, Rev. St., the deed made them tenants in common, as much so as if those very words were employed therein.

5. Besides, the attempt of the defendants was to fasten, by parol testimony, a resulting trust upon the property described in the deed, and by such testimony to change the *prima facie* operation and effect of such deed, and make the property of tenants in common partnership property, and as such chargeable with a partnership indebtedness. The burden was on them to do this. The rule in this court is settled by a uniform line of decisions that parol testimony, in order to accomplish such an object and secure such an end, must be clear, strong, and unequivocal,—so definite and positive as to leave no room for doubt in the mind of the chancellor as to the existence of such a trust. *Johnson v. Quarles*, 46 Mo. 426; *Forrester v. Scoville*, 51 Mo. 268; *Ringo v. Richardson*, 53 Mo. 394; *Kennedy v. Kennedy*, 57 Mo. 73; *Modrell v. Riddle*, 82 Mo. 31; *Berry v. Hartzell*, 91 Mo. 132, 3 S. W. Rep. 582.

The testimony in this cause falls far short of the standard heretofore established. Indeed, it is impossible to read the testimony in this record without being impressed with the idea that the theory of a partnership and partnership indebtedness took its origin after the transcript from the justice of the peace was filed, and other complications began to surround those who now claim to have been partners at the time. The claim of the plaintiff is founded in justice, and the testimony shows that it is at least as much entitled to the protection of a court of equity as the claim which was made the basis for its overthrow.

The judgment will be reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

All concur. RAY, J., absent.

ALLEN v. RAY *et al.*

(*Supreme Court of Missouri.* December 20, 1888.)

1. TAXATION—TAX TITLE—UNRECORDED PATENT—PURCHASER'S TITLE.

A purchaser at tax sale under proceedings against the patentee, whose patent is not of record in the county, and who has parted with his title, takes no title as against one claiming under a recorded conveyance from the patentee's grantee, though the intermediate conveyance is not recorded.

2. JUDGMENT—DELINQUENT TAXES—RES ADJUDICATA—EJECTMENT.

In ejectment against a purchaser at tax sale, the judgment for delinquent taxes is conclusive of the validity of the assessment, and the assessor's books are inadmissible to show its invalidity.

3. TAXATION—TAX SALE—PUBLICATION—AFFIDAVIT OF NON-RESIDENCE.

Under Rev. St. Mo. 1879, § 6837, declaring that in tax suits against non-resident owners the proceedings shall be as in civil actions affecting real or personal property, and section 3494, providing that in suits for the enforcement of liens, if it is alleged in the petition or affidavit that defendant is a non-resident, an order shall be made, directed to non-residents, etc., an affidavit at the end of the petition in a tax suit that affiant has good reason to believe and does believe that defendant is a non-resident is sufficient for an order for publication.

4. SAME—DESCRIPTION OF LAND—USE OF LETTERS.

It is not essential that an order of publication describe the land, and if it were a description of it as the "Shf" of a given section is sufficient; Rev. St. Mo. § 6857, providing that in papers in tax proceedings "S." may be used for "south," and that any description by the use of letters and characters as provided in that section, when so made that the land may be identified, is sufficient.

5. SAME—ERROR IN JUDGMENT—CORRECTION BY MOTION.

A variance between the amount of the judgment and the amount of taxes due as stated in the order for publication, caused by the addition of interest to the latter amount, if error, can be corrected only by motion against the judgment, and is not available collaterally.

Appeal from circuit court, Barry county; WILLIAM F. GEIGER, Judge. Ejectment by Thomas M. Allen against John Ray and Preston Gibson, who set up a tax title. The order for publication described the land as the "Shf" of a given section. The first, third, and sixth instructions asked by plaintiff, and refused, were: "(1) That the patents from the United States to John McFeely, and the deed from John McFeely and wife to J. Stewart Lowe, and the deed from J. Stewart Lowe and wife to George Crown, and the deed from George Crown and wife to Horace R. Williams and Thomas M. Allen, and the deed from Horace R. Williams and wife to the plaintiff, Thomas M. Allen, had the legal effect to pass the title to the land in controversy to plaintiff, and that he is entitled to recover in this action." "(3) That the recording of the deed from J. S. Lowe and wife to George Crown, in the deed-record in the office of the recorder of deeds of Barry county, Missouri, was notice to all the world from the date of its being recorded." "(6) That the patents and deeds read in evidence by plaintiff, passed to him the title to the land in question, and plaintiff is entitled to recover." Defendants obtained judgment and plaintiff appeals. Rev. St. Mo. 1879, § 6857, provide that "in all advertisements * * * or other papers required to be made under the provisions of this chapter, it shall be lawful to use letters, figures, and characters as follows: Letters may be used to denote township, range, boundaries, parts of section, parts of lots or blocks, or other subdivisions of real estate in the following manner: T. for township, R. for range, L. for lot, B. for block, N. for north, E. for east, S. for south and W. for west, or any combination or combinations of the four last mentioned letters, to denote parts of sections, lots, blocks, or other subdivisions of real property; * * * and any and all descriptions of real estate made under the provisions of this chapter by the use of letters, figures, and characters, as provided in this section, when so made that the land or lot may be identified and located, shall be deemed and held to be good. * * *" By section 6837, " * * * all notices and process in suits under this chapter shall be sued out and served in the same manner as in civil actions in circuit courts, and in case of suits against non-resident, unknown parties, or other owners upon whom service cannot be had by ordinary summons, the proceedings shall be the same as now provided by law in civil actions affecting real or personal property." Section 3494 provides that "in suits for the enforcement of * * * liens against either real or personal property, * * * if the plaintiff or other person for him shall allege in his petition or file an affidavit stating that part or all of the defendants are non-residents of the state, * * * so that ordinary process of the law cannot be served upon them, the court or clerk in vacation shall make an order directed to non-residents," etc.

Norman Gibbs and *T. M. Allen*, for appellant. *Hubbert & Wear*, for respondents.

BRACE, J. This is an action of ejectment commenced by plaintiff in the circuit court of Barry county against John Ray and Preston Gibson, brought here by appeal. Pending the appeal in this court John Ray died and his heirs, Charles and Arabella Ray, have been made parties respondent.

The plaintiff seeks to recover possession of the S. $\frac{1}{4}$ of section 14, township 23, in range 29, patented by the United States to one John McFeely, in March, 1867, and to show title in himself introduced in evidence the patents to McFeely; a warranty deed from McFeely to J. Stewart Lowe, dated April 10, 1867, recorded in Barry county, February 15, 1883; a warranty deed from

Lowe and wife to George Crown, dated January 1, 1874, recorded November 8, 1875; a quitclaim deed from Crown and wife to Horace P. Williams and Thomas M. Allen, plaintiff, dated February 13, 1882, and recorded February 15, 1883; and a quitclaim deed from Williams to plaintiff dated August 21, 1883, and recorded August 23, 1883, conveying the land in controversy,—and rested this case. The defendants admitted they were in possession, and to overcome the plaintiff's title introduced in evidence a deed from the sheriff of Barry county, in proper form, dated September 14, 1878, conveying the premises to John Ray, Michael Horim, and John W. Wellshear, purchasers at execution sale under a judgment recorded at the March term, 1878, of the circuit court of Barry county, in favor of the state at the relation of the collector of Barry county in a suit for delinquent taxes due on said land for the years 1871 to 1876, inclusive, commenced in said court against John McFeely, by petition and order of publication; the petition and judgment in said tax suit; and a quitclaim deed from Horim and Wellshear and their wives, dated December 16, 1878, and recorded December 18, 1878, to John Ray,—and rested. The plaintiff, in rebuttal, then offered in evidence the affidavit of non-residence of McFeely, and the order of publication, and offered to read in evidence the assessor's books of said county for the years 1871 to 1876, inclusive, to show that the same had not been verified by the affidavit of the assessor as the law requires, and that no legal assessment of said lands had been made for said years. To the introduction of the assessor's books the defendants objected, and the court sustained the objection, and refused to permit said books to be introduced in evidence, to which ruling the plaintiff excepted.

The case was tried before the court without a jury. The court refused all the declarations of law asked by the plaintiff, and at defendants' request declared the law of the case to be that "the judgment in the tax suit, and the sheriff's deed thereunder, as introduced in evidence, were sufficient to convey the title to the purchaser. The proceedings by suit against the land for delinquent taxes were properly conducted against the person appearing from the deed-records to be the real owner of the land. If the purchasers at the sheriff's sale under tax judgment had no notice of a previous conveyance by McFeely to another person, their purchase and deed gave them title good against all claimants under the unrecorded deed, although executed before the tax proceedings,"—found the issues for the defendants, and rendered judgment in their favor.

1. There was no error in sustaining the objection of the defendants to the introduction of the assessor's books for the purpose of showing that, they not having been verified by the assessor's affidavit, the lands in controversy had not been legally assessed for the years 1871 to 1876. The judgment of the circuit court in the tax suit was conclusive as to the validity of the assessment in a collateral proceeding. *Jones v. Driskill*, 94 Mo. 190, 7 S. W. Rep. 111; *Allen v. McCabe*, 93 Mo. 138, 6 S. W. Rep. 62; *Brown v. Walker*, 85 Mo. 262; *Wellshear v. Kelley*, 69 Mo. 343; *Hall v. Sherwood*, 96 Mo. —, 8 S. W. Rep. 781.

2. The sufficiency of the order of publication, and the affidavit on which it was issued, was questioned in the trial court. The petition was signed by the relator, J. W. Lecompte, as collector of Barry county, who made affidavit at the end of it "that he has good reason to believe, and does believe, that the within named John McFeely is a non-resident of the state of Missouri." Whether regarded as an allegation in the petition or an affidavit of non-residence, it is a substantial compliance with the requirements of the statute.

3. "The object and general nature of the suit" is sufficiently stated in the order to be "to obtain judgment against him for the taxes, interest, and costs due on the south half of section 14, township 23, range 29, in Barry county, Mo., for the years 1871, 1872, 1873, 1874, 1875, and 1876, amounting in the aggregate to \$92.86." It was not absolutely necessary that the order of publication should contain a description of the land, (*Goldsworthy v. Thompson*,

87 Mo., 233;) but if it had been, by this description the land could easily and readily have been identified and located. 2 Wag. St. p. 1212, § 240.

4. The difference between the amount of the judgment and the amount of the taxes stated in the order was caused by the addition to the latter amount of interest on the amount claimed as prayed for in the petition. If error was committed in this, it could only be reached by a timely motion, directed against the judgment; it can avail nothing as against that judgment in a collateral proceeding.

5. McFeely was duly served. He was the patentee of the lands in controversy. His patents therefor had never been placed upon the records of Barry county. Since April 10, 1867, he has had no interest in the premises. At the time the tax suit was instituted, when the sale was made, and when the sheriff's deed was executed and delivered, George Crown was the real owner of the land by warranty deed spread upon the records of the county in which the land was situate; while it in no way appeared upon the records that McFeely had ever conveyed land, also it in no way appeared by those records, so far as shown in the evidence in this case, that he was then the owner of the land.

The law under which this tax suit was brought required that it should be brought against "the owner of the property." Laws 1877, p. 384, § 4. In *Vance v. Corrigan*, 78 Mo. 94, it was held under a statute requiring suits for the enforcement of liens for special taxes to be brought against the owner of lands, that a suit could be brought and a valid judgment rendered against the land by making the person appearing by the registry of deeds to be the owner, party defendant to the suit, in the absence of notice that such person was not the true owner, and that a purchaser under the judgment in such suit in the absence of such notice would be protected in his purchase against the holder of an unrecorded deed from such apparent owner. The principle of this case, as applicable to a judgment in a suit for delinquent taxes under the general revenue law of 1877, was recognized in *State v. Sack*, 79 Mo. 661, and followed in *Cornell v. Gray*, 85 Mo. 169; *Evans v. Robberson*, 92 Mo. 192, 4 S. W. Rep. 941, and in *Payne v. Lott*, 90 Mo. 676, 3 S. W. Rep. 402. In this last case it was further held that a suit brought against a person who appeared to be the owner of the land by the plat-book of the lands, duly certified and on file in the county clerk's office, as required under sections 6697, 6703, Rev. St. 1879, was within the principle of the foregoing cases. The principle upon which these cases rest is that every person not having actual notice as to who is the real owner of lands has a right to rely upon the records provided by law to be kept for the purpose of showing that ownership. To give notice of that fact is the object of their existence. The law points the revenue officers of the state to these records of the evidence of ownership upon which to base their official action in the assessment and collection of the revenue, and keeps them open for the inspection of the citizen, that his individual action may be guided thereby, and will uphold the action of either, when based thereon in good faith, without better information; but they neither confer title, nor make owners; they simply give notice. Now, what notice did the records in this case give the collector who brought the tax suit, and the purchaser at the tax sales? Not that McFeely was the owner of the land. No record existed in Barry county at that time, so far as the evidence in this case shows, pointing to him as the owner of this land, except perhaps the tax-book in the collector's office; and that this was no such record as would protect the purchaser, was vigorously asserted in *Watt v. Donnell*, 80 Mo. 195. The only evidence of ownership to be found in these records at that time was the warranty deed from Lowe and wife to George Crown. Crown was the man pointed to by these records as the owner of the land, and in doing this they accomplished their purpose, for he was then in fact the real owner. Of the record of his deed the collector and purchaser were bound to take notice. They cannot

claim to have acted on the faith of the record, and then ignore it or any part of it. And the purchaser who, paying no heed to the warning it gave that the patentee, whoever he might be, had in all probability parted with his title, purchases the land in the hope that he may by his purchase get that title, must take the risk of getting it, and cannot invoke such record to protect his purchase against the true owner. He does not come within the principle by which the purchasers at tax sales were held to be protected by the record in the cases cited. In the absence of such protection, he gets only the title of the defendant in the tax suit, which in this place was none at all, he having many years before parted with it to the plaintiff's grantors; from which it follows that the plaintiff had the better title on the evidence; that the court erred in the declarations of law given for the defendants, and in refusing plaintiff's declarations numbered 1, 3, and 6, and in finding for the defendants, instead of for the plaintiff.

The judgment of the circuit court is therefore reversed, and the cause remanded.

All concur, except RAY, J., absent; SHERWOOD and BLACK, JJ., in the result.

STATE v. WOODS.

(*Supreme Court of Missouri. December 20, 1883.*)

1. HOMICIDE—MURDER—EVIDENCE.

Defendant and deceased engaged in a fight, were separated, and defendant went into a neighboring store, remaining there 10 minutes. On emerging, defendant said he could "lick any s— of a b— over there," pointing toward the place where deceased was; and, on being told by his companion to go home, said, "Give me the knife, and I will," and also said, "I will go over there and kill the d— s— of a b—." Defendant was handed something by his companion, and, after moving away, returned to the building where deceased was, and insisted on entering, saying he had lost a button in it. Deceased then appeared, and struck defendant with a board. Defendant grappled with and fatally stabbed him. The fight had occurred outside. *Held*, that a verdict of murder in the second degree was warranted.

2. SAME—INSTRUCTIONS—KILLING IN PASSION.

The court having charged that the instant killing, in a violent passion engendered by the previous occurrence, is not murder in the first degree, it is not error to refuse to charge that the space of 10 or 15 minutes is not deemed sufficient for the passion to subside.

3. CRIMINAL LAW—TRIAL—REFUSAL OF INSTRUCTIONS.

It is not error to refuse instructions upon a subject upon which sufficient instructions have already been given.

Appeal from St. Louis criminal court; GARRET S. VAN WAGGONER, Judge. *Thomas B. Harvey*, for appellant. *B. G. Boone*, Atty. Gen., for the State.

NORTON, C. J. At the May term, 1885, of the criminal court for the city of St. Louis, defendant was tried and convicted of murder in the second degree, for killing one Joseph Hunter, and from the judgment has appealed.

The evidence tends to show that Joseph Hunter, the deceased, who was a colored man, was at work as a porter in the Drew Glass Company's building in the city of St. Louis, and while at work there, on the 5th of December, 1882, the defendant, in company with one Stith, came along. That some angry words passed between the defendant and said Hunter, culminating, according to the evidence of some of the witnesses, in a fight on the platform in front of the door leading into the Drew Company's building. That one Maloney, an employee of the company, interfered, and the parties were separated at said door, Hunter resuming his work in the building; Woods, the defendant, and Stith, his companion, going across the street to a grocery store, or a saloon in the rear thereof, where they remained some ten or more minutes, and on coming out Woods, as testified to by witness Banks, said: "I can lick any son of a bitch over there," pointing towards the Drew Company's

building. That his companion (Stith) said to him, "Come on home;" to which Wood replied, "Give me the knife, and I will go home." Stith then said, "Will you be sure to come now?" and Woods said, "Yes." Witness stated that Stith then handed Wood something, and both of them started south, and that when he again noticed them they had turned north, and were going back towards the Drew Company's building. This witness further testified that when Woods asked Stith for the knife he said: "Give me the knife, and I will go over there and kill the damned son of a bitch," or "black son of a bitch." The testimony of this witness, as to the knife, was corroborated by Richard Coats. When Woods and Stith got back to the door of the building, one Sheehan, who was at work for the glass company, stepped to the door, and put his hands on each side of the door-facing, to prevent Woods from coming into the house. Woods insisted upon going in, claiming that he had lost a collar-button in there. Sheehan told him he could not have lost it in the glass-store, because he had not been in there. It appears that Hunter in the mean time had gone up in the elevator, which was about four feet from said door, with a load of glass; that when he came down Sheehan was still standing in the door to prevent Woods from entering, and Hunter then picked up a piece of pine box top, half an inch thick and two or three inches wide, and struck Woods with it over Sheehan's shoulder, whereupon Woods rushed into the room, grappled with Hunter, and stabbed him in the groin, cutting the femoral artery. Hunter fell over, and died in a few minutes, being unable to talk after he was stabbed. Defendant ran out of the building, threw his knife away, was pursued, and captured on Washington avenue; and, on being asked by the officer why he had cut that man, said: "What man? I cut no man." The officer testified that Woods was under the influence of liquor. No objection was made or exception saved to the reception or rejection of evidence, but it is claimed that the court erred in giving and refusing instructions.

The court gave 16 instructions of its own motion, which we deem unnecessary to insert here, as an examination of them shows that they are, in substance, copies of instructions which have been repeatedly published in our Reports, and received the approval of this court. By them the jury were instructed as to what constituted murder in the first and second degrees, and as to manslaughter in the third and fourth degrees. The usual instructions as to self-defense, and as to the duty of the jury to acquit unless convinced beyond a reasonable doubt of defendant's guilt, are also embraced in those given. On comparison, it is found that the first, second, third, fourth, sixth, seventh, tenth, fourteenth, and fifteenth are copied from or are like those given in the case of *State v. Thomas*, 78 Mo. 327, which were passed upon, and properly pronounced to be exceptionally good. The eleventh instruction, defining manslaughter in the fourth degree, is sanctioned by the case of *State v. Peak*, 85 Mo. 193. The twelfth and thirteenth instructions, defining manslaughter in the fourth degree, are justified by the cases of *State v. Hicks*, 92 Mo. 431, 4 S. W. Rep. 742; *State v. Branstetter*, 65 Mo. 149; *State v. Thomas, supra*.

The jury having been sufficiently instructed as to what constituted manslaughter in the fourth degree, as well as the third, there was no error in refusing those asked by the defendant on that subject. Nor was there error in refusing the following: "The court instructs the jury that, after the blood had been heated and passion aroused by a blow, the law does not deem the space of ten or fifteen minutes sufficient for the blood to cool or passion subside." This question was submitted favorably to defendant in the fifth instruction given by the court, as follows: "(5) The court further instructs the jury that if at the time of the alleged homicide, or a few minutes before the time of the alleged homicide, the deceased, Joseph Hunter, and the defendant, were engaged in a mutual fight, or were using violence or abusive or insulting language to each other, and were in a violent passion, engendered by such language at the time of the homicide, then the instant killing in such a

state of mind is not an act of deliberation, and will not be murder in the first degree; and whether such passion existed at the time of the alleged homicide is a question of fact, which the jury must decide from the evidence as one of the facts in this case."

In view of the evidence which tended strongly to show that defendant, previous to the homicide, had procured a knife for the purpose of killing the deceased, and which he soon after used with fatal effect, and the evidence which tended strongly to show that his wanting to get into the Drew Glass Company's house to look for a collar-button which he claimed to have lost, was a pretense, his companion (Stith) having testified that the first difficulty took place on the platform outside of the house, the verdict of the jury was fully warranted, and the judgment is hereby affirmed, with the concurrence of Judge BLACK. Judge BRACE concurs in the result.

SHERWOOD, J. I concur in the result, on the sole ground that, as I understand the facts, there was no self-defense in the case.

ATCHISON v. PEASE.

(Supreme Court of Missouri. December 20, 1888.)

1. BOUNDARIES—SETTLEMENT BY AGREEMENT—STATUTE OF FRAUDS.

Where there is a dispute as to the true division line between adjoining proprietors, and they agree on a permanent boundary, and take possession accordingly, the agreement is binding on them, and those claiming under them, and such agreement is not within the statute of frauds. Following *Jacobs v. Moseley*, 4 S. W. Rep. 135.

2. LIMITATION OF ACTIONS—ADVERSE POSSESSION.

The fence having been moved by the owners to the line agreed upon, an action would be barred by a continuous adverse possession to that line for 10 years.

3. SAME—CONTINUITY OF POSSESSION.

A purchaser at a trust sale succeeds to the possession of the mortgagor, and the continuity of adverse possession is not broken because, after executing the deed of trust, the mortgagor conveyed to one who held for several years before the sale.

Appeal from circuit court, Andrain county; ELIJAH ROBINSON, Judge.

Ejectment by Jacob W Atchison against L. M. Pease. Plaintiff appeals. *W. B. McIntire*, for appellant. *W. O. Forrest* and *W. W. Fry*, for respondent.

BLACK, J. This is an action of ejectment to recover some eight acres of land off of the north side of a designated quarter of a quarter section. The plaintiff acquired the south 40-acre tract from W. G. Brown in 1882, who owned it as far back as 1870. A. D. Kellog owned the 40 acres on the north in 1870 and 1871. In 1870 he sold the land to Frank and Thomas Levitt, and gave them a bond for a deed, which they assigned back to Kellog in 1874. In February, 1871, Kellog conveyed to B. F. Bergen, who on the same day made a deed of trust thereon to secure a debt therein described. B. F. Bergen conveyed to C. H. Bergen in July, 1872. The property was sold under the deed of trust, in 1876, to Guthrie and Gentry, through whom the defendant acquired title. The evidence of Frank and Thomas Levitt is to the effect that there was a dispute between Brown and Kellog in 1870 as to the boundary line; that they refused to buy the land until this dispute was settled; that Brown, Kellog, and Frank Levitt went to the land, and then and there fixed and agreed upon a boundary line different from that where the fence was then located. Their evidence is that the fence was by them removed to this agreed line. This was done in 1870 or 1871. Other evidence shows that defendant, and those under whom he claims, have cultivated the north 40 up to this fence, from 1870 or 1871 to the trial of this cause. The adverse possession has been continuous. This suit was commenced in May, 1884. We held in the case of *Jacobs v. Moseley*, 91 Mo. 462, 4 S. W. Rep. 135, that where there is a dis-

pute as to the true division line between adjoining proprietors, and they fix and agree upon a permanent boundary line, and take possession accordingly, the agreement is binding on them and those claiming under them. Such an agreement is not within the statute of frauds, and such facts may be shown in an action of ejectment, where the answer is a general denial only. The same doctrine is asserted in the subsequent case of *Schad v. Sharp*, 95 Mo. 574, 8 S. W. Rep. 549. The evidence is abundant to show that the fence was placed on the compromise line in 1870 or 1871, pursuant to the previous agreement, and it makes no difference whether it was placed there by Kellog or the Levitts. It was placed there pursuant to the agreement, and since that it has been treated as the true line, and that is sufficient.

So, too, if the line was agreed upon by the owners of the two parcels in 1870, and the defendant and those through whom he claims have had and held continuous adverse possession up to it for a period of 10 years before the commencement of this suit, then the statute of limitations is also a complete defense. A citation of authorities is not necessary to support so plain a proposition. The case was tried on these principles of law. The evidence shows that in the defendant's chain of title there is a deed of trust made by B. F. Bergen in 1871, and that he conveyed to C. H. Bergen in 1872, and that there was a sale under the deed of trust in 1876 to Guthrie and Gentry. It is claimed that the possession of C. H. Bergen for 1872 to 1876 was adverse to the title under which the defendant claims, but this is a misconception of the law. B. F. Bergen, though he made the deed of trust, remained the owner of the land, and had a right to convey to C. H. Bergen; and, in the absence of any proof to the contrary, the presumption is that the possession of B. F. Bergen, the mortgagor, and of C. H. Bergen, who stood in his shoes, was amicable, and not adverse to the rights of the mortgagee. The purchaser under the deed of trust succeeds to the possession of the Bergens, and that possession constitutes a part of the possession upon which he may rely to make out the 10 years.

The judgment is affirmed.

RAY, J., absent. The other judges concur.

ATKISON v. DIXON *et ux.*, (ATKISON, Intervenor.)

(*Supreme Court of Missouri*. December 20, 1888.)

APPEAL—MANDATE AND PROCEEDINGS BELOW.

Defendants lost possession of certain land by a judgment in ejectment, which on appeal was reversed, and they obtained a writ of possession, on return of which A. intervened, claiming possession by title under tax deeds. On trial of the issue, the court entered judgment against intervenor for the value of the ground-rent, and refused to vacate the return. On appeal, the judgment was reversed; the supreme court saying: "The duty of the circuit court was simply to determine whether he [intervenor] was in possession under" his alleged tax title; and, if so, "then to restore him to possession, and nothing more." Held, that the circuit court, after the mandate in that appeal was filed, properly proceeded to determine the question of intervenor's alleged superior title.

Appeal from circuit court, Cass county; NOAH M. GIVAN, Judge.

E. J. Smith and John D. Parkison, for appellant. R. O. Boggess, T. J. Smith, and Railey & Burney, for respondents.

NORTON, C. J. This case is here on the appeal of R. A. Atkison from a judgment of the Cass county circuit court in favor of defendant Dixon. The record discloses the following facts, viz.: That an execution issued from the Cass county circuit to restore the Dixons to the possession of lot 4, block 11, in the town of Butler, Bates county; said possession having been lost by them in virtue of a judgment in favor of John Atkison, afterwards reversed by this court. The sheriff in his return to this writ certifies that he executed it.

on the 31st of July, 1882, by reading the same to and in the hearing of H. H. Nichols, J. H. De Spain, Paul Dickerson, Richard Hurt, and ——— Poarch, who were found in possession of said property; and also by delivering possession thereof to A. Henry as agent and attorney of Elizabeth and Lewis Dixon; and the writ was further executed by reading the same to John Atkison on the 1st day of August, 1882,—said Atkison not being found in possession. After said return was made, R. A. Atkison, on the 15th of August, 1882, filed in the Cass county circuit court an intervening petition, setting up that the persons ousted of the possession of said lots by the sheriff in executing said writs were his tenants, and that he (R. A. Atkison) was through them in the actual possession of said lot, claiming to own the same by paramount title conferred upon him by certain tax deeds, and by the purchase of the houses thereon. By the petition the court is asked to quash and vacate the return to the writ, and restore him to the possession of the premises. To this petition the Dixons filed an answer, denying the allegations of the petition and setting up that after John Atkison, the father of R. A. Atkison, took possession of the lot in dispute under his judgment obtained in 1876 against Lewis Dixon, to defeat and prevent the possession from being retored to defendants, the Dixons transferred the possession of the same to his son, the said R. A., and made a conveyance by deed of the same to him. It may be stated here that on motion the court appointed a receiver to collect the rents, and hold the same subject to the order of the court.

On the trial of the issues presented by the intervening petition, the court rendered judgment against said Atkison for the value of the ground-rent, and refused to vacate the sheriff's return. From this judgment, R. A. Atkison appealed to this court, which reversed the judgment, and remanded the cause, and the opinion of the court is reported in 89 Mo. 464, 18 W. Rep. 13. When the mandate of the court was sent down, the circuit court retried the issue presented by the intervening petition and answer, and rendered the following judgment: "Now, at this day, comes R. A. Atkison, intervenor herein, in his own proper person, as well as by his attorney, and come also Lewis Dixon and Elizabeth Dixon, the above-named defendants, by their attorneys, and the said intervenor and the said defendants now waive the right of trial by jury, and submit to the court for trial, hearing, and determination the issue between them herein; and the court having heard and duly considered the evidence adduced and the argument of counsel, and being fully advised of and concerning the premises, doth find that during the pendency of this suit between the plaintiff, John Atkison, and defendant Lewis Dixon, and with full knowledge of the pendency, on the ——— day of ———, 1876, the said intervenor, R. A. Atkison, went into the possession of the lot four, in block eleven, (11,) in the town of Butler, Bates county, Mo., under and by virtue of the quitclaim deed therefor of date November 30, 1875, of John Atkison, the aforesaid plaintiff, and his wife, to said R. A. Atkison, their son, which quitclaim is in evidence in this case, and now before the court; and that said intervenor, R. A. Atkison, by himself and his tenants, continued in the possession of said lot, claiming and holding the same under said quitclaim deed from John Atkison and wife, and not under the tax deeds in evidence, or either of them, from the said ——— day of ———, 1876, up to and until the ouster, July 31, 1882, of which said intervenor hath complained herein; and that on the ——— day of November, 1885, all the buildings and improvements on said lot were destroyed by fire, and no buildings or other improvements have since been or are now situate thereon; and that said intervenor and his tenants were rightfully ousted under and by virtue of the writ in favor of said defendants, and against said plaintiff, and should not be restored to the possession of said premises. Wherefore it is considered, ordered, and adjudged by the court that the application of said intervenor be not granted, but be and it is denied, and that he take nothing thereby; and,

further, that defendants, Lewis Dixon and Elizabeth Dixon, have and recover of and from said intervenor, R. A. Atkison, their costs, for which execution may issue."

It is from this judgment that R. A. Atkison has appealed, and in support of his appeal it is claimed, in his behalf, that under the opinion reported in 89 Mo., *supra*, the circuit court had no jurisdiction to retry the cause; that all it could do was to order that Atkison be put in possession of the premises, and that the court committed error in not so ordering, and in proceeding to try the issues in the case.

Reference to the reversed judgment against Atkison (which is in the record as evidence) shows that the circuit court did not pass upon the question as to whether R. A. Atkison, at the time of the ouster, was in possession of the premises in virtue of a paramount title under his tax deeds, or in virtue of a quitclaim deed made by John Atkison, his father, conveying the lot in question to him, but proceeded to render against him a money judgment. In the said opinion delivered it is distinctly held that, if Atkison was in possession under a paramount title, he was wrongfully ousted, but if he was in possession under the quitclaim deed from John Atkison he was rightfully put out. The closing paragraph of the opinion is as follows: "The duty of the circuit court was simply to determine, under plaintiff's petition, whether he was in possession under his quitclaim deed or under his tax title, and, if the latter, then to restore him to possession, and nothing more, and leave the controversy between him and the Dixons, or those having their title, to litigate it in another suit. One ejectment suit cannot be injected into another. The judgment is reversed, and cause remanded, to be proceeded with in conformity to this opinion."

The trial court, after the mandate of this court was filed, proceeded to hear the evidence, and to determine from it the question referred to it by the above opinion, and did, as shown by the judgment, determine that R. A. Atkison took possession of the premises in controversy under the quitclaim deed from John Atkison, and not under his tax deeds, and, being thus in privity with John Atkison, was not entitled to the relief asked for in his intervening petition; and the court having so decided, and there being evidence to support the decision, we do not feel authorized to disturb the finding, and hereby affirm the judgment.

All concur, except RAY, J., absent.

ATKISON v. DIXON *et ux.*

(Supreme Court of Missouri. December 20, 1888.)

LANDLORD AND TENANT—LEASE OF LOT—ERECTION OF HOUSES—FORFEITURE.

Where, by the terms of a lease, the lessee is permitted to erect houses on the leased lot, with privilege of removal, the mere fact that the houses are suffered to remain after the expiration of the lease, and pending litigation between the parties as to right of possession of the lot, does not work a forfeiture of the houses.

Error to circuit court, Cass county; NOAH M. GIVAN, Judge.

The receiver appointed in the ejectment suit brought by John Atkison against Lewis and Elizabeth Dixon collected certain rents, which the court ordered should be paid, 40 per cent. to defendants, and 60 per cent. to the intervenor, R. A. Atkison. Defendants bring error, claiming that they are entitled to the entire sum.

R. O. Boggess, T. J. Smith, and Rayley & Burney, for plaintiffs in error.
E. J. Smith and John D. Parkison, for defendant in error.

NORTON, C. J. This case is here on writ of error from the judgment of the circuit court of Cass county, directing the receiver, previously appointed to collect the rents of the premises in dispute, to pay over a certain proportion

thereof to the Dixons, the defendants. It appears from the record that in 1882 J. C. Clark was appointed receiver by said court to collect the rents for the premises in dispute, and hold the same subject to the order of the court. It further appears that the lot in question had theretofore been leased by said Dixons, under the terms of which the lessees had a right to erect buildings on the same, with the privilege of renewing the same; that this lease expired in 1882. It further appears that houses were erected on said lot, and were still on it when said receiver was appointed, and that they remained on it till they were destroyed by fire, in 1885; that the evidence tended to show that R. A. Atkison was the owner of said houses, which, in the light of the admissions made for the purposes of this case, are to be considered and treated as personal property. It also appears that at the same term of said circuit court at which a trial was had on the issues raised by the intervening petition of R. A. Atkison, which on his appeal was decided at this term, (*ante*, 160,) the Dixons filed a motion asking the court to order and direct the said receiver to pay over to them the whole amount of the rents accruing from the premises collected by him. In determining this motion, the court ascertained from the receiver's report and settlement that he held in his hands, as rents collected, the sum of \$2,546, and, after hearing evidence as to ground rental value, directed by its judgment that said receiver pay 40 per cent. of the above sum, amounting to \$1,018.40, to defend Elizabeth Dixon, and 60 per cent. thereof, amounting to \$1,527.60, to R. A. Atkison. It is this judgment we are asked to reverse; the Dixons claiming that they are entitled to the whole sum in the hands of the receiver, and R. A. Atkison making the same claim.

This claim of the Dixons is founded on the fact that the houses were permitted to remain on the premises after the expiration of the lease, and that made by Atkison is founded on his contention that he was entitled to the possession of the lot as well as the houses. The mere fact that the houses were suffered to remain on the lot after the expiration of the lease, during the litigation between Atkison and the Dixons as to which of them was entitled to the possession of the lot, ought not to, and did not, work a forfeiture of his right in them; and as to the claim made by Atkison, that he was entitled to the possession of the lot as well as the houses, that question was ruled against him on his intervening petition, which ruling has been affirmed in the opinion, *ante*, 160, (decided at this term.)

There is abundant evidence in the record to show that the ground-rental value of the lot did not exceed 40 per cent. of the amount of rent collected by the receiver, both for the ground and houses, and that 60 per cent. of that amount was a fair proportion of the rental value of the houses. It is not shown that any part of the \$227 collected by Henry ever went into the hands of the receiver. The court, under the evidence, made an equitable and proper distribution of the fund in the hands of the receiver, under which each party is to get his own and no more, and the judgment is therefore affirmed.

All concur, except RAY, J., absent.

ATKISON v. DIXON *et ux.*

(Supreme Court of Missouri. December 20, 1888.)

1. EJECTMENT—EVIDENCE—INTERVENOR'S PETITION.

In ejectment, it is not error to exclude from evidence an intervening petition, and the proceedings on issues thereon, to which plaintiff is not a party, and the issues in which are still pending.

2. SAME—JUDGMENT REVERSED ON APPEAL.

A judgment which has been reversed on appeal, and thereby rendered a nullity, is properly excluded from evidence in a subsequent suit between the same parties.

3. SAME—JUDGMENT AS AGAINST ONE NOT A PARTY.

As against a defendant who was not a party when the judgment was rendered, it was *res inter alios acta*, and properly excluded for that reason.

4. APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.

Where the action of the trial court in refusing to allow plaintiff to file an answer to a motion by defendant is not made a ground for new trial, nor included in the assignment of errors, the supreme court will not consider it.

Appeal from circuit court, Cass county; NOAH M. GIVAN, Judge.

Plaintiff in ejectment, John Atkison, appeals from a judgment for rents and profits rendered in favor of the defendants, Lewis and Elizabeth Dixon. *E. J. Smith* and *John D. Parkison*, for appellant. *R. O. Boggess*, *T. J. Smith*, and *Railley & Burney*, for respondents.

NORTON, C. J. This cause, and the proceedings growing out of and connected with it, have been before this court four different times. It was originally a suit by ejectment against Lewis Dixon, as sole defendant, to recover lot 4, block 11, in the town of Butler, Bates county. Among other defenses, the answer set up an outstanding equitable title to the lot in controversy. The cause was tried by the court, and the finding was against the equitable defense, and judgment was entered for the plaintiff, from which defendant Dixon appealed. The judgment was rendered on April 11, 1876, and the appeal was taken without any appeal-bond having been given by Dixon. On the hearing of this appeal, the judgment was reversed, the court in its opinion sustaining the equitable title, and holding that the lot in question belonged to Elizabeth Dixon, the wife of said Lewis Dixon, and remanded the cause, with directions that she might be made a party, and that when made a party the court should by its decree invest her with the title. The case is reported in 70 Mo. 381. Mrs. Dixon was thereupon, when the cause was redocketed in the circuit court of Bates county, made a party defendant, and on plaintiff's application a change of venue was granted, and the case was transferred to the Cass county circuit court. After the cause had been so transferred, plaintiff, in the vacation of said Cass county circuit court, paid the costs of said suit, and directed the clerk to dismiss the suit, who made an entry to that effect. When court convened, the Dixons filed their motion asking the court to reinstate the cause on the docket, which was overruled, and thereupon an original proceeding by *mandamus* was begun in this court to compel the circuit court to proceed with the case, which culminated in the issuance of a peremptory writ commanding said court to proceed with the cause, and enter up judgment in favor of Mrs. Dixon, as directed in the opinion of this court previously rendered. *State v. Givan*, 75 Mo. 516. When this mandate was filed in the circuit court, the Dixons filed a motion asking the court to enter a decree divesting the plaintiff of all title to the lot in question, and investing Mrs. Dixon with the title; also to order that she be restored to possession; and also to assess the value of the rents and profits for defendants from 1876 to that time. The circuit court, by its judgment rendered on July 24, 1882, sustained said motion in part by ordering that the Dixons be restored to the possession of the lot, and that a writ issue for that purpose, and by vesting the title to the lot in Mrs. Dixon. So much of the said motion as requested an assessment of the rents and profits was continued to the next term of the court. Pursuant to the judgment on this motion, a writ of execution was issued against John Atkison, which was executed on July 31, 1882, by putting A. Henry, defendant's attorney, in possession. At the November term, 1882, of said circuit court, plaintiff Atkison filed his motion to quash said execution issued and executed as aforesaid, which was overruled by the court; and at the same term, upon an inquiry into the question of rents and profits, as prayed for in the motion filed at the July term, and continued as to the matter of rents to said November term, judgment was rendered in favor of said Atkison. Thereupon Atkison appealed to this court from the judgment of the circuit court overruling his motion to quash the execution, and the Dixons sued out a writ of error from the judgment rendered in favor of Atkison as to rents and profits. The *per curiam* opinion

disposing of said appeal and writ of error is not reported nor published, and is as follows:

"This case is here now on appeal by John Atkison, because the Cass circuit court complied with the peremptory writ of *mandamus* from this court; and the case is also taken up by writ of error by defendants, because the court failed to allow the rents to defendants for the time plaintiff wrongfully held the premises, from March, 1876, to December 19, 1882. The judgment appealed from by Atkison is affirmed on the authority of *Atkison v. Dixon*, 70 Mo. 381, and *State v. Givan*, 75 Mo. 516. The judgment, on inquiry of damages, is reversed, and the cause remanded, and the circuit court directed to ascertain the rental value of the lot in dispute, without regard to buildings thereon, from the date at which John Atkison obtained possession of the same under the judgment of the circuit court until defendants were restored to the possession thereof; and also to ascertain the rental value of any buildings erected upon said lot by said Atkison after the rendition of the judgment by this court in *Atkison v. Dixon*, 70 Mo. *supra*, and allow and award the rental value of said buildings to Mrs. Dixon from the date of their erection to the date of her restoration to the possession of said lot."

It appears from the record that the mandate accompanying this opinion was on the 9th July, 1885, filed in the circuit court, and that the inquiry as to rents and profits stood over till the July term, 1886, of said court; at which time Atkison offered to file an answer to defendant's motion for the amount of rents and profits, to the effect that the question of the value of the rents and profits had been adjudicated in the judgment of the Bates circuit court rendered in 1876; that another action was pending between the Dixons and R. A. Atkison for the rents from 1878 to 1882; that R. A. Atkison was in possession of said lot from said date, claiming the same by paramount title. On defendant's objection, the court refused to allow said answer to be filed. The court then proceeded to hear evidence as to the value of the rents and profits from 1876 to 1882, and rendered judgment for said Dixons in the sum of \$3,033, from which judgment Atkison has appealed to this court.

The point is made in the brief of counsel that the court erred in not allowing plaintiff to file answer to the motion of Dixons above set forth. The action of the trial court in this respect is not made, in the motion for new trial, a ground for new trial, neither is it assigned for error in the assignment of errors, and need not, therefore, be considered.

On the trial plaintiff offered in evidence the judgment rendered by the Bates county circuit court in 1876, in his favor, against Lewis Dixon, in which the monthly value of the premises in dispute was fixed at eight dollars. This evidence was objected to, the court sustained the objection, and refused to receive it, and this action is claimed to be erroneous. The judgment thus offered was reversed by this court in the opinion reported in 70 Mo. *supra*, whereby the same became a nullity, and thereafter conferred no rights, and had no vitality for any purpose. *Crispen v. Hannovan*, 86 Mo. 167, 168; *Freem. Judgm.* § 481. At the time said judgment was rendered, Mrs. Dixon was not a party to the suit, and as to her the judgment was *res inter alios acta*. *Henry v. Woods*, 77 Mo. 277.

Neither was there error in the action of the court in refusing to receive in evidence the intervening petition filed by R. A. Atkison, and the proceedings on issues thereon, for the reason that John Atkison was not a party thereto, and the issues involved therein were and still are pending; there being at this time an appeal from the judgment rendered thereon, as well as a writ of error therefrom. *Henry v. Woods*, *supra*.

But one question, as we understand the *per curiam* opinion, *supra*, was left open for investigation between John Atkison and the Dixons, and that was as to the value of the rents and profits of the premises in dispute, and this upon the trial the court ascertained from the evidence, which warranted

a judgment for the amount stated in it as the ground-rent of the lot in dispute from 1876 to 1882. The title to Mrs. Dixon to the said lot was established by the opinion of this court rendered in 1879, (70 Mo. *supra*,) which necessarily established her right to the rents and profits of it while kept out of possession by plaintiff; and this is all that the judgment accords to her after long and tedious, if not vexatious, litigation, which it was the purpose of the *per curiam* opinion, referred to, to end by restricting the inquiry, as it was in the circuit court, to the value of the rents and profits.

Judgment affirmed, in which all concur, except RAY, J., absent.

KYLE *et al.* v. POWELL *et al.*

(Supreme Court of Missouri. December 20, 1888.)

EQUITY—SETTING ASIDE DEED—FRAUD—DECREE.

On a purchase of land by a wife, the deed by mistake of the scrivener was made to the husband, who was afterwards made intoxicated, and induced to sell the land at much less than its real value to one who had notice of the wife's title. Another, who was made joint grantee, alleged that he bought a half interest of his co-grantee, relying upon his statements as to the title. The deed to the husband had not been recorded, and during the negotiations the husband declared that he had abandoned his wife, then in possession of the land, and that she claimed to own it. Held, that it was error in a decree canceling the deed from the husband to make the amount paid by the alleged purchaser from the fraudulent grantee a lien on the land.

Appeal from circuit court, Cass county; NOAH M. GIVAN, Judge.

Ejectment by J. H. Kyle and James S. Wooldridge against William O. Powell and Sadie E. Powell, his wife. Defendants appeal.

D. C. Barnett and Railey & Burney, for appellants. T. M. Horne, for respondents.

NORTON, C. J. In July, 1885, plaintiffs sued W. O. Powell in ejectment to recover possession of lots 173 and 174 in Jack's addition to the city of Harrisonville, Cass county. Defendant W. O. Powell filed his answer, in which he set up an equitable title in his wife, Sadie E. Powell, to the property in dispute, and asked that she be made a party defendant, which being done, the said Sadie filed her separate answer setting up in substance that in September, 1883, R. H. May was the owner of the property in question; that she bought it from him for \$300, and paid for it with her separate means; that said May was to convey the same to her by deed; that the scrivener who drew the deed inserted therein by mistake the name of W. O. Powell, as grantee; that she was not present, either when the deed was drawn, nor when it was executed and acknowledged; that after it was acknowledged said May left the deed with the justice of the peace, to be delivered when the balance of the purchase money was paid; that she made the payment, received the deed from said justice without examining it at the time, and not knowing that the name W. O. Powell had been inserted therein as grantee; that soon afterwards, in looking at said deed, she discovered the mistake, and called the attention of W. O. Powell to it, who then refused to receive the deed; and that it was never delivered to him; that soon afterwards both she and W. O. Powell called the attention of the justice of the peace and said May, the grantor, to the mistake, both of whom promised to rectify it by making a deed; that afterwards, in December, 1885, the said May, in pursuance of the original agreement, and his promise to correct said mistake, executed and delivered to her a corrected deed, conveying the property to her as her legal estate; that during the whole of this time she was in possession of the property claiming it as her own. In her answer she further set up that plaintiffs, having knowledge of her rights or sufficient facts to put them on inquiry, in May, 1885, to defraud her of her rights, procured and caused said W. O. Powell to drink to

excess, whereby he became drunk, and that while in this condition and incapable of entering into any contract procured said Powell to execute a deed conveying the said property to them for the consideration of \$100, which at the time was worth \$800. She then asks the court to cancel said deed and confirm her title. The defendants answered separately, putting the averments in the answer in issue, on the trial of which the court found for the defendants, finding that Sadie E. Powell was the owner of the property; that her husband had no interest therein except his marital interest; that plaintiff Kyle bought from Powell with knowledge of Mrs. Powell's rights; that plaintiff Wooldridge bought from Kyle without notice of such rights; and upon this finding decreed that the deed from Powell to plaintiffs be canceled as casting a cloud on Sadie E. Powell's title, but also decreed said Sadie should pay to plaintiff Wooldridge \$60 with interest, which should be a lien on the lots. It is from this decree that defendants have appealed, assigning as error the action of the court in requiring by the decree the payment of \$60 and interest to Wooldridge, and declaring that said sum should be a lien on the land.

There is abundant evidence in the record to establish the fact that the insertion of W. O. Powell's name as grantee in the first deed executed by May was a mistake of the scrivener, and that the purchase was made of May with the distinct agreement that the deed was to be made to Mrs. Powell; that she furnished funds to pay for it, and on the last payment put in her watch at a valuation of \$60 or \$62, at which price May had agreed to take it. This is sworn to, not only by May, who owned and sold the property, and was the grantor, but by Mrs. Powell and her husband, and is corroborated to a great extent by the evidence of Graham, who wrote the deed, and took the acknowledgment, and by the fact that the deed was never put on record, and the fact, as testified to by Mrs. Powell, that W. O. Powell refused to receive said deed, on discovering the mistake; and that soon afterwards both the justice and May agreed to correct the mistake, which was thereafter in point of fact corrected by May, by the execution of a deed in December, 1885, to Mrs. Powell, in conformity with the original agreement.

That Kyle had knowledge of Mrs. Powell's rights is established by the evidence of witness Barnett, who, among other things, testified: "I was an attorney in May, 1885. Remember the day Powell made a deed to Kyle and Wooldridge. Kyle came to me about four o'clock P. M., or between four and five o'clock, and we had a conversation about the property. I was trying a case at the time, and he called me to the bar, and told me he was thinking about buying the property, and had come to make inquiries about it. I apprised him of Mrs. Powell's rights, telling him that she claimed it as her property, and her homestead, and that she would not sell nor part with it. This conversation, and the purchase by Kyle and Wooldridge, took place May 2, 1885. There was a lull in the trial when Kyle came up, and called me to the bar. During the same lull Powell came up, and called me to the bar. He was intoxicated, was frothing at the mouth, and seemed crazed with whisky." I afterwards went to Kyle, and offered to pay him back the \$100 he had paid Powell. I offered on Mrs. Powell's behalf to pay back the money he had paid to Powell. He refused my offer, and told me he had paid \$100, and had given Ferguson \$20 for making the trade. I afterwards went to Wooldridge with the same proposition, and he said he would see Kyle. It was testified to by one or more other witnesses that Kyle had agreed to pay and did pay \$20, to one Ferguson, who was not a real-estate agent, but a gambler, engaged in no particular business, for making the trade between Kyle and Powell; and the evidence tended to show that Powell was manipulated so as to be put in the condition a short time before the trade was consummated that witness Barnett testified to.

The evidence further tended to show that the lots had been improved by Mrs. Powell, and were worth six or seven hundred dollars, and that the con-

sideration of \$100, paid to Powell by Kyle for the property, was furnished by his co-plaintiff, Wooldridge, \$50 of which was for a half interest Wooldridge was to get in the lots and which, when the deed was made, he got so far as under the circumstances he could get, by having his name inserted in the deed as a joint grantee with Kyle. Wooldridge claims to have bought of Kyle the half interest, as above indicated, before the crowning act to complete the trade was performed, viz., the execution of the deed. It is also in evidence that while negotiations were pending Powell declared he had abandoned his family, then in possession of the premises as a home, which his wife claimed to own, and was going to California, and it may fairly be inferred that Wooldridge had notice of this declaration, for it appears to have been openly made. Wooldridge relied upon Kyle, as he states, for information concerning the title, although the record showed no title in Powell, and does not seem to have investigated the question as a prudent man under the circumstances would have done.

In face of the facts disclosed by the evidence, it needs no citation of authorities to establish the correctness of the decree of the circuit court, in so far as it found the title of these lots in question was in Mrs. Powell, and canceled the deed executed by Powell to plaintiffs. On the other hand, in the light of these facts, and a well-recognized principle that notice of a fact may be implied where a party has knowledge of facts sufficient to put him on inquiry, when such inquiry would lead him to a knowledge of such fact, though he fail to make the inquiry, it needs no citation of authorities to establish the incorrectness of the decree in so far as it declares that Mrs. Powell should pay to plaintiff Wooldridge \$60 and interest, and that said amount should be a charge and lien upon the lots.

On the whole case, our judgment is that the decree of the circuit court be affirmed in so far as it declares the title to the lots in dispute to be in Mrs. Powell, and in so far as it cancels the deed made by W. O. Powell to plaintiffs, and it is reversed in so far as it requires Mrs. Powell to pay Wooldridge \$60 and interest, and in so far as it declares said amount a lien on the lots. The cause is remanded, with directions to the circuit court to enter a decree in conformity to this opinion.

All concur, except RAY, J., absent.

STATE v. DIERBERGER.

(*Supreme Court of Missouri*. December 20, 1888.)

1. HOMICIDE—JUSTIFIABLE—OFFICER—RESISTING ARREST.

Upon an indictment for murder, there being evidence that defendant, as an officer, attempted to arrest a person committing a breach of the peace, when he was resisted and assaulted by deceased, whom, in the resulting fight, he shot, it is error in the charge to limit defendant's right to use a deadly weapon to an occasion of self-defense, as it is the duty of an officer when resisted by force in his lawful attempt to make an arrest to use force sufficient, not only to protect himself, but to overcome resistance, and effect his purpose.

2. SAME—PRESUMPTION FROM THE KILLING.

Under the circumstances, the real issue being whether defendant resorted to extreme or unnecessary measures in effecting the arrest, an instruction that in the absence of evidence to the contrary the law presumed homicide to be murder in the second degree, though abstractly correct, should not be given.

NORTON, C. J., dissenting.

Appeal from St. Louis criminal court; JOHN L. THOMAS, Judge.

Indictment against Otto C. Dierberger for the murder of John Horne. Defendant had been appointed a deputy-constable, but had not taken the oath, or filed his appointment with the city register, and justified the homicide under an attempt to arrest the deceased for a breach of the peace committed on board a street car. He was convicted of murder in the second degree, but the

judgment was reversed. 2 S. W. Rep. 286. Upon a second trial he was again convicted of the same offense, and again appeals.

Smith, Silver & Brown and Charles P. Johnson, for appellant. The Attorney General, for the State.

BLACK, J. The defendant stands convicted of murder in the second degree. This case was here before, and reference is made to the opinion of the court in 90 Mo. 369, 2 S. W. Rep. 286, for a general statement of the evidence. The contention now is that the instructions given do not present the law fairly applicable to cases where an officer kills one who is resisting an arrest.

John Horne, the deceased, and Joseph Jackson, went to the front platform of the horse car, and there got into an altercation with the driver, which resulted in a scuffle, or, as most of the witnesses say, a fight. The conductor opened the front door, and they fell into the car. Defendant in the mean time went to the front to check up the car, which was going down grade at a rate of speed dangerous to the passengers. The driver returned to his post, and defendant returned to the inside of the car, and, addressing himself to Jackson, said: "I am an officer, and I will arrest you;" or, "If you don't keep quiet, I will arrest you." At the same time he caught Jackson by the lapel of his coat. Jackson said: "If you are an officer, I will go with you." Horne, the deceased, said: "No, Jackson, he is not an officer, and he can't arrest you; and I don't give a d—n whether he is an officer or not, he can't take you." Jackson said: "All right, I won't go with him." Defendant then took out his pistol, and held it up. Thus far there is no substantial conflict in the evidence.

Mrs. Horne, widow of John Horne, testified: "The conductor told defendant to put up his pistol. He then caught hold of my husband, and forced him to the front, down and half off of the seat. Defendant fired one shot through the window, and then put his arms around my husband's neck, and fired the fatal shot."

Carroll, the conductor, testified: "Told defendant to put up his pistol. He put down his arms. Jackson struck me, and I pushed him down. Did not see Horne or defendant when the first shot was fired. They were separated, and standing up when defendant fired the second shot, which killed Horne. Defendant then jumped off the car. I followed him, and he pointed the pistol at me."

The defendant was examined and cross-examined at great length, and his testimony is to the effect that when the conductor told him to put up the revolver, and, when he was in the act of doing so, Horne, the deceased, rushed forward on him, and that both Jackson and Horne struck him about the same time, forcing defendant down in the corner of the car; that the fight continued from the inside of the car to its outside, and then back on the inside, and that the second shot was fired on the inside of the car, when the defendant and the deceased were clinched. During the contest the defendant received a cut on the hand, and one on the nose, both of which appeared to have been inflicted with a sharp instrument. His face and eyes were badly bruised. There is much other evidence on the one side and the other, but enough has been given to show its general scope, and the different theories of fact.

The court told the jury that defendant was a peace-officer, and as such it was his right, not only to command the peace, but to enforce it, and to arrest any one committing a breach of the peace in his presence, and take him before the proper officer, to be dealt with according to law. This direction is correct as far as it goes, but it should go further, and state that defendant's authority to so act was the same as if he had taken an oath of office, and registered his appointment. This instruction goes on to say: "In doing this he was authorized to use such force as was necessary to overcome all resistance, even to the taking of life; but while he was clothed with this authority it was his duty

to so conduct himself as to prevent, and not provoke, a breach of the peace; nor had he the right to assault any one engaged in a breach of the peace, simply to punish him for what he might deem a violation of the law, or an insult to him; nor had he the right, as a peace-officer, to resent an insult conveyed by mere words. And in making an arrest for a breach of the peace, or preventing a breach of the peace, he was justified in repelling force by force, until his object was accomplished; but in such case he had no right to resort to the use of a deadly weapon, except in the necessary defense of his life or himself from great personal injury."

The first portion of this branch of the instruction presents the law favorably enough for the defendant. The latter part, however, nullifies the first part. The instruction, taken as a whole, and applied to the evidence, makes the case on the part of the defendant stand on the ground of self-defense. This is made the more emphatic by subsequent portions of the instructions. It places an officer making an arrest on the footing of any other person who is assaulted. It is due to the trial court to say that it doubtless designed to so qualify the instruction as to make it conform with the remark made in *State v. McNally*, 87 Mo. 644. But the question is, does this instruction present a correct exposition of the law?

Homicide is deemed justifiable when committed in the lawful defense of such person where there shall be reasonable cause to apprehend a design to commit a felony, or to do some great personal injury, and there shall be reasonable cause to apprehend immediate danger of such design being accomplished, or, when necessarily committed, is lawfully keeping or preserving the peace. Section 1235, Rev. St. This statute is declaratory of the common law, and it at once makes a radical distinction between the two classes of cases. Homicides committed for the advancement of public justice are: *First*, when an officer in the execution of his office, either in civil or criminal cases, kills a person that assaults or resists him; *second*, etc. But in all of these cases there must be an apparent necessity on the officer's side; that the party could not be arrested unless such homicide was committed. Without such absolute necessity it is not justifiable. 4 Bl. Comm. 178. As to arrests for misdemeanors and breach of the peace, it is not lawful to kill the party accused if he fly from the arrest, though he cannot be otherwise overtaken, and though there be a warrant to apprehend him. But as in case of felony, so here, if the officer meet with resistance and kills the offender in the struggle, he will be justified. 1 East, P. C. 302.

Among the acts done by the permission of the law for the advancement of public justice may be reckoned those of the officer who, in the execution of his office, either in a civil or criminal case, kills a person who assaults and resists him. The resistance will justify the officer in proceeding to the last extremity. So that in all cases, whether civil or criminal, where persons have authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force, and need not give back; and if the party making the resistance is unavoidably killed in the struggle, this homicide is justifiable,—a rule founded in reason and public utility, for few men would quietly submit to an arrest if in every case of resistance the party empowered to arrest were obliged to desist and leave the business undone. 1 Russ. Crimes, (9th Amer. Ed.) 892.

Mr. Wharton says: "As a general principle, officers of the law, when their authority to arrest or imprison is resisted, will be justified in opposing force to force, even if death would be the consequence. Yet they ought not to come to extremities upon every slight provocation, without a reasonable necessity. If they kill where no resistance is made, it will be murder, and the same rule will exist if they should kill a party after the resistance is over, and the necessity has ceased, provided that sufficient time has elapsed for the blood to cool." Whart. Crim. Law, (8th Ed.) § 402.

When, as a general proposition, one refuses to submit to an arrest after he has been touched by the officer, or endeavors to break away after the arrest is effected, he may lawfully be killed, provided this extreme measure is necessary. In misdemeanors and breaches of the peace, as in cases of felony, if the officer meets with resistance, and the offender is killed in the struggle, the killing will be justified. 2 Bish. Crim. Law, §§ 647, 650. Other text-books and cases are to the same effect, but we refrain from making further quotations, and simply cite Fost. 272; 7 Bac. Abr. 209; 4 Steph. Comm. 98, and Barb. Crim. Law, 35. These authors, ancient and modern, lay down their laws in substantially the same terms. They show that the protection which an officer is entitled to receive is a different thing from self-defense. The officer, when making an arrest, may, of course, defend himself, as may any other person who is assaulted; but the law does not stop here. The officer must of necessity be the aggressor. His mission is not accomplished when he wards off the assault. He must press forward and accomplish his object. He is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him the law throws around him a special protection. As we said in the recent case of *State v. Fuller*, 9 S. W. Rep. 583, his duty is to overcome all resistance, and bring the party to be arrested under physical restraint, and the means he may use must be co-extensive with the duty. The defendant was entitled to a plain instruction to the effect that he had a right, in endeavoring to make the arrest, to use all the force that was necessary to overcome all resistance, even to the taking of life; and if he used no more force than was reasonably necessary to then and there accomplish the arrest, then he should be acquitted. If the defendant attempted to arrest Jackson, and the deceased resisted the arrest, or aided and assisted Jackson in resisting the arrest, then deceased occupied no better ground than Jackson himself.

The evidence in this case does not tend to make out a case of deliberate killing, and there is therefore no use of incumbering the trial with instructions upon murder in the first degree.

The instructions as to murder in the second degree, among other things, state in substance that if defendant shot Horne, he is guilty of murder in the second degree, in the absence of proof to the contrary, and that it devolves upon defendant to repel that presumption, unless it is repelled by evidence offered by the state. Like instructions have been approved where there was evidence of justification for the killing when accompanied with an instruction as to reasonable doubt as to the whole case, (*State v. Alexander*, 66 Mo. 148,) but disapproved when not accompanied with a full instruction as to reasonable doubt, (*State v. Wingo*, Id. 181.)

Now, in this case the defendant is guilty of no offense, unless he resorted to extreme and unnecessary measures,—unless he shot Horne when there was no reasonable necessity for so doing in order to accomplish the arrest. Whether he did resort to such extreme measure is the very first issue in this case. The burden of proof of this issue is on the state. While in general it is perhaps proper enough to say that from the simple act of killing the law will presume that it was murder in the second degree, still we think such an instruction should not be given in this case. The case starts out with evidence tending to repel the presumption, namely, that defendant was an officer; that he attempted to arrest Jackson, and that Horne interfered. The issue should go to the jury on all the evidence, and not be divided up with presumptions. As before stated, the burden of proof is for the state to show the use of extreme measures; and in order to determine this it is necessary to look to all the circumstances surrounding the killing.

Since the killing in this case was intentional, it is one of justifiable homicide, murder in the second degree, or manslaughter in the second degree, under section 1243, or in the fourth degree, under section 1250. *State v. Edwards*, 70 Mo. 480; *State v. Curtis*, Id. 600; *State v. Watson*, 95 Mo. 412, 8 S. W. Rep.

383. Section 1243 seems to apply to those cases of unnecessary killing where the person killed was attempting to commit a felony, or do some unlawful act, and the killing occurred after the attempt had failed. Here the resistance to the arrest seems to have been one continuous struggle up to the time the second shot was fired; and we cannot see that it comes within that section. If the defendant is guilty of manslaughter, it is because of an intentional killing, but without malice aforethought, and is manslaughter in the fourth degree, under section 1250.

We are, of course, not to be understood as saying that intentional killings only are included in that section.

The judgment is reversed, and the cause remanded for new trial.

RAY, J., absent. NORTON, C. J., dissents. The other judges concur.

STATE v. STEVENS.

(*Supreme Court of Missouri.* December 20, 1888.)

1. HOMICIDE—SELF-DEFENSE—INSTRUCTIONS.

As, under a plea of not guilty, any number of defenses may be made, whether consistent or not, on a trial for murder evidence of previous threats, made by deceased against defendant, should be admitted, and instructions covering the law of self-defense given, though defendant has testified that the homicide was accidental, and that while he feared deceased, who was advancing on him at the time, he did not shoot him for that reason, and had no cause to shoot him. SHERWOOD, J., dissenting.

2. SAME—INSANITY AS A DEFENSE—INSTRUCTIONS.

Evidence of insanity having been introduced and withdrawn by defendant, it is proper to charge that there is no evidence of insanity on which the jury can acquit.

3. SAME—MURDER—DELIBERATION—INSTRUCTIONS.

Instructions stating that "deliberately" means in cool blood, and not in passion caused by just provocation; that premeditated killing, with malice aforethought, without deliberation, is murder in the second degree; and that if defendant killed deceased while under such a passion, caused by insulting language used by deceased to him, that he was unable rightly to judge the nature and consequences of his act, the homicide was not deliberate,—contain no error of which defendant can complain.

Appeal from criminal court of Jackson county; HENRY P. WHITE, Judge. Indictment against Jefferson Stevens for the murder of Thomas Kelly. Verdict of guilty of murder in the first degree. Defendant appeals.

B. G. Boone, Atty. Gen., for the State. John F. Waters, F. W. Griffin, and F. M. Hayward, for appellant.

SHERWOOD, J. The defendant was indicted for murder in the first degree. The charge in the indictment was that he shot and killed one Thomas Kelly in Kansas City, Mo., on the 14th day of July, 1887. In January, 1888, he was tried, convicted as charged, and appealed to this court. The testimony and evidence on the part of the state is substantially as follows:

Defendant was employed in a shooting-gallery in Kansas City, Mo. On the evening of the 14th day of July, 1887, the deceased, with whom the defendant had been acquainted about a week, came to the gallery, and picked up the gun, and took aim as if he was going to fire at the target. Defendant cursed him, and told him to put the gun down. He did so, and went away a few steps, and sat down. Defendant, who had been back near the target, came up nearer the deceased, and they continued to bandy words with each other. Defendant called deceased a son of a bitch, and the latter arose from his seat, and stepped towards defendant, laughing as he did so. The witness who saw this says she thought the deceased was joking the defendant, who got a little angry about it. Just at this juncture the gun in the hands of defendant was discharged by him without being raised to his shoulder, and the deceased was shot through the abdomen, the bullet ranging downward and in-

ward, passing through the stomach and the folds of the small intestines below the stomach, thence into the back to the right of the spinal column, where it lodged in the muscles. This wound was necessarily fatal, and the wounded man died from the effects of it at the city hospital in Kansas City at 11 o'clock on the night of July 15, 1887. The deceased was a spare-built, boyish looking man, 22 years of age. The coroner, who is a physician, testified that the gun must have been held, when the fatal shot was fired, so as to cause the ball to range downward and backward. As soon as defendant fired the shot, he ran across to a house on what is called "Bank Street," and, going into a room, locked the door. An officer followed him, and was about to force an entrance into the room, when it was opened by a woman, and the officer found defendant changing his clothes; he having had on a buckskin suit, and was taking it off, and putting on citizens' clothes. Just as the officer stepped into the room, the defendant threw the gun under the bed, and said that he would go along if the officer would protect him from the mob. There was no evidence of any unlawful demonstration by any one against defendant. The officer says, as they were starting to the station-house, he said to defendant, in reference to the shooting, "What in the name of God did you mean?" to which defendant replied, "I meant to kill the son of a bitch. Is he dead?" Defendant, as well as the deceased, were taken to the police station, where defendant was identified by deceased as the man who shot him. The deceased, while at the station, made the following statement: "My name is Tom Kelly. My age is 22 years. My residence is 2710 Market street, St. Louis, Mo. Believing I am about to die, I make this statement on oath: He called me a son of a bitch, and I walked towards him, and he picked up a gun, and said, 'I will kill you; you are a son of a bitch;' and then he shot me. He then ran away. The party to whom I refer is named Jeff Stevens. I have known him about one week. He is the man who shot me. In the presence of Capt. Chas. Ditsch and Officer Nichols I fully recognize the man that is held under the charge of shooting as the right man." This was signed and sworn to by deceased, and witnessed by the two officers present.

The testimony of the defendant is the following: "Kelly came there between 5 and 6 o'clock in the evening. He picked up a gun. I was back at the target. He pointed the gun in that direction, and I said: 'Lay that gun down.' He said: 'I want to shoot.' I told him it was no benefit to me to have him shoot. He laid the gun down, and said to me to go to hell. He said, 'Go to hell, you son of a bitch;' and went around, and sat down on a chair or something outside the tent. There was a table close to the end of the counter, on which there was a thirty-eight caliber Remington revolver, belonging to one Denny. Denny was writing a letter at the table. Kelly kept up the conversation after he had sat down,—called me a son of a bitch again; and I said: 'You are another one.' He then said: 'I have had it in for you, and I will fix you now.' At the time I was fixing a gun for a customer, standing at the counter. He advanced towards me, saying that he would fix me, etc., a distance of eight or nine feet, and I threw the gun up in my hand like this, [indicating.] I said, 'Stay out of here;' and undertook to load the gun. The extractor bound too tight on the cartridge, and set it off. I did not put the gun to my shoulder, nor did I take aim. At the time I shot, deceased could have reached the revolver with his hand. The gun had gone off accidentally two thousand times. The extractor binds up tight on the cartridge. It is a rim-fire. The hammer strikes on the rim. If it was a center-fire, it would not do that. I judge Kelly to have been six feet in height, and to have weighed between one hundred and sixty-five and seventy pounds. After the gun went off, Kelly ran out of the tent. He said, 'You son of a bitch, I will get my gang, and fix you;' and then I got scared, and run over to Smith's house. There were two or three circus fellows, I believe, standing there at the time." The following questions were then

asked defendant by his counsel: "*Question.* Why did you shoot Kelly? *Answer.* Because the gun went off accidentally. *Q.* Well, what occasion had you for shooting him? *A.* No occasion. *Q.* Was you afraid of Kelly? *A.* Well, I was afraid of him, but I did not shoot him because of that. *Q.* Had the deceased ever threatened you prior to that time?" But the court, of its own motion, refused to permit the testimony. On cross-examination, defendant testified that the gun went off accidentally. "*Question.* You were not shooting him because he called you a son of a bitch? *Answer.* No, sir. *Q.* You did not kill him because he was advancing on you? *A.* No, sir. *Q.* What did you think of it? *A.* I thought it was wrong. *Q.* When this shot went off, did you shoot him because he was advancing on you? *A.* I shot him because the gun went off accidentally in my hand; it wasn't my fault. *Q.* You were not defending yourself at that time? *A.* No, sir. *Q.* There was no necessity? *A.* There might have been a necessity. *Q.* The necessity hadn't arisen at the time of your shooting him, so that you had to shoot him in self-defense? *A.* No, sir; I had no cause to shoot him at the time. *Q.* You have said all that took place between you at this time? *A.* Yes, sir; at the present time."

Miss Mamie Hughes' account is that, as she was coming from the Tivoli Hotel with a market basket, she saw a lady standing on the sidewalk, and "two men quarreling in there, [the shooting tent.] I saw this man sitting in the chair. He got up, and made a remark to this man in a laughing manner, and the fellow was standing there with the gun in his hand. He had a buckskin suit on. He didn't raise the gun with an aim, but shot. If he had raised it, I would have seen him do it. He shot without having the gun raised. Kelly raised from the chair, and had taken one or two steps towards this gentleman, when he told him to stop. He was six or eight feet away. *Question.* What was Kelly doing at the time this man shot him? *Answer.* He had just risen out of the chair, and stepped towards this gentleman, when this gentleman said: 'You keep back.' The defendant was standing at the end of the counter. Mr. Stevens, the defendant, was looking very pale; whether it was from madness or fear I can't say."

This was the testimony of the eye-witnesses as to the shooting. It was also shown by other testimony that the gun used, or one like it, would "go off" accidentally. It appeared also, from the testimony of several witnesses, that he would have spasms; had tried to kill himself; and his mother had hallucinations; told wild and improbable stories, etc. Just before the close of the testimony there appears in the bill of exceptions the following statement: "At this point the state began to call witnesses to rebut the testimony relative to the mental condition of defendant; whereupon the court, at the request of the defendant, struck out all the evidence introduced by the defendant upon that subject, and thereupon the state refrained from offering further testimony."

The testimony being closed, the defendant asked the court to give the following instructions: "(1) If you believe from the evidence that the defendant, Jefferson Stevens, had reasonable cause to apprehend a design on the part of deceased to commit a felony upon him, or do him some great personal injury, and that there was a reasonable cause to apprehend immediate danger of such design being carried out, and he shot and killed deceased to prevent the accomplishment of such apprehended design, then the killing is justified upon the ground of self-defense, and you should acquit. It is not necessary to this defense that the danger should have been real and actual, or that the danger should have been impending, and immediately about to fall. If you believe that the defendant had reasonable cause to believe these facts, and he shot under such circumstances, as he believed, to prevent such expected harm, then you should acquit. (2) To constitute the right of defense, the actual striking of a blow is not necessary, nor that the assailant be in striking dis-

tance. (8) If you believe from the evidence that the defendant used the tent referred to in evidence as a place in which to lodge himself at night, then the court instructs you it was his home or habitation, and as such was sacred for his protection. A person assailed in his own house is not bound to retreat out of it, or to secrete himself to avoid violence. If you find from the evidence that at the time the killing occurred deceased was entering the tent for the purpose of feloniously assaulting defendant, or at said time defendant had reasonable ground to apprehend immediate danger to his person, and he shot under such circumstances to prevent such apprehended felonious assault or immediate danger to his person, the killing is excusable, and you should acquit."

These instructions the court refused to give, and gave of its own motion the following: "First. The indictment in this cause was filed on the 12th day of September, 1887, and charges the defendant with murder in the first degree. According to the evidence as adduced, however, it will be necessary for you to determine, in case you find the defendant guilty of any offense, whether the conviction should be had for the specified offense charged, or for murder in the second degree, or manslaughter in the fourth degree. Murder in the first degree is the killing of a human being willfully, deliberately, premeditatedly, and with malice aforethought. Murder in the second degree has all the elements of murder in the first degree, excepting that of deliberation. Manslaughter in the fourth degree, for the purpose of this trial, is the killing of a human being through culpable negligence. As used in defining murder, 'willful' means 'intentional,' as contradistinguished from 'accidental.' 'Deliberately,' for the purpose of this trial, means in a cool state of blood; that is, not in a heat of passion, caused by some just cause of provocation to passion. 'Premeditatedly' means thought of beforehand; any length of time, however short. 'Malice' does not mean spite or ill will, but signifies an unlawful state of the mind; such a state of mind as one is in when he intentionally does an unlawful act. 'Malice aforethought' means malice with premeditation, *i. e.*, that the unlawful act intentionally done was determined upon before it was executed. As used in defining manslaughter in the fourth degree, 'culpable negligence' signifies that the person by whose act a death was caused was utterly indifferent to the rights of others and the security of human life. Bearing the foregoing in view, and considering it a basis, the court submits to you the further instructions following, to-wit: (1) If you should believe and find from the evidence that at the county of Jackson, state of Missouri, any time prior to the day on which the indictment was filed, the defendant, Jefferson Stevens, in the manner and by the means specified in the indictment, shot and wounded the deceased, Thomas Kelly, and shall further believe that such shooting was done willfully, deliberately, premeditatedly, and with malice aforethought, and shall further believe that within one year and a day thereafter, and before the filing of the indictment in this case, the deceased, Thomas Kelly, at the county of Jackson aforesaid, died, in consequence of such shooting and wounding done by the defendant, you will find him, the defendant, guilty of murder in the first degree. (2) If you shall believe and find from the evidence that, within the time and at the place specified in the preceding instruction, the defendant, in the manner and by the means specified in the indictment, shot and wounded the deceased, Thomas Kelly, and shall further believe that such shooting and wounding was done willfully, premeditatedly, and with malice aforethought, but without deliberation, and shall further believe that within one year and a day thereafter, and before the filing of the indictment, the deceased, Thomas Kelly, died from the effects of such shooting and wounding at the county aforesaid, you will find the defendant guilty of murder in the second degree. (3) You will observe from the foregoing instructions that 'deliberately' means in a cool state of blood; that is, not in a heat of passion caused by some just cause or provo-

cation to passion. If, therefore, you shall believe that at the time of the shooting (provided the defendant did shoot) he, the defendant, was so far under the dominion of passion, in consequence of opprobrious epithets applied to himself, or because of offensive, insulting, or degrading language addressed to himself by the deceased, as to be unable to judge rightly as to the nature, quality, and consequences of his act, you cannot find that the shooting was done with deliberation. (4) If you shall find and believe from the evidence that at the county of Jackson, state of Missouri, any time within three years next before the day on which the indictment was filed, the defendant shot and wounded the deceased, Thomas Kelly, and shall further find and believe that within one year and a day thereafter, at the county aforesaid, he, the said Kelly, died from the effects of such shooting and wounding, and shall further believe that such shooting was the result of culpable negligence on the part of the defendant, you will, although you may believe that the gun was accidentally or unintentionally discharged, find the defendant guilty of manslaughter in the fourth degree. (5) If you shall believe and find that the wound that occasioned the death of Thomas Kelly was the result of misadventure or the accidental or unintended discharge of a gun, you cannot find the defendant guilty of murder in either degree; and you cannot find him guilty of manslaughter in the fourth degree, unless you shall find that the defendant was culpably negligent, as heretofore stated to you."

At the request of the prosecuting attorney, the court also instructed the jury that, "(6) in contemplation of law, there is no evidence before you authorizing you to acquit the defendant on the ground of insanity; nor is there any evidence that will warrant an acquittal on the ground of self-defense. (7) You are sole judges of the credibility of the witnesses, and the weight of their testimony; and if you believe that any witness in the cause has willfully sworn falsely, as to any material fact or matter testified to by such witness, you are at liberty to disregard or treat as untrue the whole or any part of such witness' testimony. (8) Under the law, the defendant is a competent witness in his own behalf, and you should take his testimony into account, and give it such weight as you deem it entitled to receive in passing upon his guilt or innocence; but, in determining what weight you will attach to his testimony, you may take into account the fact that he is the defendant in the cause, testifying in his own behalf. (9) If, upon the evidence considered as a whole, the jury entertain a reasonable doubt of defendant's guilt, you should give him the benefit of such doubt, and find him not guilty; but a doubt, to authorize an acquittal on that ground alone, should as stated be a reasonable doubt, and one fairly arising from the evidence taken and considered as a whole. The mere possibility that the defendant may be innocent will not warrant you in acquitting him on the ground of reasonable doubt. (10) If you find the defendant guilty of murder in the first degree, you will simply so state in your verdict. You are charged with no responsibility with respect to the punishment for murder in the first degree. If you find the defendant guilty of murder in the second degree, you will so state in your verdict, and assess his punishment at imprisonment in the state penitentiary for any term, not less than ten years, that may to you seem proper. If you find the defendant guilty of manslaughter in the fourth degree, you will so state in your verdict, and assess his punishment at two years in the state penitentiary, or at imprisonment in the county jail not less than six months, or at a fine not less than five hundred dollars, or at both a fine not less than one hundred dollars and imprisonment in the county jail not less than three months. (11) As to whether the shot which occasioned the death of the deceased, Thomas Kelly, was or was not accidentally discharged, you are to determine from all the facts and circumstances proven before you, including, in connection with these facts and circumstances, any statement you may believe the defendant made relative to this shooting; and in this connection the court instructs you

that what a person accused of crime says against himself is presumed to be true, because contrary to self-interest. But you must take into account all he says in favor of himself, and give it such weight which you may believe it entitled to receive according as you may believe it to be true or false. (12) The statement read to you as the dying declaration of the deceased must be considered and treated by you as a dying declaration of said Kelly; but because it is a dying declaration you are not bound to believe it. You may believe it or disbelieve it as you deem proper, considering all the facts and circumstances proven, and also the court further instructs you that you are to give such declaration such weight, in connection with all the other facts and circumstances proven, as you deem proper."

1. The action of the court in giving the sixth instruction, that there was no evidence in the cause authorizing an acquittal on the ground of insanity, was undoubtedly correct, when the foregoing statement in the bill of exceptions in reference to insanity, and the withdrawal of all testimony respecting it by the defendant, is considered. All evidence respecting insanity having been stricken out at the defendant's request, the court could do no less than it did in giving such an instruction.

2. But, in reference to the statement in the bill of exceptions already referred to, counsel for defendant say that it was "mysteriously interpolated into the record." Of this we can know nothing except from the record as we find it. We are bound to presume that the bill of exceptions was read by the judge before he signed it, and that all amendments of that bill, if any occurred, were made with his knowledge, and before the act of signing took place.

3. The instructions, speaking of them generally, were properly worded, and placed the matters arising upon the testimony fairly before the jury. The theory of the state was that the act of the defendant was intentional; the theory of the defendant, that it was accidental. Instructions covering these different theories were given, ranging from murder in the first degree down to murder in the second degree, manslaughter in the fourth degree, and homicide by misadventure.

It is claimed, however, that material error occurred in defining the meaning of the word "deliberately." Looking at the instruction where this word is first used, and to which reference is made in the third instruction, it is not thought that the jury could have been misled, or the defendant prejudiced. In *State v. Ellis*, 74 Mo. 207, if we understand that case, the doctrine is laid down that, in order to reduce what could otherwise be murder in the first degree to manslaughter, there should be a "lawful" or "reasonable" provocation, as *ex. gr.* a blow; but that in order to reduce what would otherwise be murder in the first degree, in order to eliminate from it the element of deliberation, and bring it down to murder in the second degree, grievous and degrading words of reproach would amount to "just provocation," as contradistinguished from lawful and reasonable provocation. Here the jury were in effect told, in the third instruction, that the use of such opprobrious words was capable of robbing the homicide of deliberation, and, by reason of doing so, amounting to "just provocation." And by the second instruction the jury were told that, with the element of deliberation left out of the case, the offense would be murder in the second degree; thus bringing this case fully within the rule laid down in the *Ellis Case*. How there could be a "just provocation," which is neither "lawful" nor "reasonable," seems difficult to understand. But, at all events, it does not lie in the mouth of the defendant to complain of an instruction which evidently lessens the amount of provocation necessary to exonerate him from the commission of the highest grade of homicide.

4. Before making his statement, the deceased was fully informed as to his condition, and, fully understanding his situation, he made his declaration. No error occurred on this point,

5. Under the plea of not guilty, every defense, of whatsoever nature, whether self-defense, insanity, misadventure, *alibi*, etc., is open, in criminal proceedings, to a defendant, and whereof he can avail himself, whether such defenses are consistent with each other or not; and it is wholly beyond the power of the trial court to limit or hamper him in the slightest degree in the particulars aforesaid. In a word, we hold that the power of the accused to defend must necessarily be as broad as that of the prosecution to criminate; and that this right of defense, broad as it is, is not narrowed or restricted by reason of the fact that the defendant places himself upon the stand, and testifies as a witness. So holding, we of necessity rule that grievous and prejudicial error was committed by the trial court in refusing to admit evidence of threats, etc., and in refusing to instruct the jury on the theory of self-defense.

NORTON, C. J., and BLACK and BRACE, JJ., hold that, for the errors heretofore pointed out, the judgment should be reversed, and the cause remanded, in which reversal I do not concur, but express my views in a separate opinion.

RAY, J., absent.

SHERWOOD, J., (*dissenting*.) It seems to me that the action of the trial court was correct in informing the jury, in the sixth instruction given at the instance of the state, that there was no evidence that would warrant an acquittal on the ground of self-defense. The testimony of the defendant on this point is too plain to admit of any mistake. The idea of self-defense must obviously originate with the defendant himself, and rest exclusively upon the motive which prompted him to do the act subsequently charged as criminal. If he had no intention, no motive, for doing the act; if it was purely accidental,—then, without doubt, the action of the court in instructing the jury on this point as it did, must stand confessed as free from error. An act done in self-defense is a positive intentional act, not an unintentional one; not a mere accident. Accident and intention cannot be affirmed of one and the same act. *State v. Gilmore*, 95 Mo. 554, 8 S. W. Rep. 359, 912.

He who acts in self-defense must see with his own eyes, and hear with his own ears. He must be judged from his own stand-point. He must act upon appearances; act upon facts as they appear to him, and not as they appear to others. *State v. Sloan*, 47 Mo. 604, and cases cited; 1 Bish. Crim. Law, § 305; 2 Bish. Crim. Proc. § 610. His peril may be imminent. His situation dangerous. It may excite great apprehension in the breasts of other witnesses to the transaction, and yet he himself may be wholly ignorant of his danger and unconscious of his peril. If, in such circumstances, he should unintentionally slay his adversary, it would be a perversion of terms to say his act was one done in self-defense; and, according to the defendant's own testimony, his situation and his acts were precisely similar to those in the case instanced. According to his own story, he was without apprehension of danger, and without consciousness of fear, when he did the act now called in question; and there was, in the view I take of the matter, not a particle of testimony from any other witness tending to support the theory or necessity of self-defense. The record is barren of any necessity for such defense. Granting the testimony of the defendant is true, and so it must be taken, that there was a loaded revolver on the table at the end of the counter at which defendant was standing, it does not appear that deceased attempted to reach the revolver, though the defendant swears deceased could have reached it with his hand. He could have reached it, but did not attempt to do so. Where, then, is there any basis laid for self-defense? I have always thought that, before an act of homicide is justifiable by one on the ground of self-defense, his danger must be imminent, not of a mere battery, but of death or great bodily harm, and that danger must be manifested by some overt act. See *State v. Gilmore, supra*; *State v. Tabor*, 95 Mo. 585, 8 S. W. Rep. 744, and cases cited.

The foregoing remarks also sanction the action of the lower court in refusing to admit testimony of threats. *State v. Taylor*, 64 Mo. 358; *State v. Clum*, 90 Mo. 482, 3 S. W. Rep. 200; *State v. Alexander*, 66 Mo. 148; 2 Bish. Crim. Proc. § 620. As there was no motive and no intent on the part of the defendant, who, of course, knew his own motives and intentions to do the act which he did do, as his act was unintentional, this rules the theory of self-defense out of the case; and such a theory is also ruled out by the very pertinent reason that there was no testimony extraneous of that of defendant to support it.

I am constrained, therefore, to dissent from the judgment of reversal announced herein.

STATE, to Use of *KRAMER et al., v. MASON et al.*

(*Supreme Court of Missouri.* December 20, 1883.)

1. FRAUDULENT CONVEYANCES—SALES TO ACCOMMODATION INDORSERS.

Accommodation indorsers may, on assuming the payment of the note, take in satisfaction of their liability, at its fair value, property of the principal debtor, who is insolvent, as they are to be regarded as creditors, and not as mere purchasers.

2. TRIAL—INSTRUCTIONS—ASSUMPTION OF FACTS.

An instruction that a sale would be void if the purchaser knew of the fraudulent purpose of the insolvent, etc., is properly refused, as it assumes the existence of a fraudulent intent.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Action by the state to the use of Abraham Kramer and Adolph Loth, co-partners under the style of Kramer & Loth, upon a sheriff's bond executed by Isaac Mason, sheriff of the city of St. Louis, as principal, and Thomas Griffith, Joseph W. Branch, Martin Collins, Anthony Ittner, and Samuel Hoffman, as sureties. The cause of action was the alleged wrongful attachment, as the property of one Isaac Trepp, of merchandise, which plaintiffs allege had been transferred to them in payment of Trepp's indebtedness to them. Defendants contended that such transfer was fraudulent, and requested the following instructions, which were refused:

"(1) The court instructs the jury that an actual agreement or conspiracy between Trepp and Kramer that the latter would aid the former to defraud his creditors, does not have to be shown. It is sufficient to avoid the sale if the jury believe from the facts and circumstances that Kramer either knew of the fraudulent purpose of Trepp, or, having good reason to suspect it, purposely refused to make inquiry, and remained willfully ignorant.

"(2) The court instructs the jury that the plaintiffs, Kramer & Loth, were merely indorsers upon the note made by Trepp to their order for three thousand dollars, which has been read in evidence; that on the 18th day of April, 1883, when plaintiffs obtained the goods in controversy in this action from Trepp, the said note upon which said plaintiffs were thus indorsers was not due and payable. Hence the court instructs the jury, as a matter of law, that notwithstanding the execution by Trepp of the paper signed by him, which has been read in evidence, the plaintiffs were not then creditors of the said Trepp, with respect to the said note for three thousand dollars, in any sense whatever.

"The jury are further instructed that the right and title of plaintiffs in and to such goods as were taken in satisfaction of said note consequently depend upon the consideration whether, by reason of the facts and circumstances developed by the testimony, said plaintiffs were purchasers in good faith from Trepp of that portion of the goods; and before the jury can find that plaintiffs were such purchasers in good faith, they must believe from the evidence—*First*, that plaintiffs bought without notice of any bad intent on the part of Trepp, (if the jury find that there was any such bad intent;) *secondly*, that plaintiffs bought the property for a valuable consideration; and, *thirdly*, that the plain-

tiffs actually paid the purchase money before they had notice of such bad intent on the part of Trepp. If, therefore, the jury find from the evidence that as to the purchase these three conditions have not been satisfied, there can be no recovery in this action, unless the jury further believe from the evidence that the plaintiffs were creditors to the extent of the note for \$529.06, read in evidence, and the open account for \$171.68, also shown in evidence, and that, in payment of such last-named note and account received from Trepp, that portion of the goods sued for which the jury believe was sufficient in point of reasonable value to satisfy such note and account; and unless, also, the jury find, not only that the conditions of purchase heretofore indicated have been satisfied as to the balance of the goods in controversy, but are able from the evidence to distinguish and separate that portion of the goods taken by way of purchase from the remainder of the goods taken by way of preference. And even as to those goods taken by way of preference there can be no recovery in this action if the jury believe from the evidence that in making such disposition of them Trepp thereby intended to hinder, delay, or defraud his creditors, other than those preferred, and that plaintiffs participated in, or were privy to, such fraudulent intent or purpose.

"Under the first branch of this instruction, in determining whether plaintiffs, as purchasers, were aware, either at the time they took the goods or before the time when the jury believe from the evidence they paid for them, of a fraudulent intent on the part of Trepp in making such disposition of the goods, it is not necessary that the jury should believe from the evidence that the plaintiffs actually knew what the intention of Trepp was in the premises, but it is sufficient if the jury believe from the evidence that the circumstances surrounding the parties at either of the times thus indicated were such as were calculated to convey to the mind of a man of ordinary experience notice of the fraudulent intention on the part of the vendor of the goods."

At the instance of the plaintiffs, under the objections and exceptions of the defendants, the court gave the following instructions:

"The court instructs the jury that the only question herein is whether the transfer of the property in controversy to plaintiffs was valid; the validity of no other transfer is in issue in this cause.

"(1) A debtor in failing circumstances has the right to prefer one of his creditors to another, or any number of them to the exclusion of others. A mere preference alone is no fraud. A debtor, therefore, may lawfully pay, either in money or property of like amount, one or more of his creditors their demands in full, and allow others to go unpaid in whole or in part; and if the creditor who receives such a preference does so only for the purpose of receiving his demand, his payment is valid, although at the time he receives it he may know his debtor owes other demands, and that he is, by such payment, receiving a preference. But if, in accepting such payment or transfer of property therefor, the said creditor does not act solely with the purpose of obtaining a preference for himself, but also thereby intends to aid the debtor in hindering, delaying, or defrauding his other creditors, (irrespective of the preference such creditor secures thereby,) then such intent makes such payment or transfer of property fraudulent and void.

"If, then, on the 18th day of April, 1883, Isaac Trepp was indebted to the Fourth National Bank of St. Louis for the note of \$3,000, read in evidence, and to Kramer & Loth, or said bank, in the amount of the note for \$529.06, and to Kramer & Loth on open account for \$171.68, and on that day sold and delivered the goods in controversy to plaintiffs in payment of his indebtedness to them, and in consideration that they would pay off and discharge the said \$3,000 note to said bank, then and in that case, in the absence of any intent on the part of the plaintiffs to do more than secure payment of Trepp's indebtedness to them, and so protect themselves against their liability to said bank in respect of said note or notes, such sale of said property was

a valid sale, and did operate to pass the bill to them free from the claim or claims of other creditors of Trepp.

"(2) The jury are instructed that fraud is not to be presumed, but must be proven by the party alleging it, and therefore, in this case, by the defendants. And while it need not be established by direct and positive evidence; but may be proven by the facts and circumstances indicative of it, still, mere matters of suspicion, which are not sufficient to satisfy the mind and conscience of its existence, do not establish it, and it should never be imputed when the facts and circumstances upon which it is predicated are as consistent with a lawful purpose and intent as with an unlawful one.

"(3) If the jury find for the plaintiffs, they will assess as the damages the reasonable market value in St. Louis, on the 18th day of April, 1883, of the property herein in controversy, including the portion thereof which it is admitted was replevied. The value of the portion replevied should, however, be taken to be six hundred dollars, that being the admitted value thereof. The jury may, however, further allow and assess as damages interest upon the said value of said property herein in controversy from said 20th day of April, 1883, to this date, at the rate of six per cent. per annum."

Of its own motion the court gave the following instructions, and the appellants duly excepted:

"The jury are instructed that if they believe from the evidence that Trepp made the transfer of the goods in question to plaintiffs, Kramer & Loth, with intent to hinder, delay, or defraud his creditors, and that Kramer & Loth participated in such intent, as explained in instruction numbered 2, then the jury must find for defendants.

"The jury are instructed that it is not necessary to establish a fraudulent intent by direct and positive evidence, but that an intent to defraud may be established by inference in the same way as any other fact, by taking into consideration the acts of the parties, and all the facts and circumstances of the case."

The jury found a verdict for plaintiffs, and defendants appeal.

Krum & Jonas and Nathan Frank, for appellants. *David Goldsmith*, for respondents.

SHERWOOD, J. Action on sheriff's bond, brought to the use of Kramer & Loth, because of a levy made by Mason, as sheriff, by virtue of a writ of attachment, on a large quantity of merchandise as the property of one Trepp, which property plaintiffs claimed as their own, and which they alleged was lost to them by reason of the levy and the seizure of the goods. The answer of the defendants, among other things, alleged in substance and effect that the property seized under the writ was the property of said Trepp, who had fraudulently transferred it to plaintiffs, with a view to defraud the creditors of Trepp. The evidence introduced tended to show fraud, and there was evidence of a contrary effect. The instructions given, and those refused, will accompany this opinion. Trepp was indebted to Kramer & Loth, the relators, in the sum of \$171.68 on open account; \$529.06 on note; and they were accommodation indorsers for him on a note for the sum of \$3,000, payable at the Fourth National Bank; the indebtedness of Trepp then aggregating some \$3,700. The bill of sale recites that the goods mentioned therein were transferred to relators upon consideration of the account and note for \$529.06, and in satisfaction thereof, and upon consideration that they assumed the payment of the note for \$3,000. Both these notes were, it seems, in bank, and when afterwards they matured, they were paid by relators. This was something over a month subsequent to the statement of the goods, and the verdict of the jury fixes the value of those goods at something less than the price which relators paid and assumed to pay for them.

The main point in the cause is this: Are relators, with respect to the note

for \$3,000, to be regarded as creditors of Trepp, or are they to be regarded as mere purchasers of the goods sold? This question is answered by the case of *Albert v. Basel*, 88 Mo. 150, where, in similar circumstances, a surety on a promissory note was regarded as a creditor, and not as a purchaser, and therefore to be governed by those rules which pertain to those persons who, in order to secure some existing indebtedness, or to secure themselves against some existing liability, buy at a fair valuation the property of their failing debtor, and at the same time, in consideration of their purchase, satisfy the debt or assume the liability. The fact that in this case the relators were accommodation indorsers of Trepp, does not alter the complexion of this case, nor cause it to differ from the one cited; for, as between the bank and relators, the latter were as firmly bound to pay the note which they had indorsed for the insolvent, Trepp, as though they had been his mere sureties on the bank proper. *St. John v. Camp*, 17 Conn. 222; *Bump, Fraud. Conv.* (3d Ed.) pp. 187, 225, and cases cited.

The instructions given by the court are in accord with this position, and they are sufficiently comprehensive to cover the issues in the case. As to the first instruction asked by defendants, it was properly refused, aside from reasons already stated, because it assumes a fraudulent purpose on the part of Trepp. Therefore judgment affirmed.

All concur. RAY, J., absent.

STATE *ex rel.* NEW YORK LIFE INS. CO. *v.* PHILLIPS *et al.*, Judges.

(*Supreme Court of Missouri.* December 20, 1888.)

1. MANDAMUS—TO TRANSFER CASE TO SUPREME COURT.

Section 6 of an amendment to Const. Mo., "concerning the judicial department," provides that when any one of certain courts shall "render a decision which any one of the judges therein sitting shall deem contrary to any previous decision * * * of the supreme court," the said court "must, of its own motion, pending the same term, and not afterwards," certify the cause to the supreme court. *Held*, that if it had been the duty of a court during a term to transfer a cause, and it had failed, *mandamus* would lie to compel the transfer, after the term expired, though the court could not then transfer the cause of its own motion.

2. COURTS—CERTIFYING CASE TO SUPREME COURT—DISAGREEMENT OF JUDGES.

Where there is no disagreement between the dissenting judge and the majority of the court on the principle in support of which he cites a supreme court decision, and he does not intimate that he deems the application of that principle, made by the majority to the case in hand, in conflict with any supreme court decision, it does not become the court's duty to certify the case to the supreme court.

Application by the state *ex rel.* New York Life Insurance Company for *mandamus* against John F. Phillips, James Ellison, and Willard P. Hall, judges of the Kansas City court of appeals.

Hough, Overall & Judson, for relator. *Smith, Silver & Brown*, for respondents.

BRACE, J. At the March term, 1887, of the Kansas City court of appeals, and on the 6th day of June, 1887, an opinion was delivered by the judges of said court in the case of *Peyton F. Greenwood v. the relator herein*, then pending in said court on appeal from the circuit court of Adair county, affirming the judgment of said court in favor of said Greenwood. On the same day the court of appeals adjourned until court in course: first having caused an order to be entered of record permitting parties to file motions for rehearing, in all causes decided on said 6th day of June, within 10 days thereafter. Within the time allowed, the relator filed its motion for a rehearing in said cause, which, coming on to be heard at the next ensuing October term, was on the 8th of October, 1887, of said term, overruled. Afterwards, during said term, the relator filed its motion, suggesting that the decision was, in the opinion of one of the judges sitting in said cause, contrary to a previous de-

cision rendered by the supreme court; and praying that the cause be certified to the supreme court. This motion, coming on to be heard during said term, was on the 20th day of February, 1888, overruled, and relator's prayer denied, and on the same day said court adjourned until court in course, the next term of which began on the first Monday in March following, without having certified and transferred said cause to the supreme court. On the 5th day of March, 1888, the relator made application to the supreme court for a writ of *mandamus*, compelling said judges of the Kansas City court of appeals to certify and transfer said cause to this court. An alternative writ was issued and served upon the respondents, and to their return to that writ, setting up the foregoing facts, the relator demurs, and the questions to be determined arise upon the demurrer to the sufficiency of the return.

1. By the late amendment to the constitution, "concerning the judicial department," it is provided that "two terms of the Kansas City court of appeals shall be held,—one on the first Monday of March, and one on the first Monday of October." Section 6 of the amendment provides: "When any one of said courts of appeals shall, in any cause or proceeding, render a decision which any one of the judges therein sitting shall deem contrary to any previous decision of any one of said courts of appeals, or of the supreme court, the said court of appeals must, of its own motion, pending the same term, and not afterwards, certify and transfer said cause of proceeding, and the original transcript therein, to the supreme court, and thereupon the supreme court must rehear and determine said cause or proceeding, as in case of jurisdiction obtained by ordinary appellate process."

It is quite too plain for argument that the effect of the order, made by the court of appeals on the last day of the March term, allowing 10 days thereafter to parties to file motions for rehearing in cases in which opinions were delivered on that day, and the filing by the relator of its motion within that time, was to continue the cause to the ensuing October term. The opinion did not become the decision of the court upon which a judgment could be entered until that motion was disposed of. The decision of the court in the cause then was rendered at the October term. It is equally plain that under the constitutional provision the court had the whole of that term in which to certify and transfer the cause to the supreme court, if it became at any time during the term its duty to do so. If it did not become its duty to certify the cause during the term, it could not become so afterwards, and after the term the court could not of its own motion certify and transfer the cause; but if it did during the term become its duty to do so, and they failed to discharge that duty, it is no answer to the writ of *mandamus* commanding them to perform that duty to say that it was our duty, under the constitution, to perform the act. During the term we failed to perform that duty, and now we have no power to act. The supreme court has power to command the performance of the neglected duty, and although your neglect has rendered you powerless to do it upon your own motion, its command carries with it the power to do the act required. The constitution has placed no such restriction of time upon the exercise of its power to command the performance of neglected duty, and when that duty is performed, under its mandate, it is by virtue of and in obedience to the power of that mandate, and not *sua sponte*, by virtue of the power given by the constitution which created the duty which has been neglected. The provisions of the constitution enacted for the purpose of securing a prompt performance of a duty, by prescribing a period of time within which it must be done, cannot be defeated by a delay to perform that duty until the allotted time has expired. It does not follow, because the court is forbidden on its own motion to transfer a cause after the term in which the decision was therein rendered, that they may not be compelled to do so by *mandamus*, if it was their duty to transfer it during the term, and they failed to do so.

2. It is contended for the relator that at the October term of the court it did become the duty of the judges thereof to certify and transfer the cause to this court, on the ground that Judge HALL, one of the judges therein sitting, "deemed the decision therein rendered at said term contrary to a previous decision of the supreme court," and in support of this contention we are cited to the language of that decision. The point of difference between Judge HALL and the majority of the court will appear from the following extracts from the opinion: Judge HALL, who delivered the opinion of the court, speaking for himself, says: "The judgment in this case cannot be upheld on the ground of such ratification, because no such issue was made by the pleadings. Ratification must be pleaded. *Wade v. Hardy*, 75 Mo. 399. The plaintiff, to maintain this action on the ground of the defendant's ratification, had to plead such ratification in express terms, or by the allegation of facts from which ratification would have been necessarily implied. The allegation of facts from which ratification might have been inferred is not sufficient. The facts alleged to raise the issue of ratification, by force of the allegation of them, had to conclusively show ratification. * * * In the petition, ratification was not pleaded in express terms; neither was ratification pleaded by the allegation of facts from which it was necessarily implied. * * * In my opinion, the judgment should be reversed, and the cause remanded." And in speaking for the majority of the court, says: "They are of opinion that the facts pleaded in the petition, and proved at the trial, are equivalent to a ratification by the defendant company. As it is distinctly alleged in the petition that notwithstanding the provision of the policy directing the payment of premiums to be made in the city of New York, or to the agent, yet the plaintiff thereafter, for a period of nine years, made such payments at the Kirksville Savings Bank, according to the understanding had with the agent, Woodfin, and the defendant during all this period recognized the act by the receipt of the money through this bank, the majority hold that these facts would constitute a ratification."

The respondents in their return say, in substance, that the decision rendered in said cause was not deemed by Judge HALL to be contrary to the previous decision of the supreme court in the case of *Wade v. Hardy*; and not having claimed that it was in conflict with any controlling decision of the supreme court, and not having asked that the cause be certified to the supreme court, they could not, under a sense of official duty, so certify the same. This is a full and sufficient return to the writ, and shows good reason why the cause was not certified. It could only become the duty of the court to certify when, in the opinion of one of the judges sitting in the cause, the decision was contrary to a previous decision, and after that opinion had been communicated to the majority of the court, by an explicit statement that such was his conclusion, in an enduring form, in the shape of an opinion filed by such judge in the cause. This is the only way in which the court can authoritatively know that he is of the opinion that such decision does conflict with a previous decision. The opinion rendered is not inconsistent with this return. It will be observed that there is no disagreement in the opinion between Judge HALL and the majority of the court upon the legal proposition that "ratification must be pleaded," in support of which he cites *Wade v. Hardy*. That citation would not have been out of place as an introduction to the language in which the position of the majority of the court is stated. The difference between them was in the application of the principle to the facts of the case in hand; but it is not intimated, much less expressed, by Judge HALL, that he deems the application made by the court of that principle in that case in conflict with the decision in the case of *Wade v. Hardy*, or any other decision of this court. Even if the majority of the court, from the language used, might deduce the conclusion that such was his opinion, a certificate could not be predicated upon such a deduction. Their act of certification is purely min-

isterial, and their duty to perform it must be clear and unmistakable, and not dependent upon the solution of a judicial question. It is for the dissenting judge to solve that question in his own mind and conscience; give it expression in authentic form upon the records of the court, in explicit terms; and only when this is done does it become the duty of the court to certify and transfer the cause; and, it thus appearing that it never became the duty of the court of appeals to certify and transfer the cause of *Greenwood v. The New York Life Insurance Co.* to this court, the demurrer to the return is overruled, the peremptory writ prayed for denied, and this cause dismissed, at the cost of the relator.

All concur, except RAY, J., absent.

GRUBE v. MISSOURI PAC. RY. CO.

(*Supreme Court of Missouri*. December 20, 1883.)

1. RAILROAD COMPANIES—NEGLIGENCE—VIOLATION OF ORDINANCE.

In an action for an injury occasioned by the moving of trains in a yard used by defendant railroad company exclusively for the storage of cars and making up trains, allegations in the petition of non-compliance with municipal ordinances regulating the speed of trains and the exhibition of signals should be struck out; such ordinances not being applicable to railroad yards.

2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLIGENCE OF FOREMAN.

But allegations that another servant superior to plaintiff's intestate, for the killing of whom the action was brought, was incompetent and unskilful, and that cars were moved in a careless and negligent manner, thus causing the injury, state a cause of action.

Appeal from circuit court, Cass county; NOAH M. GIVAN, Judge.

Action by Mary A. Grube against the Missouri Pacific Railway Company. Judgment for plaintiff, and defendant appeals.

T. J. Portis and Adams & Bowles, for appellant. *Prosser Ray and S. B. Wyne*, for respondent.

SHERWOOD, J. Action for damages. The substance of the testimony and the pleadings, so far as necessary to outline the cause, are as follows: The plaintiff's husband was injured in the switch-yards of defendant at Kansas City, Mo., on the 20th day of November, 1883, from the effects of which he died two days later. He was employed by defendant to work in its yards as one of a switch crew. A switch crew consisted of an engineer and fireman, a foreman and two switchmen. Deceased was one of the switchmen. At the time that he was injured there were three switch-engines standing on one of the side tracks in the yard. They were on the west end of what is called "Track No. 6." At this place there were coal-chutes and a water-crane, where the engines were coaled and watered each morning and evening before the men commenced work. The engines were standing only a few feet apart, all headed the same way. Immediately in front of the first engine (which was numbered 801) were some freight cars on the same track, a few feet distant. Standing just behind this engine, and three or four feet distant, was another engine, on the front foot-board of which the deceased was sitting. Just behind this engine, and likewise only a few feet away, was another engine. All of the engines were steamed up and ready to go to work. At that time there was another crew at work in the east end of the yard. They came in on this side track No. 6 for the purpose of getting the cars which were standing in front of the engines, as aforesaid. They had an engine and seventeen cars. The engine was on the east end of the string of cars backing down track No. 6. In doing so, the string of cars that was being backed up struck the three cars that were standing still, and drove them against engine No. 801, which was forced against the engine immediately in the rear of it, and Grube was caught between the two engines and injured. The duties of the foreman were

to direct the crew in the switching of the cars in the yard, to couple and uncouple the cars, and to generally help about the work to the same extent that the switchmen did. One O'Neal was the foreman of the crew that backed the string of cars in on track No. 6. Plaintiff alleged in her petition, as the negligence upon which she ought to recover, that the switch foreman, O'Neal, was an incompetent and unskillful man, and unfit for the duties which he was required to perform; that the cars were backed in on side track No. 6 in a careless and negligent manner, whereby they were caused to collide with the cars standing thereon, and forced back against the engines; and also no lamp or lantern was displayed on the rear end of the moving cars, as required by the ordinances of the city of Kansas. The answer was a denial of all the allegations in the petition, and further pleaded that the place where the injury occurred was within the limits of the yard of defendant, which was used exclusively by it for the storage of its cars, locomotive, and other machinery, and for making up its trains; that part of the yard is within the limits of the city of Kansas, Mo., and part in the state of Kansas; that there are no streets and alleys laid out, established, or used in the same, but that it is kept for the transaction of business of defendant alone, and no person except its workmen and laborers has any right to be therein; that therefore the ordinances pleaded by plaintiff are unreasonable, inapplicable, and void, in so far as they attempt to have them apply to said yard; that the deceased and O'Neal were fellow-servants; and that the injury was caused by the contributory negligence of the deceased.

The foregoing statement, sustained as it is by the testimony, sufficiently shows that the unfortunate accident occurred in a locality used by the defendant as its own private yard, and for its own private purposes; and the fact that the *locus in quo* was not inclosed with a fence did not alter the situation of the defendant, and increase its liability as towards the deceased. Very frequently, and perhaps most frequently, it would be wholly inconsistent with practical railroading to have the private premises of a railway company inclosed like the residence grounds of an individual. The obvious necessity laid upon a common carrier for the dispatch of its business, in order to meet the exigencies of its duty to the public, evidently favors the idea that such company should not be hampered by restriction when making up its trains, and preparing its engines and cars for the public service, to the same extent as when actually engaged in the transportation of freight and passengers upon ground over which it has no exclusive control, and where it owes a duty to the public,—a duty which does not begin until the private grounds of the company have been left behind, and the duty and the liability of the company become commensurate. This view is in full accord with that entertained in the recent case of *Rafferty v. Railway Co.*, 91 Mo. 33, 3 S. W. Rep. 393. Any other conclusion than that just announced would abolish all distinctions between the exercise of a private right and the performance of a public duty, and cannot, therefore, be supported by sound reason. Because of this, the motion of defendant to strike out of the petition certain clauses relating to ordinances of the city of Kansas in regard to the speed of trains, and the manner of regulating the same, etc., should have prevailed, as such matter was wholly redundant, and constituted no basis for a recovery. The ordinance, by its terms, might be applied to cars or locomotives being moved in the private yards, or, for that matter, even in the round-house, of the company; but such a construction would be a very strained and unnatural construction,—a construction which would sacrifice to the bare letter of the ordinance its most vital part, its object, spirit, and purpose. Whenever a law, whether public or local, can be so construed as to avoid such an unreasonable result, a very familiar rule requires that it should be done. As the motion to strike out portions of the petition, as aforesaid, should have been successful, the same line of reasoning condemns the giving of the first and second instructions

given at the instance of the plaintiff, which had as a basis for plaintiff's recovery the failure of defendant, when moving its cars in its yard, to comply with the ordinance heretofore mentioned.

But, notwithstanding the error committed as already stated, it does not follow that plaintiff has no cause of action. The other allegations of the petition, if supported by the evidence, as they would seem to be, afford grounds upon which a verdict might rest; for, though the company owed no duty to the public when engaged in making up its trains in its own private yard, yet it did owe a duty to its employees engaged in that locality and occupation. The judgment is reversed, and the cause remanded.

NORTON, C. J., and BRACE, J., concur in the result. BLACK, J., concurs. RAY, J., absent.

CAMPBELL, Comptroller, v. POPE *et al.*

(*Supreme Court of Missouri.* December 20, 1888.)

1. CORPORATIONS—ACTS OF OFFICERS—ACQUIESCENCE—RATIFICATION.

Where a corporation is made party defendant to an action by service upon its president, as authorized by statute, and is represented by its attorney, it will be presumed to know what transpires in the action, and that on appeal by it an appeal-bond was executed for it by its president without attaching the corporate seal, and having acquiesced in such execution during the pendency of the appeal, and until suit on the bond, will be held to have ratified it.

2. JUDGMENT—FOR NEGLIGENCE—ASSIGNMENT—JOINT DEFENDANTS—MUNICIPAL CORPORATIONS.

The charter of St. Louis, § 9, requires the joinder, in an action against the city for negligence, of all parties jointly liable, and that the execution shall be first collected of the other defendants, and only from the city when the other defendants are insolvent. *Held*, that a judgment recovered in such an action, of which the city took an assignment on payment, was not satisfied, and could be enforced by the city against its co-defendants.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Action by Robert A. Campbell, comptroller of the city of St. Louis, upon an appeal-bond executed by the Pope Iron & Metal Company by R. C. Pope, its president, and by R. C. Pope and Harrison W. Burton as sureties. Judgment was rendered for defendants below, and plaintiff appeals.

Leverett Bell, for appellant. *Taylor & Pollard*, for respondents.

NORTON, C. J. The record discloses the following facts: That on the 23d of March, 1882, one Mary Grogan recovered judgment in the St. Louis circuit court against a corporation known as the "Pope Iron & Metal Company," and a corporation named the "Broadway Foundry Company," and the city of St. Louis, for \$3,500, for the death of her minor son, occasioned by the negligence of defendants. That an appeal from said judgment was prosecuted to the St. Louis court of appeals, where the judgment of the circuit court was affirmed, and from this judgment of affirmance the said Pope Iron & Metal Company prosecuted an appeal to this court, which resulted in an affirmance of said judgment. That on taking said appeal from the judgment of the St. Louis court of appeals to this court an appeal-bond, of which the following is a certified copy, was given, to-wit:

"Know all men by these presents that we, Pope Iron Metal Company, as principal, and Richard C. Pope and H. W. Burton, as sureties, are held and firmly bound unto Mary Grogan in the sum of eight thousand dollars, for the payment of which well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals, and dated at St. Louis this 19th day of June, 1883. The condition of the above obligation is such, that whereas, Pope Iron & Metal Company has appealed from the judgment rendered against it, and in favor

of Mary Grogan, in the St. Louis court of appeals: now, if said appellant shall prosecute its appeal with due diligence to a decision in the supreme court, and shall perform such judgment as shall be given by the supreme court, or such as the supreme court may direct the St. Louis circuit in the city of St. Louis to give, and, if the judgment, or any part thereof, be affirmed, will comply with and perform the same, as far as it may be affirmed, and pay all damages and costs which may be awarded against it by the supreme court, then this obligation to be void; otherwise to remain in full force and effect.

"POPE IRON METAL CO. [Seal.] "RICHARD POPE. [Seal.]

"By R. C. POPE, Pres. [Seal.] "HARRISON W BURTON. [Seal.]

"Affirmed in open court this 19th day of June, 1883.

"Attest: JOS. F. BARER, Clk."

The judgment thus obtained was duly assigned by said Mary Grogan to George M. Stewart, and was by said Stewart duly assigned to Robert A. Campbell, the plaintiff in this suit, who is and was at the time of said assignment the comptroller for the city of St. Louis, and who paid out of the funds of the city the sum of \$4,287.50 to said Stewart therefor. It also appears that said Mary Grogan on the 23d December, 1885, by her certain writing, sold, transferred, and assigned all her right and interest in said appeal-bond to plaintiff, Campbell, and it is upon this appeal-bond that he sues the parties who executed the same, alleging in his petition that the Pope Iron & Metal Company has not paid said judgment, or any part thereof; and asking judgment on said bond for the amount of said judgment, interest, and cost.

The defendants denied the execution of the appeal-bond, and further set up that the defense that the Mary Grogan judgment, by virtue of the payment made by Campbell out of the funds in his hands as comptroller of the city of St. Louis, was in law satisfied. A trial before the court resulted in a judgment for defendants, and the cause is before us on plaintiff's appeal therefrom.

On the trial, among other things, it was proved that R. C. Pope, at the time he signed the appeal-bond, was president of the Pope Iron & Metal Company, and that as such he signed the name of said company to said bond, and that he and Burton, who was also an officer of said company, signed the same as sureties. Pope in his evidence stated that he had not been authorized by the board of directors to sign said bond, and that the Pope Iron & Metal Company had a corporate seal.

It is claimed by respondents that the appeal-bond in question, though signed and sealed as shown in the copy above given, was never executed by the Pope Iron & Metal Company, inasmuch as the seal of the corporation was not affixed thereto. "The old rule of the common law undoubtedly was that corporations aggregate could contract or appoint special agents for that purpose only by deed. In England, this rule has, in modern times, been greatly, though gradually, relaxed; and in our own country, where private corporations have been multiplied beyond any former example, on account of the inconvenience and injustice which must in practice result from its technical strictness, the rule has, as a general proposition, been completely done away with." Ang. & A. Corp. § 219.

While a seal of a corporation affixed to a writing or contract executed by the proper officer of the corporation is evidence that the contract or writing is a corporate act, and that the officer executing it did not exceed his authority, it seems to be nevertheless true that if the officer executing the instrument for and on behalf of the company was authorized, by vote or resolution, to execute it, that such authorization would dispense with the necessity of affixing the corporate seal; inasmuch as such resolution or vote would as clearly, if not more so, indicate that the act was a corporate act done by the authority of the corporation, as affixing the seal would indicate it. "The acts of the board of directors, evidenced by a written vote, are as completely binding on the corporation, and as complete authority to their agents, as the most solemn

acts done under the corporate seal." 2 Kent, Comm. 291; Field, Corp. § 288. "In general, it may be laid down that not only the appointment, but the authority, of an agent may be implied from the adoption or recognition of his acts by the corporation or its directors." Ang. & A. Corp. § 284, p. 297. "If a corporation ratify the unauthorized act of its agent, the ratification is equivalent to a previous authorization, as in the case of natural persons. Such ratification need not be by any formal vote or resolution of the corporation, or be authenticated by the corporate seal. Thus, where the president of a railroad company established certain rates of fare and freight on a railroad, the corporation receiving and appropriating such rates was held to have ratified the president's acts, and as tantamount to an original authority." *Bank v. Fricke*, 75 Mo. 183. In *Chouteau v. Allen*, 70 Mo. 240, it is held that notice to the officers of a corporation of the unauthorized acts of their predecessors in office is notice to the corporation, and, if no dissent is expressed, ratification will be presumed, and the acts become binding on the corporation." So in *Kiley v. Forsee*, 57 Mo. 890, it is said "that it is a settled rule that not only the appointment, but the authority, of the agent of the corporation may be implied from the adoption or recognition of his acts by the corporation." In view of the principles above stated, and the fact that in the suit of Mary Grogan against the defendant corporation and others the statute authorized it to be brought into court by service of summons upon its president or other chief officer, and in view of the fact that when thus brought in it is held to know what transpires in the suit, and in this case to the knowledge of the fact that it had taken an appeal from the judgment of the St. Louis court of appeals to this court, and that an appeal-bond had been given to operate as a *supersedeas*, and the further fact that this bond had been executed for it by its president without affixing the seal of the corporation, and that after the pendency of said appeal for two or more years in this court the judgment was affirmed; in view of the above and the further fact, which appears from the report of the case in 87 Mo. 321, that defendant was represented by its counsel,—we must hold that this knowledge and acquiescence in the act of its president in executing the bond in question, without attaching the corporate seal, and in the manner it was executed and sealed, amounts to a ratification and adoption of the act, and gives to it by such ratification as much validity as if the corporation, through its directors, by resolution or vote, had authorized it to be executed in that way.

It is next insisted that the evidence shows that the payment out of the city funds in plaintiff's hands, as comptroller of the city of St. Louis, to Stewart, for the assignment of the judgment to him by Stewart, was a satisfaction of the judgment, and that for that reason no action could be maintained either by Mrs. Grogan or her assignee on said appeal-bond; the condition of the bond having been fulfilled by the satisfaction of the judgment. Whether the payment made by Campbell was a satisfaction of the judgment depends greatly upon the intention with which it was made, and upon the construction to be put on the following provision of the charter:

"Sec. 9. Whenever the city shall be made liable to an action for damages, by reason of the unauthorized or wrongful acts, or of the negligence, carelessness, or unskillfulness, of any person or corporation, and such person or corporation shall also be liable to an action on the same amount by the party so injured, the injured party, if he sue the city for damages suffered by him, shall also join such other person or persons or corporation so liable, if residing in the state, so that they can be served with process, as a defendant or defendants in his suit, and no judgment shall be rendered against the city unless judgment is rendered against such other person or corporation so liable to be sued as aforesaid; and if any action be brought against the city alone, and it is made to appear that any person or corporation ought to be joined as a defendant in the suit, according to the provisions of this section, the plaintiff

shall be nonsuited; but no person shall be liable under this act to be sued jointly with the city, who would not be liable to be sued separately, irrespective of its provisions. When a judgment shall be obtained against the city and the other party liable as aforesaid, execution shall issue against all the defendants in the ordinary form, but shall first be enforced and collected of the other defendants, and shall not be collected of the city unless the other defendants are so insolvent that the same cannot be made out of them, and in that case the city shall pay only so much of the judgment as cannot be made out of the other defendants."

It is evident that under this charter provision the joint judgment rendered against the city of St. Louis, the Pope Iron & Metal Company, and Broadway Foundry Company was only enforceable against the city by execution, in the event that payment of the judgment could not be enforced against the other defendants. The liability of the city is contingent, and made to depend on the fact that the other defendants in the judgment are insolvent, and in this respect the city stands upon different ground from that occupied generally by joint tort-feasors. Keeping this distinction in view, can the payment made by Campbell with the funds of the city for the assignment of the judgment be held as a satisfaction of it? This question must be answered in the light of the authorities.

In section 444, *Freem. Ex'ns*, it is said: "The voluntary payment of the amount due on a judgment or execution, if made unconditionally, and without any reservation, to keep the judgment, is unquestionably and irrevocably a satisfaction of the writ, no matter by whom the payment is made." This authority is recognized in the case of *Mill Co. v. Sugg*, 83 Mo. 476, where it is incidentally held that if, on the payment made in that case, an assignment of the judgment had been taken, it would not have operated as a satisfaction of the judgment.

In section 472, *Freem. Judgm.*, it is said: "Whether one of the several persons against whom a joint judgment has been rendered, may pay the judgment, and keep it on foot by any means or for any purpose, is a question upon which the authorities are very equally divided. It is held in New York, in the case of *Harbeck v. Vanderbilt*, 20 N. Y. 395, that when one of several defendants against whom there is a joint judgment pays to the other party the entire sum due, the judgment thereby becomes extinguished, whatever may be the intention of the parties to the transaction. If, therefore, in such a case, a defendant take an assignment to himself,—or, unless under special circumstances, even to a third person, for his own benefit,—the assignment is void, and the judgment is satisfied. The rule laid down in New York seems to be recognized in Massachusetts, and is distinctly affirmed in Alabama and North Carolina." On the other hand, in the cases of *Coffee v. Tevis*, 17 Cal. 239; *Wheeler's Estate*, 1 Md. Ch. 80; *Brown v. White*, 29 N. J. Law, 516,—the right of any defendant to furnish money to pay the whole judgment, by taking an assignment to a third person to employ the judgment as a means of enforcing contribution from his co-defendants, is distinctly and confidently affirmed. The right to subrogate, in such cases, is made to depend only on the intention of the debtor in making the payment. The same doctrine is announced in the case of *McIntyre v. Miller*, 13 Mees. & W. 728, when this question underwent investigation, where it is said: "To construe that as payment which is meant to be an assignment is a contradiction in terms." Viewing the transaction or payment in this case in the light of the intimation made in the New York case above referred to, that under special circumstances a payment could be made and an assignment of the judgment taken to a third person, that would not operate as a satisfaction of the judgment.

The "special circumstances" referred to may be said to exist in this case, considering the relation that the city of St. Louis sustained to its co-defendants, the Pope Iron & Metal Company and Broadway Foundry Company, as

to its ultimate and contingent liability on the Mary Grogan judgment. Viewing it in this light, and in the light of the line of authorities last cited, and the intimation contained in the case of *Mill Co. v. Sugg*, 83 Mo. *supra*, that the character of the payment must be determined by the intention with which it was made, we must and do hold that the payment made by Campbell for the assignment of the judgment was not intended to be a satisfaction of the judgment, and that the assignment thereof to him was made for the purpose of keeping the judgment alive, so that it might be enforced against the co-defendants, who, under the judgment and charter provision above quoted, were primarily liable for its payment. The trial court, as shown by the instruction given, held that the judgment was satisfied by the payment made by Campbell, and tried the case on a different theory from that herein announced, and the judgment is hereby reversed, and cause remanded.

All concur, except RAY, J., absent.

HARNEY *et al.* v. DONOHUE *et al.*

(*Supreme Court of Missouri.* December 20, 1888.)

1. CONVERSION—REALTY ACQUIRED BY ADMINISTRATOR—RIGHTS OF ALIEN HEIRS.

Rev. St. Mo. 1885, p. 51, § 2, provided that where a deceased had purchased real estate, and not completed payment, the administrator might complete the payment out of assets in his hands, "and such real estate shall be disposed of as other real estate." *Held*, that where an administrator completed payment under a contract made with the deceased, and took the title "as administrator," the property was not constructively changed to personalty, and held for the benefit of the next of kin, but remained realty for the benefit of the heirs; and that non-resident alien heirs, being incompetent to take realty, had no rights therein.

2. LIMITATION OF ACTIONS—RUNNING OF STATUTE—IN FAVOR OF ADMINISTRATOR.

The administrator having made final settlement, and received his discharge, and thereafter continued to occupy the land under claim of title, the statute of limitations began to run in his favor from the date of his discharge.

Appeal from St. Louis circuit court; SHEPARD BAROLAY, Judge.

Action by Mary Harney and others against Terence Donohoe and others, to compel the conveyance of certain property in the city of St. Louis. Judgment for defendants, and plaintiffs appeal.

J. M. Holmes, for appellants. *Jay L. Torrey*, for respondents.

BLACK, J. This is a suit to compel the defendants to convey to two of the plaintiffs one-half of a lot 83 by 85 feet in the city of St. Louis. The agreed statement discloses the following facts: Francis Donohoe purchased the lot from O'Fallon in 1889, and received a bond for a conveyance, conditioned upon the payment of \$450. Francis Donohoe died in September, 1842. At that time he had paid all the purchase price, except the sum of \$10. Terence Donohoe, brother of the deceased, took out letters of administration in September, 1842, and, among other property, inventoried this title-bond. He made final settlement of the estate, and was duly discharged in September, 1847. "On January 1, 1844, Terence Donohoe, having personally completed the payment of the sum of \$450, took a deed from John O'Fallon to the lot in controversy to 'Terence Donohoe, administrator of Francis Donohoe, deceased.' From and after said conveyance he personally held open and notorious possession of and used and occupied said land in controversy for his own use, and improved it until the year 1878, when, without consideration, he conveyed the same to his son John F. Donohoe, and his daughter Margaret Kortzen-dorffer, defendants, in undivided equal portions." Francis Donohoe died, leaving as his nearest of kin his brother Terence, who became administrator, and who then resided in this state. He also left a sister, Margaret Reilley, and a brother, John Donohoe, both of whom resided in Ireland. John died there in 1867, leaving four children, Mary Harney and Ann Donohoe, the plaintiffs in this suit. They came to this state in 1856 and 1863. John Dono-

hoe also left two boys, who have not been heard from for seven years and more. Neither Margaret Beilley nor her children, if any she had, ever left Ireland.

Under the statutes of this state, as they existed from 1835 to 1845, a resident alien could acquire real estate here by descent or purchase. St. 1835, p. 66; Rev. St. 1845, p. 113. These statutes did not apply to aliens non-residents of the United States. *Wacker v. Wacker*, 23 Mo. 426. Terence Donohoe, therefore, inherited the real estate belonging to Francis at the time of the death of Francis. The other brother and sister of deceased being aliens, and residing in Ireland, could take no interest whatever in the real estate. As to that Terence was the sole heir.

Nothing in the statute as to common law, however, prevented the non-resident aliens from taking as distributees of the personal property. *Greenia v. Greenia*, 14 Mo. 526. The claim of the plaintiffs then is that, when Terence took the deed from O'Fallon to himself as administrator, he held the property for the distributees, and not for the heirs. An executor or administrator is a trustee, and when he purchases property with funds of the estate he holds the property in trust for the estate, and those entitled thereto; and it makes no difference whether the deed be to him as executor or administrator or not. But it does not follow that this property must be treated as personal property. The statute, as far back as 1835, enacted that where the deceased had purchased real estate, and not completed the payment, and the completion of the payment would be beneficial to the estate, and not injurious to the creditors, the administrator might, by order of the court, complete the payment out of assets in his hands, "and such real estate shall be disposed of as other real estate." Section 2, p. 51. Rev. St. 1835. Francis Donohoe, at the time of his death, had an equitable title to this property. His interest therein was a real-estate interest. Had the administrator paid the \$10, balance of the purchase price, out of the assets of the estate by order of the court, the property would have been real estate, and descended to the heirs of the deceased. That he paid the balance of the purchase price from his own funds can be of no disadvantage to him. When he took the deed to himself as administrator, he held the property for the benefit of those entitled to the real estate. Terence Donohoe, being the sole heir, held the property for himself, after the payment of the debts of the estate. It was real estate from first to last, and neither the plaintiffs nor their ancestor ever had any right to it, or any part thereof. As a general rule, the administrator has nothing to do with the real estate, where there is sufficient personal property to pay the debts; but in cases like this, where the purchase price of real estate has not been completed, the completion of the payment from the assets of the estate does not change the character of the property from real to personal. The law intends that it shall remain real property, and subject to the laws of descent.

Besides all this, the administrator made final settlement and received his discharge in September, 1847. His trusteeship was then at an end, and there is no reason why the statute of limitations should not, from that time, run in his favor. Terence Donohoe used the property as his own, and had open and notorious possession for a period of over 30 years, and that of itself constitutes a complete defense.

The judgment is affirmed.

RAY, J., absent. The other judges concur.

THOMAS v. STATE.

(Supreme Court of Arkansas. December 15, 1888.)'

1. PERJURY—INDICTMENT—DESCRIPTION OF OFFENSE.

An assignment of perjury in an indictment for falsely making an affidavit to a claim presented to the county court, stating that the truth was that defendant did not furnish "a suit of clothing and underclothing of the value of \$13, and one coffin of the value of \$10, as sworn to," puts in issue nothing but the value of the articles, and admits that they were furnished.

2. SAME—EVIDENCE.

In such case, proof by one witness that the coffin was worth \$7, by another that defendant arranged to pay 65 cents for the labor in making it, and by another that a coat and vest similar to the one used could be bought at a place other than that at which those furnished were procured for \$3.50 or \$4, and by a third that defendant sent him for the clothing, giving him money to pay for them, the exact amount of which witness did not remember, but which might be more than \$6, and that it was not sufficient, but that the merchant allowed him to take them, will not sustain a verdict of guilty.

Appeal from circuit court, Randolph county; J. M. BUTLER, Judge.

Indictment against R. F. Thomas for perjury in falsely swearing to an account presented to the county court of Randolph county for furnishing certain clothing to and a coffin for the burial of a pauper. The affidavit stated that he furnished a coat, pants, vest, and underclothing worth \$13, and a coffin worth \$10. On the trial a witness Kemper testified that he made the coffin, which was worth about \$7, and that another man furnished the lumber. Another, Ray, said that defendant told him to divide \$1.30 he owed defendant with Kemper to pay for making the coffin and for witness' trouble in going after the clothing. There was evidence tending to show that defendant furnished the lumber for the coffin, and lined it, and that the witness Kemper knew nothing about who furnished it. Witness Ray also stated that defendant gave him money to go for the clothing; how much he did not remember, but it might have been more than \$6, and it was not enough to pay for the clothing, but the merchant let him take them. One witness stated that the coat and vest were used, but the new pants were not, as a pair was found in deceased's trunk which were used; defendant saying that he would pay the balance on the clothing, about 80 cents, and take the pants. There was also some underclothing, the value of which was not fixed by the witness, but a similar coat and vest, he stated, could be bought at one place (other than the place those used were obtained) for from \$3.50 to \$4. The jury found defendant guilty, and judgment was rendered thereon, from which he appeals.

Appellant, pro se. D. W. Jones, Atty. Gen., for the State.

BATTLE, J. Appellant presented an account for allowance to the Randolph county court, in which he charged the county of Randolph \$13 for a coat, pants, vest, and underclothing, and \$10 for a coffin, furnished by him for the dressing and burial of the remains of Elijah Johnson, a poor and indigent person, who died in Randolph county. He appended an affidavit to the account; in which he swore that the amounts charged were the cost of the same; that the coffin furnished was such as cabinet workmen usually sell for \$10; that the account was just; that the prices charged are what the articles furnished were reasonably worth in currency; and that the statements made in the account are true. For making this affidavit he was indicted for perjury. The assignments of perjury in the indictment are in the following words: "The said R. F. Thomas well knew that said affidavit was false and fraudulent when he so made it; the truth being that the said R. F. Thomas did not furnish the said Elijah Johnson, deceased, a suit of clothes, pants, vest, and underclothing of the value of thirteen dollars, as charged and sworn to in said account, and one coffin of the value of ten dollars, as sworn to as above stated."

The effect of the assignments of perjury contained in the indictment, if sufficient for any purpose, is to admit the furnishing of the clothes and coffin, and to deny that the clothes were of the value of \$13, and that the coffin was worth \$10. *Schaetzel v. Insurance Co.*, 22 Wis. 412; *Feely v. Shirley*, 43 Cal. 369; *Larney v. Mooney*, 50 Cal. 610. The question, therefore, is, did appellant feloniously, willfully, falsely, knowingly, and corruptly swear that the clothes were worth \$13 and the coffin \$10, as charged in the indictment? To sustain an indictment for perjury, the evidence must more than counter-balance the oath of the prisoner, and the legal presumption of his innocence. One witness is sufficient to prove what the witness swore, but more is necessary to prove the falsity of what was sworn. The oath of the prisoner is entitled to have the same effect as is given to that of a credible witness. If nothing more than the testimony of one witness was introduced to prove its falsity, the scale of evidence would be exactly balanced, and additional evidence would be necessary to destroy the equilibrium before the accused could be convicted. The additional evidence must therefore be corroborative of the testimony of the accusing witness, and the corroboration must go beyond slight, indifferent, or immaterial particulars, and must go to some one particular false statement. "It will not be sufficient to prove by one inadequate line of testimony that one statement made by the defendant is false, and then by another inadequate line of testimony that another statement made by him is false." 1 Greenl. Ev. §§ 257, 258; 3 Greenl. Ev. §§ 198-200; Whart. Crim. Ev. § 387; 2 Bish. Crim. Proc. (3d Ed.) §§ 928-938.

Tested by the rule laid down, the verdict of the jury in this case was not sustained by evidence. The judgment of the court below is therefore reversed, and this cause is remanded for a new trial.

DYER v. HUTCHINS et al.

(*Supreme Court of Tennessee. January 5, 1889.*)

ANIMALS—KILLING SHEEP—ACTION—JOINDER OF OWNERS.

Under act Tenn. 1859-60, c. 45, § 1, providing that the owner of any dogs shall be liable for sheep killed or injured by them, where two dogs, owned by different persons, injure sheep, the owners cannot be sued therefor jointly.

Appeal from circuit court, De Kalb county; M. D. SMALLMAN, Judge.

Action by W. C. Dyer against I. S. Hutchins and I. C. Hutchins. Judgments for plaintiff, and defendants appeal.

T. W. Wade, for appellants. Webb & Avant, for appellee.

TURNER, C. J. The act of 1859-60, c. 45, § 1, is: "Where any dog or dogs shall kill or in any manner damage any sheep in this state, the owner of such dog shall be liable upon an action for damages to the owner of such sheep for the worth of such sheep, if killed, or for the amount of injury or damages committed upon the same by such dog." In this case the injury was done by two dogs belonging to different persons, who were sued jointly. There is nothing in the statute making the wrong the joint wrong of the respective owners; each is responsible only for the act of his own animal, and must be sued separately therefor. The judgment must be reversed, and the suit dismissed.

BURNETT v. TURNER et al.

(*Supreme Court of Tennessee. November 12, 1883.*)

CONSTITUTIONAL LAW—TITLES OF ACTS—AMENDMENT.

Under Const. Tenn. art. 2, § 17, providing that every act repealing or amending another shall in its caption or otherwise recite the title or substance of the act to

be repealed or amended, Acts Tenn. 1887, c. 85, attempting to amend the mechanic's lien law, but merely reciting "that section 2746 of the Revised Code shall read as follows," is unconstitutional.

Appeal from chancery court, Hamblen county; JOHN P. SMITH, Chancellor. This is an action by C. J. Burnett against G. K. Turner and wife and H. B. Liverman to enforce a furnisher's lien on a house built for said Turner and wife by said Liverman, of lumber furnished by the complainant. Complainant appeals.

O. C. King and *J. F. Lafferty*, for appellant. *James G. Rose*, for appellees.

SNODGRASS, J. The act approved March 21, 1887, c. 85, Acts 1887, to amend the mechanic's lien law, is unconstitutional and void, because it does not recite, in its caption or otherwise, the substance or title of the act amended, as required in section 17 of article 2 of the constitution. The recitation in this act, "that section 2746 of the Revised Code shall read as follows," is insufficient. There is no "Revised Code" of Tennessee, as a matter of law; and as a matter of fact there are two compilations to which the term "Revised Code" is often applied, and equally applicable. Nothing in this reference indicates which, if either, of these is referred to, and there is therefore no identification of the law amended.

H. B. Liverman contracted to build and partly built a house for G. K. Turner upon a lot, the title of which was in the wife of G. K. Turner for life, remainder to their son, David Payne Turner, a minor. Burnett, the complainant, sold to Liverman lumber of which the house was built, and brings this suit to enforce a supposed furnisher's lien thereon, under the act of 1887, entitled "An act to provide a more just and equitable mechanic's lien law, and to afford mechanics, contractors, subcontractors, and material-men greater security for work done and material furnished." Acts 1887, p. 165. In the event a lien could not be enforced on account of the condition of the title, and Mrs. Turner refused to recognize and agree to said lien, then complainant sought to remove the lumber which was obtained of him from the building, in pursuance of section 2 of the act referred to. The defendants demurred to the bill on various grounds, and, the demurrer being overruled, answered. They set up in both the unconstitutionality of the act of 1887, and insist that if it is valid it can have no such construction as contended for, which would authorize the destruction of the house to reclaim the lumber. It was further answered and shown that the contract was that of defendant G. K. Turner alone with Liverman; that Liverman was to furnish the lumber and build at a stated price, and it was insisted that Liverman was the "furnisher" in the sense of the statute. On the hearing the chancellor held that the complainant was entitled to a lien on the lumber furnished, and ordered a reference, to ascertain its amount and value. He then decreed that in the event the value ascertained was not paid, the sheriff should take and remove the lumber from the building, and deliver it to complainant. From this decree complainant appealed, and assigns errors indicated by statement of defenses of the answer.

In the view we take of it it is unnecessary to notice any question involved but the constitutional one, as that is conclusive; and though we do not agree with the chancellor in his construction of the act, we need not even state, much less discuss, the difference in our views on that subject. The act in question proposes to amend an existing law, and the only reference to the law to be amended is contained in the first section in the declaration "that section 2746 of the Revised Code shall read as follows," proposing a substitute for the entire section referred to. The objection is that the act does not recite, in its caption or otherwise, the title or substance of the act revived, repealed, or amended, as required in section 17 of article 2 of the constitution of Tennessee. The ob-

jection is well taken. If the act can operate as a valid law, it is upon the idea that it eliminates a section from the "Code" of Tennessee, and supplies its place with one of corresponding number. There is no "Revised Code" of Tennessee, the legislature not having adopted or enacted any compilation of our statutes as such since the enactment of the Code in 1858, which, being the first Code, is not itself a revision. It therefore follows that it is not the amendment of a recognized law to amend the "Revised Code," nor is it necessarily the amendment of a law to amend any section of such supposed Code by number. It may be that in point of fact a given section of any compilation to which the legislature might refer and specifically identify in an amending act would turn out to be a correct reprint of an existing law, but it is not so by force of its existence in such compilation, or by reason of its having a particular sectional number therein, as is the case in the Code enacted. Therefore, to make an amending act valid there must be something more than the recitation in the act of 1887.

It will be remembered that while we have no "Revised Code" in law, we have in fact two valuable compilations of the statutes of Tennessee, to either of which this term is often applied, and to both of which it can be applied with equal accuracy. If it be assumed, as argued, that one of them is referred to, it cannot be told which. Neither is identified by any distinctive legal term applicable to it, or more applicable to it than to the other. Nor is the identification made or attempted by designation of the compilers or otherwise, so that not only is no law by title or substance recited in the repealing statute, but no law is referred to; and worse still, no book in which it can be found is named or identified in the reference.

It is argued, however, that it can be made to appear by inference that the repealing act was intended to amend the mechanic's lien law contained in the last compilation of our statutes by Milliken & Vertrie, because the amending act designates the number of a section of which the corresponding number there is upon that subject, while the same is not true of any other compilation. The answer to this is—*First*, that surely no such inferential method of establishing an amendment could be resorted to in opposition to the plain terms of the constitutional provision cited, requiring that the amendment shall actually "recite the title or substance of the law amended;" and, *second*, that such inferential deduction by comparison cannot be made to determine the application of this act, or the intent of the legislature to refer to that "revision," because the act in effect merely strikes out an entire section,—not indicating on what subject it is, and therefore not, of course, confining its repealing operation to a section upon the same subject as that to be substituted,—and substitutes another. There is no reason why it may not therefore eliminate and replace the corresponding number in one compilation as the other.

But it is not necessary to pursue this discussion on this line further. The conceded purpose of the constitution is to prevent the amendment or change of existing laws, even when they are actually in terms referred to, unless the title or substance is recited. A law, therefore, which proposed to repeal the original act from which section 2746 in the last compilation originated, or one of its amendments, as the act of 1881, by reference merely to a certain section of a certain chapter of such act, without more, would be void; as, suppose the legislature of 1887 had enacted that sections 1, 2, and 3 of the act of 1881 (which is the most material amendment to the mechanic's lien law embodied in section 2746, referred to) shall read as follows: and then substituted for them the sections proposed in lieu of "section 2746 of the Revised Code," no one would controvert that the attempted amendment was invalid. Can it be possible, then, that if a law enacted cannot be so amended by such reference to itself, it can be amended by a reference more vague to its mere copy or reprint, not enacted anywhere as law?

It is argued that we must perforce adopt a different construction to save amendments to these compilations, now quite numerous, all of which, it is argued, would be invalidated by like construction. To this we answer—*First*, that this does not affect the merits of the question if it were conceded, as it is our duty to give the law a proper construction, not to make it or uphold it against the constitution because there may be many like it, or invalid for like reason; and, *second*, that the conclusion does not follow, as argued, because it is possible to amend a law in such manner, and with such specific recitation and identification as the constitution requires, whether it be referred to in one or another authorized, but not enacted, compilation; always provided—as was not the case in this instance—the act identifies the book where it is to be found, and the amended law, with such recitation as the constitution requires. It is sufficient for the purpose of this case, and the holding goes no further, of course, that this reference and attempted recitation are insufficient, and the act is therefore void. The decree is reversed and the bill dismissed with costs.

CITY OF ST. LOUIS v. BELL TEL. CO.

(*Supreme Court of Missouri. December 20, 1888.*)

TELEPHONE COMPANIES—REGULATION OF CHARGES—POWERS OF MUNICIPALITIES.

Neither under its authority to regulate the use of streets, nor section 28, art. 8, of its charter, empowering the mayor and assembly "to license, tax, and regulate" various professions and businesses, nor the general welfare clause permitting the passage of all such ordinances, not inconsistent with the provisions of the charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufacture, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company.

Appeal from St. Louis court of criminal correction; CHARLES F. CADY, Judge.

Hitchcock, Madill & Finkelnburg, for appellant. *Leverett Bell*, for respondent.

BLACK, J. This was a prosecution against the Bell Telephone Company of Missouri for the violation of an ordinance which provides that "the annual charge for the use of the telephone in the city of St. Louis shall not exceed \$50." A violation of the ordinance is made a misdemeanor, and subjects the offender to a fine of not less than \$50, nor more than \$500. The defendant appealed from a judgment assessing a fine of \$300 against it. The defendant is a corporation organized under article 5 of chapter 21 of the Revised Statutes of this state, and hence has all the powers therein conferred upon such corporations. Among others, they have the power to own and operate lines of telephone, to make such reasonable charges for the use of the same as they may establish, to erect their poles along and across public roads and streets, to condemn private property for a right of way, and they are charged with the duty of receiving and transmitting messages with impartiality, and in good faith. The defendant neither affirms nor denies the power of the state itself to fix a maximum rate of charges, but does contend that no such power has been delegated to the city of St. Louis. The defendant's property, consisting of poles, wires, fixtures, and the like, is, of course, private property, but the property is devoted to public use; and since the defendant has conferred upon it the special franchises and privileges, including the right of eminent domain, the corporation is subject to public regulations; and we shall take it for granted that the state has the power to fix and prescribe a maximum rate for telephone service. That this power could be delegated to municipal corporations is equally clear. The ordinances of the city of St. Louis must not be in conflict with the general laws of the state. If the city has had this power to fix rates conferred upon it, then an ordinance which fixes reasonable maximum

rates would not be in conflict with the law under and by virtue of which the defendant is organized, and which law constitutes its charter.

A telephone company, when once its poles are planted, and wires stretched on or over the streets of a city, becomes, in effect, a monopoly, and the company must submit to such reasonable regulations as the municipal corporation has power to prescribe. The important question, then, is whether the city of St. Louis has the power to enact the ordinance in question,—the power to fix reasonable maximum charges for telephone service,—and, nothing to the contrary being shown in this case, it is assumed that the rate fixed is reasonable; so that the question is narrowed down to one of power on the part of the city to fix telephone rates at all. If the city has such power, it must be found in a reasonable and fair construction of its charter. Judge Dillon makes this full and comprehensive statement of the rule as to municipal powers: "It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: (1) Those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation,—not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied." 1 Dill. Mun. Corp. (3d Ed.) § 89. See, also, *St. Louis v. McLaughlin*, 49 Mo. 562. The rule, as before stated, is in accord with what we said in *City of St. Louis v. Herthel*, 88 Mo. 128. The city places some reliance on its general power to regulate the use of the streets. This power extends to new uses as they spring into existence from time to time, as well as to uses common and known at the time of the dedication or grant of the power to the municipal corporation. *Ferrenbach v. Turner*, 86 Mo. 416. The erection and maintenance of telephone poles is one of new uses. Such use is a proper use of the streets. *Association v. Telephone Co.*, 88 Mo. 258. That the company is subject to reasonable regulations prescribed by the city, as to planting its poles and stringing its wires and the like, is obvious. Such regulations have been obeyed by this defendant.

Conceding all this, we are at a loss to see what this power to regulate the use of the streets has to do with the power to fix telephone charges. The power to regulate the charges for telephone service is neither included in nor incidental to the power to regulate the use of streets, and the ordinance cannot be upheld on any such ground. By the fifth subdivision of section 26, art. 3, of the charter of St. Louis, the mayor and assembly have power "to license, tax, and regulate lawyers, doctors," etc., "telegraph companies as corporations," etc., and all other business, trades, avocations, or professions whatever. Telephone companies are not mentioned, though a vast number of trades, professions, and avocation are specified. They are not mentioned, in all probability, because not existing at the date of the charter. In construing this paragraph of the charter, we held in the case of *City of St. Louis v. Herthel*, *supra*, that architects were, for purposes of construction, *ejusdem generis* with lawyers, doctors, dentists, and artists, and therefore included by the general concluding words. So in this case it may with equal propriety be said that telephone companies are *ejusdem generis* with telegraph companies, and therefore included in the words of the general concluding clause.

It can make no sort of difference that these telephone companies were not in existence at the date of the charter. One of the objects had in view by the use of the general clause was to provide for just such cases. As aptly observed in that case: "We are to construe it [the charter] according to the intent of the framers, and that intent must be gathered from the language and object of the charter provisions, and giving that language an interpretation neither strict nor strained." Does, then, the power to regulate telephone companies, when that term is coupled with the powers to license and tax, give

the city the power to regulate the charges for telephone service? By the General Statutes of Massachusetts of 1860, p. 167, it is provided that the mayor and aldermen of any city may make rules and orders for the regulation of carriages, and may receive one dollar annually for each license granted to a person to use a carriage in the city. Under this power it was held, in *Com. v. Gage*, 114 Mass. 328, that a city might fix the compensation to be charged by hackney coachmen. This case would at first seem to furnish some authority for the claim made by the city in this case. Turning to other provisions of the charter, we find that express power is given to establish ferry rates; to fix the rates for carriage of persons, and of wagonage, drayage, and cartage of property; to regulate the price of gas; and to regulate and control railways within the city as to their fares, hours, and frequency of trips. These express powers to fix prices, fares, and charges, in these specified cases, are followed by no general words. With this specific enumeration of cases where the city may regulate the compensation to be charged, it impliedly appears that such a power was not intended to be given in other cases. This conclusion presents itself with more force when we see that by the clause before quoted the city has power to license, tax, and regulate private carriages, omnibuses, carts, drays, and other vehicles; so that the framers of the charter did not regard the power to license, tax, and regulate sufficient to give the power to fix rates and charges. The power to regulate, it may be conceded, gives the city the right to make police regulations as to the mode in which the designated employment shall be exercised, (1 Dill. Mun. Corp. § 358;) but, taking these charter provisions together, we think it would be going to an extreme length to say that they confer upon the city the power to fix telephone rates. If it has power to do this, it may also fix the charges for telegraph services, and for the other designated services which are of a public character. We conclude that the city has no power to pass the ordinances in question by reason of any of the charter powers before considered.

This brings in the general welfare clause, which is in these words: "Finally, to pass all such ordinances, not inconsistent with the provisions of this charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufactures, and to enforce the same by fines," etc. Sometimes the power to enact ordinances is given in general terms, and in other cases there is a specific enumeration of the powers. This difference, says Dillon, "is essential to be observed, for the power which the corporation would possess under what may be termed the 'welfare clause,' if it stood alone, may be qualified, or where such intent is manifest, impliedly take away, by provisions specifying the particular purposes for which by-laws may be made." 1 Dill. Mun. Corp. (3d Ed.) § 315. Under a general power like the one now in question this court has held that the city may pass ordinances concerning vagrants, prohibiting persons from keeping open their places of business on Sunday, and prohibiting cruelty to dumb animals. *St. Louis v. Schoenbusch*, 95 Mo. 618, 8 S. W. Rep. 791, and cases cited. These matters are all within police regulations, strictly speaking, and naturally fall within the domain of municipal legislation and regulation. To say that under this general power the city may fix rates for telephone services would be going entirely too far. This conclusion is manifest when we consider that the charter points out with particularity those cases in which the city may fix rates and charges.

What has been said in respect to the power to license, tax, and regulate applies with equal force here. We are not cited to, nor have we found, any adjudicated case which will support the ordinance now under consideration under the present charter powers of the city of St. Louis. The judgment in this case is therefore reversed.

RAY, J., absent. The other judges concur.

CHICAGO & A. R. Co. v. LAMKIN, Collector.

(Supreme Court of Missouri. December 20, 1888.)

1. RAILROAD COMPANIES—TAXATION—SCHOOL TAX—CONSTITUTIONAL LAW.

Act 1885, (Laws Mo. 1885, p. 280,) amending Rev. St. § 6880, and providing that the average rate of taxation for the erection of school buildings in the county shall be levied on the apportioned valuation of the road-beds and rolling stock of railroad companies, and that the tax shall be apportioned among the several districts levying the tax, thereby authorizing a tax in districts through which the railroad does not run to be taken into consideration, is not invalid, under Const. art. 10, § 11, providing that for the purpose of erecting school buildings the rates of taxation therein limited may be increased by vote, and section 5, authorizing the taxation of railroad companies for school purposes.

2. SAME—INCREASE BY DISTRICT.

Though an act authorizing a tax in excess of the rate fixed by Const. Mo. art 10, § 11, would be invalid, yet when the rate has been increased by vote of the district, as therein authorized, such increased rate becomes the constitutional limit.

Appeal from circuit court, Saline county; RICHARD FIELD, Judge.

Suit by the Chicago & Alton Railroad Company against John C. Lamkin, collector of Saline county, to restrain the collection of \$300 school taxes. The bill was dismissed, and plaintiff appeals.

G. B. MacFarlane, (George S. Grover, of counsel,) for appellant. A. F. Rector, for respondent.

NORTON, C. J. The state board of assessment and equalization of railroad property certified to the county court of Saline county for taxation the valuation of the apportionment to said county of plaintiff's road-bed and rolling stock, amounting to the sum of \$568,607.19. The county court levied a tax of 89½ cents on the \$100 of this valuation. The tax at said rate amounted to \$2,255.48. The said rate of tax was ascertained by adding together the rates levied by each of the school-districts in the county, and then dividing the sum thereof by the whole number of school-districts. It is admitted that some of said school-districts, through which the road-bed of plaintiff did not run, had voted at an election properly held to increase the rates therein, for school purposes, above the limit of 40 cents on the \$100 of valuation. The county court also levied a tax of 5½ cents on the \$100 of said valuation for public buildings in the school-districts, amounting to \$326.95. The taxes so levied for "school purposes" and building purposes aggregated the sum of \$2,582.43. The said rate for building purposes was ascertained by taking the average of the rates levied in the districts of the county for buildings in school-districts. It is conceded that these rates and levies were made in conformity with section 6880, Rev. St., as amended by Laws 1885, p. 280. Plaintiff paid all of the said taxes except \$300, and instituted this proceeding by injunction against the collector of said county to restrain him from the collection of said sum upon the alleged ground that so much of the levy as was made for building purposes was illegal and void. The trial court dismissed the bill, gave judgment for defendant, and plaintiff appealed therefrom; and the real question presented by the appeal is, did the county court have the right, under the constitution and existing laws, to levy a tax on the apportionment of the valuation of plaintiff's road-bed and rolling stock, at the rate of 5½ cents on the \$100 valuation for public buildings erected in school-districts where tax rates had been voted for that purpose in districts through which plaintiff's road did not run? The existence of this power is affirmed by defendant, and denied by plaintiff.

The constitution provides in section 11, art. 10, among other things, that the annual rate of taxation on property for school purposes "shall not exceed forty cents on the \$100 valuation: provided, the aforesaid annual rates for school purposes may be increased in districts formed of cities and towns to an amount not to exceed one dollar on the hundred dollars valuation, and in

other districts not to exceed sixty-five cents on the hundred dollars valuation, on the condition that a majority of the voters who are tax-payers voting at an election held to decide the question vote for said increase. For the purpose of erecting public buildings * * * in school-districts the rates of taxation herein limited may be increased, when the rate of such increase, and the purpose for which it is intended, shall have been submitted to a vote of the people, and two-thirds of the qualified voters of such * * * school-district voting at said election shall vote therefor." In the case of *State v. Railroad Co.*, 83 Mo. 395, while it was held that section 6880, Rev. St., authorized the levy of a tax for school purposes on the apportioned valuation of the road-bed and rolling stock of a railroad company, first ascertaining the rate of such tax by adding together the local rates of the several school-districts in the county, and dividing the sum thus ascertained by the whole number of districts, it was also held that said section did not authorize the levy of a tax on such valuation for public buildings in school-districts. In 1885, (Laws 1885, p. 230,) the legislature, to supply this omission, so amended said section 6880 as to authorize the county to ascertain "the average rate of taxation levied for the erection of public buildings * * * by the several local school boards or authorities of the several school-districts throughout the county. Such average rate levied for the erection of public buildings * * * shall be ascertained * * * by adding together the local rates of the districts in the county levying a tax for the erection of public buildings, * * * and by dividing the sum thus ascertained * * * by the whole number of districts in the county, and the clerk shall cause to be charged to said railroad companies taxes for the erection of public buildings * * * at said average rate on the proportionate value of said railroad property so certified to the county court under the provisions of this article, and the county court shall apportion the said taxes for the erection of public buildings * * * so levied and collected among the several school-districts levying such taxes, in proportion to the amount of such taxes so levied in each district."

It is conceded, in this case, that the rate of tax levied on plaintiff's property, both for school and public building purposes, was ascertained in the mode prescribed by the legislature in said section 6880, as amended. But it is insisted by appellant's counsel that, inasmuch as it is contemplated by the constitution that where the rate of taxes has been increased for the erection of public buildings in a school-district, that such rate shall be levied on property in the district voting the increase, the law authorizing the county court to take such rate of increase, made in districts through which plaintiff's road does not run, into consideration in fixing the rate to be levied on plaintiff's road for public buildings so erected, is invalid and void. And in support of this contention we have been cited to the case of *Wells v. City of Weston*, 22 Mo. 384, where it is held "that the legislature cannot authorize a municipal corporation to tax, for its local purposes, lands lying beyond the corporate limits." The principle announced in the above was held not to apply to the assessment and levy of taxes on railroads, in the *Railroad School Tax Case*, 78 Mo. 596, which was a case where the constitutionality of an act of the legislature was called in question, which authorized county courts, in levying school taxes on the assessed valuation of a railroad bed and rolling stock, to levy for school purposes the average rate of taxes levied for school purposes by the several local school boards through which each railroad runs, and which required the tax so levied to be apportioned to the other school-districts of the county as well as the districts through which the road ran, in the proportion the number of children in each district bore to the whole number of children in said county. There were 69 districts in the county, and the railroad passed through 12 of them. It was contended that the act of 1875, which authorized the levy and distribution of the tax, was unconstitutional in that it gives a proportion of the tax levied on property in one township to other townships, and the case

of *Wells v. City of Weston*, *supra*, was cited as authority in support of the contention; and it was distinctly held in the above case that the road-bed of a railroad is chiefly valuable as an entirety, and its subdivisions within the limits of a county or school-district are not to be treated as local property under the act of 1875 for the assessment and distribution of railroad taxes; that school taxes on such road-bed apportioned to a county are properly distributed to the school-districts therein, in the proportion that the number of school children in each school-district bears to the whole number in the county, and the act providing for such distribution is not unconstitutional as giving a portion of the taxes levied upon the property in one district to another. While section 6880, Rev. St., changes the method for ascertaining the average rate of school taxes to be levied on railroads, it does not affect the principle announced in the above case.

The doctrine announced in 78 Mo., *supra*, has been affirmed in cases of *School-Dist. v. Rhoads*, 81 Mo. 474, and *State v. Railroad Co.*, 92 Mo. 137, 6 S. W. Rep. 862. In the last case above cited, where so much of said section 6880 as related to the method of ascertaining the average rate of taxes to be imposed on railroads for school purposes was under discussion, the constitutionality of which was challenged, it is said: "It is provided by section 11, art. 10, of the constitution, among other things, that 'for school purposes the annual rate on property shall not exceed forty cents on the one hundred dollars valuation.' The statute in question would only be violative of said section, and even in that case only to the extent of such excess." And it is further said: "It is certainly within the power of the legislature to authorize the imposition of school taxes on the property of defendant, and, considering the nature of its property, and the fact as stated in 78 Mo. 596, 'that the road-bed is chiefly valuable as an entirety;' that its aggregate value is made up because of its continuity; that the portion of a railroad in a county, when considered as disconnected with a continuous line, would in most cases be of little or no value, considering these things in connection with the further fact that the rolling stock of defendant, constituting a large and valuable part of its property, cannot be localized in any one county, it being from its very nature constantly changing from one county to-day and another to-morrow, we cannot say that said section 12 of the act of 1873 is violative of the fourteenth amendment, inasmuch as under the construction we put upon it the average rate to be applied to defendant's property must not exceed the limit prescribed in the constitution." If, as is held in the cases cited, the law prescribing the method of ascertaining the rate of tax to be levied on the valuation of a railroad apportioned to a given county for "school purposes" is valid and constitutional, it necessarily and logically follows that the law prescribing the method of ascertaining the rate of tax to be levied for "building purposes" in school-districts is also valid; for it is in contemplation of the constitution that both the tax authorized to be levied for school purposes as well as the tax for building purposes should be levied on property in the districts fixing the rates for such purposes. Express power is given by section 5, art. 10, of the constitution to tax all railroad corporations for school purposes; and in the exercise of this power it is competent for the legislature to classify such property for purposes of taxation, the principal restriction being that the tax shall be uniform upon the same class of subjects within the territorial limits of the authority imposing the tax, and that such tax shall be levied and collected by general laws.

The case in 92 Mo., *supra*, is cited by counsel as holding that in no case can the rate of taxes on the valuation of a railroad for school purposes exceed 40 cents on the \$100 valuation. This is a misapprehension. It is there held that if the law under which the tax imposed in that case authorized a rate of tax to be levied in excess of the limit prescribed by the constitution, it would be invalid, and what is there said with reference to the constitution having

fixed the limit at 40 cents on the \$100 valuation, was said without reference as to whether that rate had been increased by a vote as therein authorized. As the constitution authorizes said limit of 40 cents on the \$100 valuation to be increased by a vote, when it is so increased by such vote under the law authorizing an election to be held for that purpose, the limit of 40 cents is moved up to such increased rate by the very terms of the constitution, and such rate, so increased, is as much a limit prescribed by the constitution as if inserted therein.

Judgment affirmed, in which all concur, except RAY, J., absent.

KANSAS CITY, C. & S. R. CO. v. STORY.

(*Supreme Court of Missouri.* December 20, 1888.)

1. **EMINENT DOMAIN—PROCEDURE—TRIAL BY JURY.**

In proceedings to condemn land for railway purposes, the right of trial by jury as to the amount of compensation, guaranteed by Const. Mo. art. 12, § 4, is not waived by the appearance of the owner before the judge in vacation pursuant to notice, and the appointment of commissioners at his request; and a demand for a jury, after their report is filed and he has excepted thereto, is in time.

2. **SAME—CONSTITUTIONAL LAW.**

Whether under Rev. St. Mo. art. 6, c. 21, § 896, provision is only made for a jury trial when a new appraisement is ordered, is immaterial, as the constitutional right to a jury trial is not lost by the lack of legislation prescribing the mode of its exercise.

3. **SAME—SUFFICIENCY OF REPORT.**

Under Rev. St. Mo. art. 6, c. 21, § 894, requiring a report of commissioners to contain "a specific description of the property for which damages are assessed," a report referring to the road as "located over, through, or upon" the land in question, and accompanied by a plat, which, with the plat and profile filed under the statute in the county clerk's office, fully shows the location, is sufficiently definite. SHERWOOD, J., dissenting.

4. **SAME—COMPENSATION.**

Injury to a subdivision, through which the road does not pass, but which constitutes part of the same farm, should be estimated as part of the damages, though not mentioned in the petition.¹

5. **SAME—ELEMENTS OF DAMAGE.**

Cuts and fills necessary to be made in the construction of the road ought also to be considered as enhancing the damages.¹

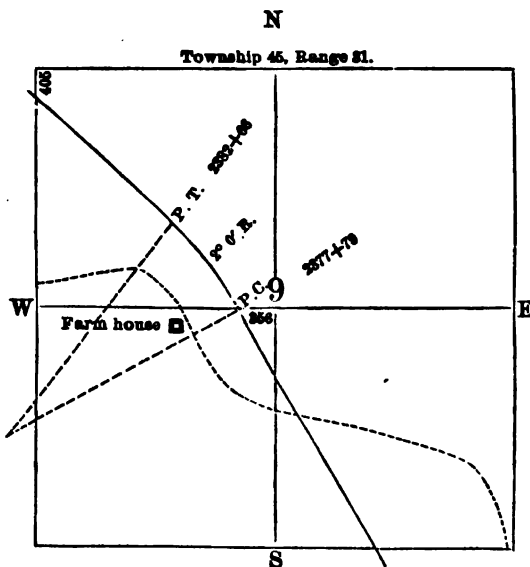
6. **SAME—LUMPING DAMAGES.**

Damages should not be "lumped," or estimated arbitrarily, as by doubling the value of the land actually taken.

Appeal from circuit court, Cass county; NOAH M. GIVEN, Judge.

Proceedings by the Kansas City, Clinton & Springfield Railway Company to condemn land of Thomas R. Story for railway purposes. The damages were assessed by commissioners at \$410, their report confirmed by the court, and defendant appeals. The plat accompanying the report was substantially the same as that filed in the county clerk's office, of which the following is a copy:

¹ Respecting the elements of damage which may be considered in awarding compensation in condemnation proceedings, see *In re Rugheimer*, 36 Fed. Rep. 876, and cases cited: *Doud v. Railroad Co.*, (Iowa,) 41 N. W. Rep. 65, and note.



The petition, which was against Story, and other owners on the route of the road, is as follows:

"The petition of the Kansas City, Clinton & Springfield Railroad Company respectfully shows that it is a corporation created and existing under and by virtue of the laws of the state of Missouri; that your petitioner, in pursuance of the laws of said state, and of its charter is about to construct, operate, and maintain a standard or broad guage railroad in the counties of Cass, Henry, St. Clair, Hickory, Cedar, Polk, and Green, commencing on the west line of the state of Missouri, in the county of Cass, at a point where the eastern terminus of the line of railroad of the 'Johnson County Railroad Company,' a corporation of the state of Kansas, intersects said state line, thence through the county of Cass, via Harrisonville, through the county of Henry, via Clinton, and through the counties of St. Clair, Hickory, Cedar, Polk, and Green, to a point on the line of railroad of the Fort Scott, South Eastern & Memphis Railroad Company, about twenty miles westerly from Springfield in said county of Green, together with the necessary side tracks, turnouts, stations, and water-tanks, convenient for and appurtenant thereto.

"And your petitioner further shows that it needs and seeks to acquire for public use, and for the purposes aforesaid, the several parcels of land situate in the county of Cass and state of Missouri, described and owned as follows, to-wit, that is to say: [Parcels belonging to other owners, and not now in question in this case.] Third parcel: One hundred feet in width, in a general north-westerly and south-easterly direction, as said road is sought to be constructed over, through, and upon the north-west quarter of section nine, in township forty-five, of range thirty-one, according to the location of said railroad, and which is owned and claimed by said defendant Thomas R. Story. That there is a deed of trust of date June 16, 1883, of record against said land, executed by one O. H. Cogswell and wife, to defendant Leroy M. Sea, trustee, to secure six hundred and eleven and 37-100 dollars in favor of defendant Isaac N. Rogers, recorded in Book N, page 232, in recorder's office of said Cass county. [Other parcels belonging to other defendants, and not now in question.] That the one hundred feet in width in each of the foregoing parcels of land as specified is fifty (50) feet on each side of the center of said railroad, as indicated by stakes driven along the line of said road, and the map

and profile thereof on file in the office of the clerk of the county court within and for Cass county, Missouri, and showing the location thereof.

"And your petitioner further says that it and the owners of said parcels of land, who are residents of the state of Missouri, cannot, nor can said petitioner and either of said owners, agree upon the proper compensation to be paid for said land, or any interest therein, which it seeks to acquire, although it has endeavored so to do.

"Your petitioner therefore prays for the appointment by said court, or by the judge thereof in vacation, of three disinterested freeholders, residents of said Cass county, as commissioners, or of a jury to ascertain and assess the damages which the owners of said several parcels of land may severally sustain as the just compensation to which they may severally be entitled in consequence of the construction, maintenance, and operation of said railroad and appurtenances as aforesaid, and the use and occupation thereof.

"WALLACE PRATT,

"W. J. TERRELL, and

"C. W. SLOAN,

"Attorneys for Petitioner."

And thereupon, on the 8th day of November, 1884, the judge of the Cass county circuit court in vacation, upon the hearing of said petition, appointed H. M. Bledsoe, William Kelly, and F. E. Bybee commissioners to assess the damages under said petition. And afterwards, to-wit, on the 15th day of November, 1884, the said commissioners filed their report. The report of the commissioners was as follows:

"We, the undersigned, H. M. Bledsoe, William Kelly, and F. E. Bybee, three disinterested freeholders, residents of the county of Cass, Missouri, appointed by the judge of said court in vacation on the 8th day of November, A. D., 1884, to view the lands hereinafter described, and return under oath an assessment of the damages which the owners of said land may severally sustain by reason of the taking, appropriation, and condemnation thereof by said petitioner for public use for the purposes of its railroad and appurtenances, and to ascertain the just compensation to be paid to the owners for the land so taken and appropriated, and being first duly sworn to faithfully and impartially discharge said trust reposed in us according to the best of our ability, as appears from our several affidavits herewith filed, respectfully return and report under oath: That on the 18th day of November, A. D. 1884, we viewed the lands hereinafter described, and ascertained the just compensation to be paid to the owners thereof for taking the same, and assess the damages which the said owners may and will severally sustain by reason of the taking, appropriation, and condemnation of such lands by the petitioner for public use for the purposes of its railroad and appurtenances, and set forth and state the compensation and damages allowed each owner separately as follows, to-wit: [Parcels belonging to other owners.] Third parcel: One hundred feet in width in a general north-westerly and south-easterly direction as said road is sought to be constructed and is located over, through, and upon the N. W. $\frac{1}{4}$ of section nine, (9,) in township forty-five, (45,) of range thirty-one, (31;) that compensation shall be paid, and damages are allowed in the sum of four hundred and ten dollars to the owner thereof, said defendant, Thomas R. Story. [Other parcels belonging to other defendants.]

"A plat of said lands so taken and hereinbefore particularly described is hereunto annexed and made part of this report.

"Witness our hands and seals.

"WILLIAM KELLY, [Seal.]

"H. M. BLEDSOE, [Seal.]

"F. E. BYBEE, [Seal.]

"Commissioners."

Subscribed and sworn to before William D. Summers, notary public.

Gates & Wallace, for appellant. *Wallace Pratt* and *W. J. Terrell*, for respondent.

SHERWOOD, J. The present proceeding was instituted for the purpose of condemning for a right of way certain lands owned by defendant and others who were joined with him. The petition was presented to the judge in vacation, due notice being given to those interested, and three commissioners were appointed to assess the damages, etc. At the next term the commissioners made their report. The defendant appeared and filed various exceptions thereto, and at the conclusion of his exceptions asked for a jury to assess his damages. Witnesses, including the commissioners, were thereupon heard as to the quantum of his damages. These exceptions were overruled, the report approved, a jury denied him, and he appeals.

1. Section 4, art. 12, of our constitution, provides that "the right of trial by jury shall be held inviolate in all trials of claims for compensation, when, in the exercise of said right of eminent domain, any incorporated company shall be interested either for or against the exercise of said right." It is urged by plaintiff that defendant waived his right of trial by jury when he appeared before the judge in vacation, and the commissioners were appointed at his "instance and request." This, however, he denied upon oath; the issue being made by plaintiff's reply to the exceptions filed, charging that such commissioners were appointed in the manner already stated, and no one testified to the contrary of the defendant's statement. It is also urged that the judgment confirming the report of the commissioners recites that at defendant's "instance and request" the commissioners were appointed in vacation, and therefore he is concluded by the record from making any denial of such recitals. This may be granted; but what does the concession amount to? The appointment of commissioners in vacation was merely an initiatory step, a provisional measure, which might or might not fix the right of the parties, as subsequent events should determine. Besides, at the time of the appointment of the commissioners, it was impossible for defendant to have had a jury, though never so desirous of obtaining one; and if he had demanded one, and had been refused, there was no way known to the law whereby he could have saved his exceptions to such refusal. These observations sufficiently indicate that defendant is not estopped by the record, and that he did not waive his right to demand a jury. A man can scarcely waive anything which is out of his reach. And as soon as the report of the commissioners came in, and was not regarded by him as altogether just, he exercised his right of disaffirmance on the first opportunity, by filing his exceptions, and demanding a jury. His demand was therefore timely.

But it is insisted that under the provisions of section 896 a party is not entitled to a jury, except a "new appraisalment" be ordered; and in this case there was none ordered, the report having been confirmed. Of this claim it is sufficient to say that if there be any incongruity between the statute and the constitutional provision already quoted, the latter must prevail. The action or non-action of the legislative department of the government cannot defeat a constitutional right, nor place it in abeyance. The right being conceded, it carries with it the appropriate remedy. *People v. McRoberts*, 62 Ill. 38; *Kine v. Defenbaugh*, 64 Ill. 291; Bish. St. Crimes, § 137, and cases cited; *Ex parte Marmaduke*, 91 Mo., cases cited pp. 265-267.¹ And when section 4 of article 12, *supra*, declares that "the right of trial by jury shall be held inviolate," etc., the jury there meant is "the historical jury of twelve men," with all of its incidents. This rule applies without exception, unless a contrary purpose is unmistakably manifested. *Cooley*, Const. Lim. (5th Ed.) 506. In consequence of these views and authorities, it must be held that under the sec-

tion of the constitution upon which defendant relies he is entitled to a common-law jury, and to all the incidents which pertain to a trial by such a body of men. By none of the foregoing remarks is it intended to be intimated that a party situated as was the defendant could not waive his right to a jury trial. On the contrary, the opinion is that it was quite as competent for him to do so, and in a similar way, as if the cause were any ordinary civil action. The only point decided in regard to that is that the acts of the defendant disclosed by the record did not amount to such a waiver, and were not at all indicative of it.

The defendant claims that the report of the commissioners, filed herein, is not a compliance with section 894, in that it does not contain "a specific description of the property for which damages are assessed." My associates are, however, of the opinion that the report is well enough in this respect, since it refers to the road as "located over, through, and upon" the land in question, and gives a plat; and the plat and profile filed, according to the statute, in the office of the county clerk, shows just where the road is located, so that their conclusion is that the maxim *id certum*, etc., applies in this instance. I do not concur in this view, because I believe that the report on its face must show the precise strip of land taken, and any report falling short of this does not comply with the statute, which requires the report to contain "a specific description of the property" taken. *Mills*, Em. Dom. § 115, and cases cited; *Railway Co. v. Carter*, 85 Mo. 448. The object of this statutory requirement is obvious, the intent being that the report is to be a muniment of title, a permanent memorial, which identifies with absolute certainty, and leaves nothing to parol testimony to identify, the land taken, where in after years the center of the road-bed is shifted, and the temporary stakes have disappeared. But whatever the reason of the statute is, it is sufficient to say that its command is of itself a sufficient reason.

The commissioners, in their testimony, stated that in estimating the damages they did not take into consideration the question of how far the other 160 acres in the same farm was affected. This was improper, under the view taken by this court in *Railway Co. v. Calkins*, 90 Mo. 538, 3 S. W. Rep. 82; *Railway Co. v. Waldo*, 70 Mo. 629; and *Railway Co. v. Ridge*, 57 Mo. 599.

The commissioners erred in other respects in making their estimate of damages. One of them says he put the damages at double the value of the land actually taken; another that they "lumped" the damages at \$410; and they all say that, in estimating the damages, they took no account of the "cuts and fills." Arbitrary and lumping methods of assessing damages for taking property have heretofore been condemned by this court, (*Railroad Co. v. Campbell*, 62 Mo. 585,) and elsewhere, (*Railway Co. v. Birkett*, 62 Ill. 332.) There are numerous authorities holding that cuts and fills made by a railroad passing through a man's farm, and the inconvenience to which he will be subjected by making it more difficult to reach the severed portions of the land, are proper subjects for consideration in estimating the damages sustained. *Mills*, Em. Dom. §§ 166, 189.

For the errors aforesaid the judgment will be reversed, and the cause remanded.

All concur. RAY, J., absent.

GALVESTON, H. & S. A. RY. CO. v. PORFERT.

(Supreme Court of Texas. December 21, 1888.)

1. RAILROAD COMPANIES—ACCIDENT AT CROSSING—CONTRIBUTORY NEGLIGENCE.

In an action for damages against a railroad company for injuries sustained by plaintiff through alleged negligence in running over him while driving across the track, plaintiff testified that he first saw the train when he was in the center of the

track; that it was then about 390 feet away, and going at the rate of 40 miles an hour. *Held*, that he must have been guilty of contributory negligence in failing to cross the road before the train struck him.¹

2. SAME.

The court properly refused to charge that if plaintiff could have heard the approaching train by stopping his wagon to listen, then his failure to do so was contributory negligence. Whether or not it was negligence was a question for the jury.¹

3. DAMAGES—MEASURE FOR TORT—PAIN AND ANGUISH.

It was error for the jury, in assessing plaintiff's damages, to make separate assessments for "pain and suffering," "mental anguish," and "peril and fright," as the first item was broad enough to cover the last two.

4. SAME—EXCESSIVE DAMAGES.

It appeared that plaintiff was confined in a hospital for 145 days; that dead bone was at the time of the trial (21 months after the accident) still working out of the wound, which was still open; one leg was partially stiffened, and somewhat shorter than the other; and he was disabled for life; his leg had been broken; large pieces of skin were torn from the flesh; and he was bruised in many places. *Held*, that a verdict of \$14,167 was not excessive.²

Commissioners' decision. Appeal from district court, Bexar county; GEORGE H. NOONAN, Judge.

Action by Charles Porfert against the Galveston, Harrisburg & San Antonio Railway Company, for damages for personal injuries sustained through the alleged negligence of defendant's servants. Defendant appeals from a judgment for plaintiff.

Waelder & Upson, for appellant. *John H. Copeland* and *J. H. McLeary*, for appellee.

COLLARD, J. Appellee, Charles Porfert, brought this suit on the 23d day of August, 1883, against the appellant, the Galveston, Harrisburg & San Antonio Railway Company, for damages alleged to have been caused by the negligence of defendant's servants in managing and propelling its engine and cars, by which negligence he was knocked off of his wagon while attempting to cross the railroad track and injured; "causing a compound fracture of the left leg below the knee, wounding him severely in many places, injuring him internally, and bruising him all over, from head to foot." The damages are specified and itemized as follows: "The company, by the carelessness and negligence of its servants and agents, and by the collision aforesaid, and by the wounds, bruises, and injuries aforesaid, to plaintiff done, have caused him great pain and suffering and have damaged him for life, transforming him from a hearty and robust young man to a cripple for life, to his great and irreparable damage as follows, to-wit:

"To loss of time from the 23d of July to the filing of the amended petition, [March 4, 1885,]	-	-	-	\$ 2,500 00
To peril and fright at the time said injuries were sustained,	-	-	-	2,500 00
To mental anguish suffered by plaintiff in consequence of said injuries,	-	-	-	5,000 00
To pain and suffering consequent on said personal injuries,	-	-	-	20,000 00
To impaired capacity for labor in consequence of weakness and permanent injuries as aforesaid,	-	-	-	20,000 00"

Plaintiff also alleges that he observed the sign, "Railroad Crossing;" that before attempting to cross he looked and listened, both to the right and left,

¹Respecting contributory negligence in actions for injuries received at railroad crossings, see *Buchanan v. Railroad Co.*, (Iowa,) 39 N. W. Rep. 663, and cases cited; *Railroad Co. v. Bell*, (Pa.) 15 Atl. Rep. 561, and note; *Railway Co. v. Kuehn*, (Tex.) 8 S. W. Rep. 484, and note.

²As to what are excessive damages in actions for injuries to the person, see *Johnston v. Railway Co.*, (Mo.) 9 S. W. Rep. 790, and cases cited; *Railroad Co. v. Lee*, (Tex.) Id. 604; *Railroad Co. v. Mitchell*, (Ky.) 8 S. W. Rep. 703, and note.

and neither saw nor heard anything to indicate the approach of a train, and, after taking these precautions, he attempted to cross, when he was hurt as previously stated; that he was 32 years old at the time of the accident; that by reason of the injuries aforesaid he was confined to his bed six months; that he cannot be restored to a healthy and robust condition, but must henceforth be a sickly cripple, and a miserable invalid; that the defendant's engine was running at a great speed,—40 miles per hour; that no bell was being rung, nor whistle blown, at the time and distance required by law, on the locomotive, before crossing the public highway; and that all other usual and necessary precautions were disregarded, and that he was guilty of no contributory negligence whatever. Defendant pleaded not guilty, contributory negligence on the part of plaintiff by attempting to cross the railroad on a narrow and obscure lane, not exceeding 12 feet in width, without using his senses of sight or hearing, giving no heed to the whistle which was duly given by the engineer at the proper time and place; and that, if plaintiff had not long since recovered from the alleged injuries it had been through his own fault and imprudence; among other things, by voluntarily contracting a loathsome disease. It is also alleged that defendant, after the injuries, for the space of about one year, had plaintiff fed, nursed, and cared for in the best manner, and supplied with comforts, medicines, and medical attentions, at its own expense, in the sum of \$1,000, which is pleaded in set-off. As nearly as can be stated, the accident occurred as follows: About 4 o'clock in the afternoon of the 23d of July, 1883, Charles Porfert, aged ——— years, was driving a two-horse wagon on the Nelson road, a public road, near the Medina river, intending to go to San Antonio. The dirt road approached the defendant's railroad from the south, and crossed the railroad about 220 yards west of the bridge on the river. The railroad here runs nearly east, and the dirt road nearly north. The wagon road on the south side runs through a lane about 22 feet in width. At the time plaintiff was driving along the road, towards the crossing, there was a brush fence on the left side of the lane, green corn growing in the field, a few trees along near the line of the fence, sunflowers and blood-weeds growing in the right of way. There was a cut for the railroad through rising ground from the bridge towards the crossing, from three to four feet deep, and the waste dirt was piled or banked up in the usual way; and on these embankments and in the right of way, sunflowers and blood-weeds were growing thick, and several feet high. This cut did not extend from the bridge to the crossing, but was between the two. At the crossing the track of the railroad was a little above the natural ground,—eight or ten inches; so that the pull for a wagon to the top of the track was slightly upwards. The evidence is conflicting, but it was amply sufficient to justify the jury in finding that, as plaintiff approached the railroad crossing along the lane he could not see an approaching train until he got close to the track,—within a few feet of it. At the track and on it, the road, being straight, could be seen for over a mile each way. Plaintiff had worked on this road, and was familiar with the locality. He knew the train signals, whistles, and bells. There was a whistling-post at the proper distance from the crossing, and a sign at the crossing for travelers, designating it as a railroad crossing. The wind was from the south or south-east. Just before plaintiff reached the crossing—about 18 feet from it—he stopped to have one Baden move his wagon out of the way. Baden was loading wood on his wagon from the brush fence, and his son was assisting. His son moved the wagon so that plaintiff could pass. A few words were exchanged, and plaintiff drove on. While stopped at this point, plaintiff listened, but heard no train. He drove the horses up to the track, looked and listened again, he says, and saw and heard nothing. When the wagon was on the track, he looked, and, coming from the west, was a train, about 13 rail-lengths away—390 feet. It was a construction train—locomotive and two flat cars. He says it was running

very fast; that he raised his stick, and was in the act of striking his horses, then moving and off the track, when the locomotive struck his wagon on the rear end, tearing the wagon to pieces, and causing the injuries to him as set out in the petition. The train passed on and stopped several hundred yards east, near the section-house, and returned to him. He was found unconscious, about 15 steps from the cattle-guard, in Baden's field. Baden says he heard no whistle or other signal until the train was crossing the lane. He then looked, and saw only the plaintiff's horses standing on the opposite side of the track, the wagon gone. The engineer and fireman on the train say the regular signals for crossing were given at the proper time, and the engineer says plaintiff, when he saw him first, had his head down, looking east; that he gave an alarm at once, reversed his engine, called for brakes, and did all in his power to avoid the collision. Plaintiff says he was driving slow, to avoid overturning a can of butter he was taking to San Antonio. Defendant produced a number of witnesses who testified that an engine and train could now be seen from nearly every point of the lane, all the way from the crossing to the bridge. The road-bed had been raised about 10 inches after the accident, before these witnesses took observations; some trees had been cut away; the brush fence had in part been removed; the corn and weeds were not in the way to any extent, being younger and smaller. The employees testified that the train causing the accident was moving at a rate not exceeding 18 miles an hour, when plaintiff was first seen by them. The engineer bore a good reputation for competency, and stood well with the company. The cause was submitted to a jury April 7, 1885. Their verdict was as follows:

"We, the jury, find for plaintiff, and assess the damages as follows:

Loss of time, - - - - -	\$ 833 00
Peril and fright, - - - - -	833 00
Mental anguish, - - - - -	1,666 00
Pain and suffering, - - - - -	6,667 00
Impaired capacity, - - - - -	6,667 00
<hr/>	
Total, - - - - -	\$16,666 00"

Judgment was entered accordingly, and defendant appealed and assigned errors.

The first assignment of error is as follows: "The court erred in refusing to give to the jury the charges asked by defendant, which two special charges are marked 'Refused,' for the reason that the first thereof should have been given in view of the testimony of the plaintiff himself that he could have heard the approaching train or locomotive, if he had stopped his wagon, the noise of which prevented his hearing." The charges asked and refused were but one consecutive charge, and were as follows: "In this connection you are instructed that if a person riding in or upon a wagon could not hear the approach of a train or locomotive by reason of the noise made by his wagon, and if by stopping his wagon he could have heard the approach of danger, then it would be an act of prudence and necessary precaution to stop the wagon to enable him to listen for an approaching train or locomotive on the railroad track, and, failing to do so, he would contribute to his own injury, and thus be guilty of what is called contributory negligence, for which no one but himself would be at fault or responsible." This is the first part of the charge refused, on which the foregoing assignment of error is based; the following is the latter part of it, for the refusal of which the second assignment of error is taken: "If, therefore, the jury believe from the evidence in this case that the plaintiff failed in the exercise of ordinary and reasonable care and caution in approaching and going upon the railroad track, and that the want of such care and caution on his part contributed to the injury which he has sustained, and that by the exercise of such care and caution he could have avoided

the accident by which he was injured, then the defendant is not liable, although the railroad company may not have given the signals which the law requires; and in that event your verdict should be for the defendant." The assignment of error relating to this part of the requested charge is as follows: "The court erred in refusing to give to the jury the other of said two charges, for the reason that the evidence generally, and the plaintiff's own testimony, shows that the plaintiff failed in the exercise of ordinary and reasonable care and caution in approaching and going upon the railroad track, and that the want of such care and caution on his part contributed to the injury which he sustained." The general charge of the court upon this subject was as follows: "*Third*. If you believe from the evidence that the plaintiff was injured, as stated by him in his petition, by the railroad train of the defendant, and that prior to said collision plaintiff used all necessary precautions to ascertain if a train was in the vicinity of the wagon-road crossing, and that in fact plaintiff is guilty of no contributory negligence, and that the injury complained of was caused by the negligence of the defendant's employes in operating the railroad train of the defendant, you will find for the plaintiff a verdict for such damages as the proof shows he has sustained." "*Fifth*. If, however, you believe from the evidence that the plaintiff failed in the exercise of ordinary and reasonable care and caution in approaching and going upon the railroad track, and that the want of such care and caution on his part contributed to his injury, and that by the exercise of such care and caution he could have avoided the accident by which he was injured, then the defendant cannot recover in this suit, and your verdict will be for the defendant." In addition to the foregoing, the court gave the following charge at request of defendant: "The statute law of this state provides that a bell of at least thirty pounds weight, or a steam-whistle, shall be placed on each locomotive engine, and the bell shall be rung or the whistle blown at the distance of at least eighty rods from the place where the railroad shall cross any road or street, and to be kept ringing or blowing until it shall have crossed such road or street, or stopped, and, neglecting to do so, shall be liable for all damages sustained by any person by reason of such neglect. While this is a duty imposed upon railroad companies, the performance of which the traveler may expect, yet all persons wishing to cross a railroad track at the crossing of a road are also charged with the reciprocal duty of exercising reasonable care, prudence, and caution in avoiding danger in approaching or crossing the track; and the jury are therefore further instructed that a person in attempting to cross a railroad track at a crossing must use due care to avoid danger, and if he does not do so, and his own negligence is the proximate cause of the injury, he cannot recover damages for any injury received by him, although the railway company may not have given the signals which the law requires to indicate the approach of a train or locomotive. In such case he contributes to his own injury, and it is not the result of the omission of the act required by the law. It is not only the duty of one in approaching a railway crossing to look along the line of the road, and see if a train is coming; but if he fails so to do, or to listen, or to use any other reasonable means of informing himself of approaching danger, such conduct on his part, when it appears from the evidence, would amount to negligence."

We do not think the court erred in refusing the requested charge. It has been often decided that negligence or not is a question of fact for the jury. In the first part of the charge requested and refused the court was asked to instruct the jury that if plaintiff could have heard the approaching train by stopping his wagon to listen, then his failure to do so was contributory negligence. The court cannot specify in its charge what acts would have been prudent, or what imprudent; what precautions would have avoided the collision; or what would amount to negligence. The jury must be left to connect the facts in their own way; to reason for themselves, and form their own conclusions from

the evidence without the aid of the court. The court cannot point out to them a method by which they can reach a conclusion from the evidence, or suggest to them an argument arising from the facts by which they can or must solve an issue of fact. It is the duty of the court to furnish the jury with the rules of law applicable to facts as they may find them, and no more. If the law should make certain acts or omissions negligence *ipso facto*, the court should then direct the jury that the finding of such acts or omissions would be a finding of negligence; but the court would transcend its authority if it instructed the jury that the omission of an act of prudence would amount to negligence unless the law declared it to be so. The court might as well argue one feature of the case as another, and in this way argue the whole case for the jury upon the facts. The jury must be left to argue the facts for themselves, without suggestion or intimation from the court. *Railroad Co. v. Wright*, 62 Tex. 517, 518; *Railroad Co. v. Chapman*, 57 Tex. 82.

The error assigned for refusal to give the latter part of the charge is not well taken. The first part of the charge asked was not the law, and for that reason the last part of it could not be given. The court is not required to separate a charge into fragments, giving such portions as are the law to the jury, and refusing such as are not the law. Besides this, the court had in the section of its charge above quoted (as the fifth section) substantially given the latter part of the charged asked. The use of the word "defendant" where it is evident "plaintiff" was meant, could not, in the connection in which it was used, have misled the jury. In addition to this, the special charge asked by defendant and given by the court was as favorable to defendant as the law would warrant, upon the subject of contributory negligence. It not only stated that it was plaintiff's duty on approaching the railroad crossing to use his senses to look and listen for trains, but proceeded to declare that his failure to do so would amount to negligence. The charge given by the court of its own motion, and the special charge given at the instance of the defendant, submitted the question of contributory negligence as favorably to defendant as it could have been.

Appellant complains because the jury failed to find contributory negligence on the part of plaintiff in approaching and crossing the railroad track. It will be observed that if the plaintiff can recover at all he must do so upon his own evidence as to how the accident occurred. After stating that he stopped just before reaching the track, and exchanged a few words with Baden, he proceeds to say: "While standing in the lane, I listened, and could see no train or anything. To the east the railroad curved. Beyond the curve could see no track on account of corn and two large wood-piles. Then I turned my head towards the river, and could see nothing that way on account of the brush fence, the hackberry tree, the bluff, a pecan tree—one limb hanging down on the bridge; don't think it is there now. I stopped and listened; could not hear anything. I drove on slowly on account of butter in a can. I went up to the iron track. Kind of a high place, where horses generally give a pull up, and sometimes don't go very fast. About the time the horses struck the track, I could not see anything to the west of me. I looked east, and could not see anything there. About that time I got on the track. Just as my body got on the track I saw a train. Had been looking east, watching the curve. The train was right on me, within thirteen rail lengths. It had not whistled then. The wind was blowing pretty strong at the time. I did not hear the bell nor whistle. After I got on the track and saw the train, the horses were off the track, north of it. My body was in the center of the track when I saw the train. I raised my stick, and struck the horse with my left hand. As I struck the horse the train struck me. The train got within 13 rail lengths of me, when they happened to see me, and commenced whistling, and signaled for brakes." Again, on cross-examination, he was asked: "Where did you say you were when you first saw the train?" He answered: "On"

the track." "Whereabouts?" "Right in the center of the track." "And your horses were off the track?" "Off the track," he answered. "Where did you first see the train?" "About 13 rail lengths from me, this side of the tank." "Your horses were going?" "They were going; yes." It was in proof that a rail length was 30 feet. If the testimony of plaintiff is true, it is impossible that he could not have driven off the track after he saw the train, before it struck him, if he had exercised the care he was bound to use under the circumstances. His horses were moving, and already across the track. His seat in the wagon was in the middle of the track when he saw the train, 390 feet away, coming, plaintiff says, at the rate of 40 miles an hour. Under such circumstances he must have been guilty of contributory negligence in failing to cross the road before the train struck him. This conclusion is so free from doubt that we do not hesitate to say the verdict was contrary to the evidence, and it was error in the court below to refuse a new trial on that ground.

The verdict assessed damages for "peril and fright," \$833; "mental anguish," \$1,666; "pain and suffering," \$6,667. The petition claimed damages for "peril and fright at the time said injuries were sustained; mental anguish suffered in consequence of said injuries;" thus dividing the mental suffering into two periods. It might as well have been divided into as many days as the suffering continued. The suffering of mind was the result of one act, and, though the injury was continuing, it was but one injury. The petition also divided the damages into "pain and suffering consequent on said personal injuries," to which the jury responded as before stated. This pain and suffering is not by the petition denominated "physical" pain and suffering, so as to distinguish it from the fright and mental anguish before set up as items of damage. We think the petition asked for, and the verdict awarded, a double recovery. The \$6,667 awarded for pain and suffering consequent upon the personal injuries included the two items for fright and mental anguish already allowed. The findings for the two previous items, \$833 and \$1,666, should both be stricken out, reducing the verdict to \$14,167. The amount of the verdict, in so far as it is double, could be here remitted, and judgment could be rendered for the \$14,167, if the verdict could be sustained at all. It cannot, however, be sustained at all, on account of reasons before given.

Appellant claims that the verdict is excessive. We are not prepared to say that an appellate court should so hold. Plaintiff's injuries were very severe. He suffered in the hospital 145 days; dead bone was at the time of the trial (21 months after the accident) still working out of the wound; the wound was still open; his leg was partially stiffened, and somewhat shorter than the other leg; and he was disabled for life; his leg had been broken; large pieces of skin were torn from the flesh; and he was bruised in many places. The verdict was large, but not so clearly excessive as to require us to set it aside after it has been approved by the trial judge. *Railroad Co. v. Dorsey*, 66 Tex. 148; *Railroad Co. v. Garcia*, 62 Tex. 292; *Railroad Co. v. Dawson*, Id. 261; *Railroad Co. v. Brett*, 61 Tex. 483; *Railroad Co. v. Randall*, 50 Tex. 254; *Railroad Co. v. Casey*, 52 Tex. 114; *City of Galveston v. Posnainsky*, 62 Tex. 120; *Railroad Co. v. Ormond*, 64 Tex. 490; *Railroad Co. v. Kirk*, 62 Tex. 233.

Because of the refusal of the court below to grant a new trial on the ground that the jury should have found that plaintiff was guilty of contributory negligence, we conclude the cause ought to be reversed, and remanded for a new trial. We have omitted to state, in the proper place, our conclusion upon appellee's motion to strike out the statement of facts submitted with the case. The stenographer's report of the testimony was in part adopted by the parties and the court as a correct statement of facts. In many instances the questions propounded to witnesses, and their answers, are given in full. This was

done to give the supreme court a better appreciation of the testimony. In so far as the questions to and answers of the plaintiff are given, we cannot say that they were unnecessary. We do not think the statement of facts in the particulars mentioned in the motion is so violative of the rules as to require us to sustain the motion. We think it ought to be overruled.

STAYTON, C. J. Report of the commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

HOPKINS v. PARTRIDGE.

(Supreme Court of Texas. October 30, 1888.)

SALE—OF CROPS—CHANGE OF POSSESSION.

An oral sale of cotton, partly picked and partly in the fields, the seller agreeing to pick the remainder, and deliver the whole at a certain place, from which the purchaser agrees to haul it to market, and to pay the market price for it, applying the proceeds on notes due him by the seller, both parties agreeing that the property is "turned over" to the purchaser, vests title in the latter, as against a subsequent attachment levied on the cotton while in the seller's possession, under the statutes of Texas allowing such sale to rest in parol, and the sale not being attacked as fraudulent, though the attaching creditor did not know of the sale.¹

Appeal from district court, Camp county; W. P. McLEAN, Judge.
Sheppard & Thompson, for appellant. *E. A. King*, for appellee.

WALKER, J. This is a controversy as to the ownership of a cotton crop grown by one Quash Reed, under whom both parties claim. The burden of proof was upon appellee, and his right, whatever it is, was prior to that of appellant.

The testimony to the alleged sale by Reed to Partridge is as follows: Partridge testified: "Quash Reed was owing me for a tract of land, and I held three notes of his,—two for four bales and one for five bales of lint cotton,—as a consideration for said land. All of these notes were past due. About four weeks before said levy [by appellant] I went over to where Reed was gathering cotton. He had picked then about 2,000 pounds of seed cotton, and about fourteen acres on said farm unpicked. A part of this cotton was gathered and put in Reed's smoke-house on said farm; part was gathered and put in a cotton-pen in the field. I bought all of said cotton in said smoke-house and pen, and all the ungathered cotton, the same being about fourteen acres of cotton, which had been cultivated by said Reed. I promised to give the said Reed the market price for said cotton at Pittsburgh. The cotton had been badly handled, and was trashy and dirty; and the lint from the same at that time was worth seven cents per pound at Pittsburgh, Tex., but we did not agree on that. Quash Reed turned over the said ungathered and gathered cotton then and there. Reed accepted my proposition, and then and there sold me said cotton, and agreed further to pick out the balance of said cotton, and haul all of the same over to Bailey's gin, the same being close by. I told Reed that when the same was hauled over to Bailey's gin, and ginned up, I would haul the same to the town of Pittsburgh, Tex.; and when the same was weighed, and the number of pounds and price ascertained in Pittsburgh by the market price thereof, I would give the proper credit on his said land notes,

¹As to what is a sufficient change of possession on a sale of chattels to pass title as against the seller's creditors, see *Davis v. Meyer*, (Ark.) 1 S. W. Rep. 95, and note; *Levasseur v. Cary*, (Me.) 3 Atl. Rep. 461, and note; *Pope v. Cheney*, (Iowa,) 27 N. W. Rep. 754, and note; note to *Weil v. Golden*, (Mass.) 6 N. E. Rep. 220. See, also, as to when title passes, *Jeroulds v. Brown*, (N. H.) 15 Atl. Rep. 128.

—all of which I and the said Reed then and there mutually agreed. The cotton in the said field, and in the smoke-house and pen, were in the same condition when I bought it as when the levy was made by the officer in favor of the plaintiff, and against the said Reed." Quash Reed testified: "I know defendant, [Partridge.] I was living on defendant's place at the time of the levy of the attachment in this suit. About four or five weeks before the date of said levy, I had sold my entire crop of cotton grown on the said plaintiff's farm. There was about 20 acres ungathered, and about 2,000 pounds picked out, in my smoke-house and cotton-pen on said farm, and located in said field. Defendant came over where the cotton was, and I turned over the same to defendant. I agreed to pick out the balance of said cotton, and haul it over to Bailey's gin, near by. I agreed to take the Pittsburgh, Tex., market price of cotton. Defendant agreed that when I had hauled the said cotton to the said gin that he [defendant] would haul the same to Pittsburgh, Tex., and have the same weighed, and, as soon as the market price could be ascertained, he would place the proceeds on the said land notes." The value of the cotton was agreed in this case to be \$100.

The assignments of error attack the sufficiency of the testimony to show a completed sale of the cotton (1) because the transaction did not include a delivery of possession; (2) there was work to be done upon the cotton preparing for delivery; (3) no price was fixed, or could be, until after it was taken to market; and (4) because the cotton, being found in Reed's possession, was subject to the attachment. It would seem that, if the parties to the contract about the cotton are to be believed, all the objections urged were satisfied. They testified clearly to a change of ownership. 1 Benj. Sales, §§ 308, 309. Both parties to the contract state the fact that the entire cotton crop was sold by Reed to Partridge. There was then no necessity for anything further to ascertain what was sold. *Cleveland v. Williams*, 29 Tex. 204; *Woods v. Half*, 44 Tex. 684; *Allen v. Melton*, 64 Tex. 218; *Boaz v. Schneider*, 69 Tex. 132, 6 S. W. Rep. 402; 1 Benj. Sales, §§ 313-317. Both testify that the cotton was turned over to Partridge at the time; Partridge saying: "Reed turned over the said ungathered and gathered cotton then and there." Reed testified: "Defendant came over to where the cotton was, and I turned over the same to defendant." From this, the possession, so far as they could stipulate, was in Partridge. *Brewer v. Blanton*, 66 Tex. 532; 1 Benj. Sales, § 8. As to the price, "the Pittsburgh market price was to be taken." Reed was owing Partridge for the land on which the cotton was grown, largely in excess of the value of the crop. Reed wished the cotton used to pay on Partridge's claim. No fraud is suggested in the dealings between them. It would seem that, under these circumstances, the price could be ascertained with certainty. *Blanton v. Langston*, 60 Tex. 150. Reed agreed to pick that remaining in the field, and haul all the cotton to Bailey's gin. Had Reed failed to do this, his vendee could have taken the cotton as it was. It was his by contract, and the possession had been turned over to him. The failure on Reed's part to perform his agreement to pick the cotton remaining in the field, and to haul all of it to Bailey's gin, could not have defeated the right of his vendee to the cotton after its sale and delivery by Reed to his vendee. *Brewer v. Blanton*, 66 Tex. 533, 1 S. W. Rep. 576. Under our statutes, the sale could as well be made by parol as in writing. That the possession remained in Reed was evidence of fraud, which, however, could be explained, if the transfer had been attacked as fraudulent. No charge or suggestion of fraud is made against Reed in selling to Partridge. That plaintiff did not know of the sale at the time of his levy of attachment did not render the levy good against the property of Partridge, unless the sale be attacked for fraud. Good faith on part of plaintiff in making the seizure did not confer title upon him under the at-

tachment, if the property did not belong to the defendant in attachment. *Dodd v. Arnold*, 28 Tex. 100.

As the court below passed upon the credibility of the witnesses, and as their testimony is sufficient to support the judgment, it will be affirmed.

COOPER v. STATE.

(Court of Appeals of Texas. December 15, 1888.)

ELECTIONS AND VOTERS—OFFENSES AGAINST ELECTION LAWS—CARRYING WEAPONS.

Where defendant is charged with carrying arms within half a mile of a voting place on election day, the presumption is that the election is legal, and the burden is on the accused to show the contrary.

On rehearing. For statement of case and former opinion, see 8 S. W. Rep. 654.

E. R. Lane, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. In the motion for rehearing it is again urged that articles 163 and 320 of the Penal Code define the same offense, and that they provide different punishments, and that, therefore, the punishment being uncertain, no punishment should be inflicted. If these articles define the same offense, this judgment should be reversed, because the penalty should be certain. Do they define the same offense? Appellant is charged with violating article 163 of the Penal Code. The weapon was a gun. This article, in substance, provides: "If any person other than a peace officer shall carry any gun, etc., on any day of election during the hours the polls are open, within the distance of one-half mile of any poll or voting place, he shall be fined not less than one nor more than five hundred dollars, and in addition thereto may be imprisoned in the county jail for a time not exceeding one month." To be guilty the accused must carry the gun. He must carry the gun during the hours the polls are open on a day of election. He must carry the gun on such a day, and during the hours the polls are open, within one-half mile of the poll or voting place. These are the elements which enter into the composition of the offense defined by article 163. That portion of article 320 bearing upon the question provides in substance: "If any person shall go * * * to any election precinct on the day or days of any election, where any portion of the people * * * are collected to vote at any election, * * * and shall have or carry about his person a pistol or other fire-arm, etc., he shall be punished by fine not less than fifty nor more than five hundred dollars, and shall forfeit to the county the weapon," etc. Now, to commit this offense the accused must go to an election precinct on a day of election. He must go when a portion of the people are collected. The people must be collected to vote at the election, and he must have or carry about his person the prohibited weapon. It will be readily perceived that the elements of these offenses are not the same. In that defined by article 320 it is not material whether the polls are open or not; nor is it necessary that the weapon be carried during the hours that the polls are open. On the other hand, it is not an element in the offense defined by article 163 that the accused have or carry the weapon at or to the crowd collected to vote. If the weapon is carried (during the hours the poll is open) within one-half mile of the voting place, the other elements attending, he would be guilty.

But it is contended that the election was void, because no notice of the same was given by posting as the law requires. Now, the appellant is not charged with violating the local option law, nor with illegally voting at an election, but with carrying a gun within a half mile of a voting place on a day of election while the poll was open. We hold that the presumption obtains that the

election was legal; and, if the question of the illegality of the election could be made in this collateral manner, the burden is on the accused or show illegality, and not on the state to show that it was legal. Again, whether the election was legal or not, it was being held under the forms of law, and was not a farce. The mischief intended to be prevented by the statute would as likely arise in the one case as the other. The motion is overruled.

HARRELL v. STATE.

BUTLER v. STATE.

(Court of Appeals of Texas. December 15, 1888.)

Appeals from district court, Karnes county; H. C. PLEASANTS, Judge.

PER CURIAM. All questions presented in these cases are decided adversely to appellants in the opinion in *Cooper's Case*, ante, 216, (this day decided.) The judgments are affirmed.

CROWLEY v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

CRIMINAL LAW—TRIAL—FAILURE TO INSTRUCT JURY.

Where all the evidence connecting the accused with the theft of a yearling is circumstantial, failure to charge the jury with reference to circumstantial evidence is reversible error.

Appeal from district court, Jack county; G. A. MCCALL, Judge.

Joseph Crowley, Jr., was convicted of the theft of a yearling. The prosecuting witness, who alone testified for the state, stated that his certain roan yearling disappeared from its range about the time alleged in the indictment. It was then in witness' mark, but was unbranded. Two months later witness found it in defendant's pasture, fresh branded and re-marked. The defendant then declared that he knew nothing whatever about the yearling, nor about the brand on it. About two weeks later, the defendant came to the witness, and told him that the yearling belonged to him, (defendant); that he bought it from a man whose name he refused to divulge; and that the brand, which was his, was put on the animal by him. Defendant afterwards fled the country, and was a fugitive from justice for two years. The defendant's mother, who was his only witness, testified that some time prior to the alleged theft the defendant traded with his brother, James, for some yearlings, and that it was her recollection that one of the yearlings he got in that trade was a roan animal.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In this case the evidence upon which the conviction is based is wholly circumstantial as to the taking of the alleged stolen animal by the defendant. He claimed the animal as his property, and admitted that he had placed his brand upon it; but claimed also that he had bought it. He never admitted that he took it from the range, or from the possession of the owner, and there is no evidence that is not circumstantial which connects him with the original taking of the animal. Such being the character of the evidence, the trial court committed a material error in failing to charge the jury with reference to circumstantial evidence, and for this error alone the judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

CHATTEL MORTGAGES—DISPOSING OF MORTGAGED PROPERTY—INDICTMENT.

An indictment for "disposing of" mortgaged property is fatally defective which does not allege the name of the person to whom it was disposed of, nor that he was unknown to the grand jury.

Appeal from district court, Lamar county; E. D. McCLELLAN, Judge.
Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This appeal is from a conviction for "disposing of and trading off" mortgaged property with intent to defraud. The indictment is fatally defective, because it does not allege the name of the person to whom the property was disposed of or traded, nor that the name of such person was unknown to the grand jurors. *Presley's Case*, 24 Tex. App. 494, 6 S. W. Rep. 540. The judgment is reversed, and the prosecution dismissed.

LANDA v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

1. THREATS AND THREATENING LETTERS—INDICTMENT—DELIVERY.

An indictment charging that the accused sent and delivered a letter to one W., threatening to accuse him of a crime, and that he did so send the letter with intent to extort money, but not alleging that he delivered the letter with such intent, does not charge the offense of delivering a letter with such purpose, under Pen. Code, Tex. art. 813.

2. CRIMINAL LAW—VENUE.

Where the letter was mailed in B. county the offense of sending was committed there, and was not triable in C. county, under Code Crim. Proc. Tex. art. 225, providing that offenses shall be prosecuted in the county where committed. HURT, J., dissenting.

Appeal from county court, Collin county; W. M. JOHNSON, Judge.

Issy Landa was convicted of delivering threatening letters, and appealed. Pen. Code Tex. art. 813, provides a punishment for delivering or sending a letter threatening to accuse the receiver of a crime for the purpose of extorting money from him. Code Crim. Proc. art. 225, provides that the proper county for the prosecution of offenses is that in which the offense is committed. *Issy Landa, pro se.* Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. It is charged in the information that the defendant did knowingly send and deliver to one W. H. Webb, a written letter, threatening to accuse said Webb of a criminal offense, the letter being set forth *in hac verba*, and that he did so send said letter with a view to extort money from the said Webb. It is to be observed that it is not alleged that the defendant delivered the letter with the view to extorting money, but only that he sent it with that view. We must therefore hold that as the offense of delivering a threatening letter the information is insufficient, as an essential element of such offense is that such letter be delivered with the view to extort money. Pen. Code, art. 813.

As to the sending of the letter in question, the evidence conclusively shows that it was sent in Bexar county, by being posted at San Antonio, in that county. The offense of sending was therefore complete in said county, and the venue of such offense is in that county, and not in Collin county. Code Crim. Proc. art. 225. Because the information is fatally defective with respect to the offense of delivering the letter in question, and because the

county court of Collin county is without jurisdiction of the offense of sending such letter, the judgment is reversed, and the prosecution dismissed.

HURT, J., dissents, being of opinion that the offense of sending the letter may be prosecuted in either Bexar or Collin county.

BROOKSER v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

1. CRIMINAL LAW—EVIDENCE—ADMISSIONS.

Defendant and others were discovered in the act of skinning a stolen cow in a slaughter-house. When officers entered, defendant had left, and the others said, "Arrest [defendant]; he is the guilty one, if anything is wrong." *Held*, that this statement was not admissible against defendant, there being nothing to show that he heard it.¹

2. SAME—CONSPIRACY.

Even if a conspiracy were shown, such statement would not be admissible, not being in furtherance of the common design.¹

3. SAME—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

A charge that, where "circumstantial evidence is relied upon to sustain a conviction, each fact or circumstance necessary to establish the conclusion of guilt must be proved beyond a doubt, and the facts so proved must be consistent with each other, and with the guilt of the accused, and, when considered together, must be so conclusive as to satisfy you beyond a reasonable doubt that the defendant is guilty as charged," is not sufficiently full.

Appeal from district court, Tarrant county; N. A. STEDMAN, Special Judge. Indictment found against Albert Brookser for theft.

The charge of the court, upon circumstantial evidence, was as follows: "And where, as in this case, circumstantial evidence is relied upon to sustain a conviction, each fact or circumstance necessary to establish the conclusion of guilt must be proved beyond a doubt, and the facts so proved must be consistent with each other, and with the guilt of the accused, and, when considered together, must be so conclusive as to satisfy you beyond a reasonable doubt that the defendant is guilty as charged."

No. 714 of Willson's Criminal Forms (referred to in opinion) is as follows: "In order to warrant a conviction of a crime on circumstantial evidence, each fact necessary to the conclusion sought to be established must be proved, by competent evidence, beyond a reasonable doubt; and all the facts (that is, necessary facts to the conclusion) must be consistent with each other, and with the main fact sought to be proved; and the circumstances, taken together, must be of a conclusive nature, leading, on the whole, to a satisfactory conclusion, and producing, in effect, a reasonable and moral certainty that the accused, and no other person, committed the offense charged."

B. G. Johnson, for appellant. Asst. Atty. Gen. Davidson, for the State.

HURT, J. The appellant and Switzer and Voight were found in possession of, and were skinning, a stolen cow, which was well known to them. After discovering these parties in the act of skinning the cow in a slaughter-house, the witness left, and soon returned with an officer and *posse*. When they entered and arrested Switzer and Voight, they (Switzer and Voight) said: "Arrest Albert Brookser; he is the guilty one, if anything is wrong." A witness stated that he approached the slaughter-house. He heard some one inside the slaughter-house say: "Arrest Albert Brookser; he is the guilty one, if any one is guilty." As the officers approached the house, a man was seen run-

¹See, as to when the admissions and declarations of co-conspirators are admissible in evidence, *State v. Banks*, (La.) 5 South. Rep. 18, and note; *People v. Irwin*, (Cal.) 30 Pac. Rep. —, and note; *State v. Johnson*, (Kan.) 19 Pac. Rep. 749, and note.

ning rapidly, and the circumstances point with great force to appellant as being the man; but it is a fact that the evidence fails to show, with any degree of certainty, that appellant was present or heard the remarks of Switzer or Voight. If not present, or, if he did not hear the remarks, he was not bound by them; the rule being that the accused must be present, or at least it must reasonably appear that he heard the statements of others, before they can be made evidence against him. This must be shown affirmatively by the prosecution, though it may be done by circumstances.

The assistant attorney general contends that a conspiracy is shown, and was not consummated, and hence the declarations of Switzer and Voight—the co-conspirators—were admissible. Let us concede for the argument the conspiracy, and that it was not at an end. Evidently the exclamation of Switzer and Voight: "Arrest Albert Brookser; he is the guilty party, if anything is wrong,"—was not in furtherance of the common design, and did not aid in the consummation of the conspiracy. Appellants' objection to this matter should have been sustained.

We are also of the opinion that the charge of the court upon the rule applicable to a case of circumstantial evidence is not sufficiently full. For the correct rule, see No. 714 of Willson's Criminal Forms.

The judgment is reversed, and the cause is remanded.

LAWS v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

1. HOMICIDE—TRIAL—INSTRUCTIONS.

Under Pen. Code Tex. art. 570, making homicide to prevent theft at night justifiable, it is error to omit to instruct the jury as to the meaning of the word "night," where the evidence shows that the killing occurred at or after sunset.

2. WORDS AND PHRASES—"NIGHT."

Pen. Code Tex. art. 710, relating to burglary, defining "day-time" to include any portion of the 24 hours from 30 minutes before sunrise until 30 minutes after sunset, a theft at night, within the meaning of the above act, is a theft committed at any time between 30 minutes after sunset and 30 minutes before sunrise.

3. HOMICIDE—JUSTIFIABLE KILLING—PREVIOUS INTENT.

It is not error to instruct the jury that if defendant killed deceased in the execution of a previously formed intent, and not to prevent the theft, such killing would not be justified, though done in the night-time, and while deceased was committing a theft.

Appeal from district court, Franklin county; W. P. McLEAN, Judge.

Talbert & Turner, R. E. Kennan, and H. Glass, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. Homicide is permitted by law when inflicted for the purpose of preventing theft at night, and the homicide in such case is justifiable at any time while the offender is at the place where the theft is committed, or within reach of gunshot from such place. Pen. Code, art. 570. In this case no question is made as to the commission of the homicide by the defendant, but the defendant claims that at the time he shot and killed the deceased the latter had committed theft of whisky belonging to the former, and was within gunshot of the place where the theft was committed, and that it was night-time when the theft and the homicide were committed, and that he committed the homicide for the purpose of preventing the consequences of the theft. There is evidence tending to support this defense.

In instructing the jury with reference to such defense, the court omitted to define "night-time." This omission in the charge was not excepted to, but was insisted upon as error in defendant's motion for a new trial. There is a conflict in the evidence as to the exact time when the homicide occurred. Some

of the witnesses fix the time at later than 30 minutes after sunset, and some at about sunset. This being the state of the evidence, it was very important to the defendant, we think, that the jury should understand the legal meaning of the word "night," as used in the statute referred to. This statute does not furnish a definition of the word, and we must therefore resort to other authorities for its meaning.

At common-law, "day-time" means those portions of the morning and evening wherein, though the sun is below the horizon, sufficient of his light is above for the features of a man to be reasonably discerned. If there is not sufficient light for this purpose, it is night. Light from the moon is not to be taken into account. There is no middle space between day and night, but where one begins the other ends. But the difficulties of applying this common-law rule are so considerable that it has been changed by statute in England, and in most of the American states, and these statutes prescribe exactly the time which separates the day from the night. Bish. Stat. Cr. § 276. In this state, with reference to the crime of burglary, it is provided: "By the term 'day-time' is meant any time of the twenty-four hours from thirty minutes before sunrise until thirty minutes after sunset." Pen. Code, art. 710. Again, it is provided that "words, which have their meaning specially defined, shall be understood in that sense, though it be contrary to their usual meaning." Id. art. 10. It is clear to our minds, in view of the provisions cited, that a "theft by night" is a theft committed at any time between 30 minutes after sunset and 30 minutes before sunrise, and the court should have so instructed the jury, and, having failed to do so, committed a material error, calculated to injure the defendant's rights.

Relating to the defense above mentioned, the court, among other instructions, gave the jury the following, in substance: "If you find that the defendant killed the deceased in the execution of a previously formed intent or plan to take his life, and not to prevent theft then being committed, or to prevent the consequences of the same, such killing would not be justified, though done in the night-time, and while deceased was committing or had committed a theft." This instruction was not excepted to, but was urged by defendant as error in his motion for new trial, and is insisted upon here as error. We are of opinion that the instruction is not erroneous. If the killing was upon malice, and not to prevent a theft, or the consequences of a theft, it would not be justified under the statute, although a theft by night was actually being committed by deceased at the time he was killed. It is not the intention of the statute to justify murder. Such a construction of the statute would, to our minds, be unreasonable, and exceedingly dangerous.

Other questions presented on this appeal are not discussed and determined, because not likely to arise on another trial. Because the charge of the court is materially defective in not instructing the jury in the legal meaning of "day-time" and "night-time," the judgment is reversed, and the cause is remanded.

MARTIN v. McCARTY.

(*Supreme Court of Texas.* December 4, 1888.)

1. PUBLIC LANDS—SALE OF SCHOOL LANDS—FILING STATEMENT.

To make valid a purchase of public school land, under act Tex. April 12, 1883, § 7, there must be a classification of the land, and the filing of a tabulated statement in the office of the surveyor of the county where the land is situated.

2. SAME—SALE IN COUNTY WHERE SITUATED.

Under section 8 of said act, the land must be sold at public outcry in the county where situated.

3. TRESPASS TO TRY TITLE—EVIDENCE—ACTUAL SETTLER.

In an action of trespass to try title by a purchaser of such land, the evidence of defendant, which merely shows that he settled upon and had possession of the land, and

erected valuable improvements thereon, is not sufficient to establish the fact that he was an "actual settler in good faith," so as to give him a preferred right of purchase under act Tex. April 12, 1883, § 5, which provides that "any actual settler in good faith, upon any land included in this act, who is now and was an actual settler in good faith on the 1st day of January, 1883, shall have the right," etc.

Commissioners' decision. Appeal from district court, Tom Green county; WILLIAM KENNEDY, Judge.

Trespass to try title by J. S. Martin against D. Q. McCarty. Judgment for defendant, and plaintiff appeals.

Fisher & Townes, for appellant. *Terrell, Walker & Gregory*, for appellee.

HOBBS, J. This is a suit by the appellant, J. S. Martin, against the appellee, D. Q. McCarty, to recover section 128, surveyed by the S. P. R. Co. for the state for the benefit of the common school fund, containing 640 acres of land, and situated in Tom Green county. The plaintiff's petition is in the usual form of an action of trespass to try title, and alleges ownership in plaintiff on the 2d day of January, 1884. It appears from the evidence in this case offered by the plaintiff that the land board of the state, under the act of April 12, 1883, placed the land which is the subject-matter of this suit upon the market for sale, and provided that any one desiring to purchase should make a written application, addressed to the secretary of said board, describing the land by block, number, etc., and with sketch of survey accompanying and price offered. This was to be registered by the surveyor of the county, and open to inspection. The surveyor was required to indorse on the application the bid and date of registry. This was to be done at least 10 days before the first Tuesday of the month following. The application was to be forwarded to the board for consideration. In accordance with the plan adopted by the land board for the purchase of the land, the plaintiff, on December 14, 1883, applied in writing to the surveyor of Tom Green county, who registered the application, and it was forwarded to the board at Austin, with the sum of \$42.67, the first payment on the land, which was received by the proper authorities. It was shown by the indorsements upon the application of Martin that his bid was number 220. His obligation for the balance of the unpaid purchase money was executed in the sum of \$1,237.33, payable to the state. The payment of the sum of \$61.86, interest upon the foregoing obligation, is also shown. Upon the application of Martin on December 14, 1883, forwarded, as above stated, to the board at Austin, the land in controversy was awarded to him on the 2d day of January, 1884. B. B. Tarver testified that he was the surveyor of Tom Green county in 1883 and 1884, and was the agent of the land board, authorized to sell the school land in that county; that as such agent he did not sell the land in controversy to Martin, in that county; he received and registered the application and bid made by Martin in December, 1883, and forwarded it to the board; that there was no classification made and tabulated statement of the school land on file in his office under the law of April 12, 1883, or at any other time under the resolutions of the land board; that the land in controversy was not sold, or offered for sale, at public outcry in Tom Green county; that there were about 140 applications received by him on the last day they could be filed in his office; he did not offer the land for sale in Tom Green county at public outcry. The foregoing facts constituted the foundation of appellant's title. It appears from the testimony that the application of appellee was rejected on April 24, 1884. The questions raised upon this appeal are whether the appellant (plaintiff in the lower court) has established any title, complete or inchoate, which would authorize a recovery. If not, has the appellee shown by the proof that he has title as an actual settler, as specially pleaded by him?

The conclusions of fact and law found by the court were "that the land in controversy was on the 14th day of December, 1883, public free-school land,

in Tom Green county; that on the 17th day of December, 1883, the appellant, Martin, made application to purchase under section 7 of the act of April 12, 1883, which was duly filed, and registered in the surveyor's office; that the application was filed in said office on December 21, 1883, and in the office of the secretary of the land board, on January 3, 1884; that the first payment of \$42.67 was made by Martin on the land, and that it was awarded to him by the board on the 2d day of January, 1884; that the land was not sold in Tom Green county. The conclusion of law found from these facts by the court was that the sale, not having been made in Tom Green county, where the land was situated, was void."

The judgment was that "the plaintiff take nothing by his suit, and the defendant go hence with his costs, and the defendant take nothing by his cross-action, and recover costs of plaintiff." Both parties appealed, and assigned errors.

The defendant, McCarty, pleaded specially his title as a purchaser, under section 5 of the act of April 12, 1883, for the benefit of actual settlers in good faith, who had settled on or before the 1st day of January, 1883, under the act of April 6, 1881. The proof in support of his title consisted of his application as such purchaser to the secretary of the land board, dated July 14, 1883, with the statement that the land in controversy had been duly appraised by the surveyor of Tom Green county, and by the commissioner's court of said county approved, and filed in the land-office, as provided by section 5 of the act of 1883, showing the appraisement to have been made, under the act of 1881, at \$100 per acre, accompanied with his affidavit that on the — day of March, 1882, he had procured the surveyor to survey the said section 128; that he immediately entered upon, and has continuously held possession of, and occupied, the same, and does now have full and complete possession and occupancy of said section; that he has erected valuable improvements thereon, consisting of a *corral* and lumber dwelling-house, and has made every effort that the law permitted to purchase the same, and desires now to purchase said section under the act of 1881, as provided by section 5 of the act of 1883, with the supporting affidavits of two citizens, each stating that he knew of his own personal knowledge that said applicant settled upon said land prior to January 1, 1883, and has continuously held and occupied said land up to the present time, and has valuable improvements on said land. There was proof of the payment by appellee, McCarty, of the sum of \$71, being one-thirtieth of the appraised value of the land, and interest for one year thereon. It is apparent, we think, from the foregoing, that the appellee, McCarty, having applied to purchase the land on the 14th day of July, 1883, under section 5 of the act of April 12, 1883, providing for the acquisition of the same by actual settlers in good faith, he would be entitled to a decree, under his pleadings, had his application been a full compliance with this law, there being no assertion of or claim to any right in appellant, Martin, prior to December, 1883; but it is nowhere shown by the evidence that the appellee, McCarty, was a settler in good faith, as that character and term has been repeatedly described and defined in this state. *Burleson v. Durham*, 45 Tex. 159. That this was essential to a recovery by appellee is recognized by his answer. But in this important and vital respect the proof does not support the answer which fully alleges him to be such purchaser. This question has been discussed in *Snyder v. Nunn*, 66 Tex. 258, and cases there cited, and all that we might say with reference to the necessity for establishing this fact would be but a repetition of what was there said. The evidence of appellee merely shows that he settled upon, and had possession of, the land, and erected valuable improvements thereon, on the — day of March, 1882; that he desired to purchase the land, and still does wish to purchase the same, under the act of 1881, as provided by section 5 of the act of 1883. The statute of April 6, 1881, gives a preferred right to purchase to

"any persons having improvements upon any of such land, prior to the taking effect of this act shall have the preference in the purchase thereof, for the period of six months next after the value thereof is fixed." Gen. Laws 1881, § 2, p. 119. Section 5 of the act of April 12, 1883, provides that "any actual settler upon any land included in this act, who is now and was an actual settler in good faith on the 1st day of January, 1883, shall have the right," etc., "provided that any actual settler, in good faith, upon lands appraised," etc., "in accordance with the provisions of sections one and two of the act of 1881," etc., "shall be permitted to purchase." It is not pretended that he has any right by reason of having improvements upon the land prior to April 6, 1881. If so, he might, it seems, under section 2 of that act, have had a preferred right to purchase for six months from the date the act of 1881 took effect, which was April 6, 1881. But his right rests primarily upon the fact of being, under the law by virtue of which he asserts title, an actual settler in good faith. Not having brought himself within the provisions of the statute upon which he relies, he has no reason, we think, to complain of the judgment in this case.

The remaining question, then, is, has the appellant shown such a compliance with the law of 1883 as would authorize a recovery? As we have stated, there was no compliance with the law requiring a classification of the land, and the filing of a tabulated statement in the office of the surveyor of the county where the land was situated. Nor was there any offer of the land for sale at public outcry at the court-house of the county by the person authorized by the board to sell, as provided by section 6 of the act. In *Taylor v. Burke*, 66 Tex. 646, 1 S. W. Rep. 910, it was said that this was a requirement of the law, but the question was not raised in that case, and not decided. In *Snyder v. Nunn*, before cited, it was held that no right vested in a purchaser as an actual settler, where the application was made in the absence of an appraisement; in *Ramsey v. Medlin*, 55 Tex. 248, also, an appraisement was held to be absolutely necessary to entitle a purchaser to recover.

We think the rule applies, with equal reason, to the requirement of the law that the classification and tabulated statement shall be made and filed. The statute prescribes with particularity the facts which must exist, as said in *Snyder v. Nunn*, 66 Tex. 260, before the applicant shall be entitled to the land; and though payments upon their respective applications were made by appellant and appellee, and were accepted, these have been held insufficient to warrant the presumption that an appraisement had been made. Where the evidence was silent upon that point, in the case under consideration the uncontroverted proof was that no classification of the land and tabulated statement had been made and filed in Tom Green county, under the act of 1883, or at any other time. So, too, there was undisputed testimony that the agent authorized by the board to sell did not, as required by section 6 of that act, sell, or offer to sell, at public outcry, this land. That which the law had prescribed as absolutely essential to be done to vest any right to the land in appellant was not done, and we therefore think he failed to establish his right to recover, and we are of opinion that the judgment is correct as between the parties to this suit. But we do not wish to be understood as saying that the appellee, McCarty, is precluded from showing that he is entitled to the land as a settler in good faith under the act of April 12, 1883. If he can establish this fact, he would be entitled to recover.

The judgment, as between the parties in this case, should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment affirmed.

MUSICK v. STATE.

(Supreme Court of Arkansas. January 12, 1889.)

INTOXICATING LIQUORS—ILLEGAL SALES—EVIDENCE.

Where a merchant without a license to sell liquor kept a stock of brandy cherries in pint and quart bottles, which he sold to customers, furnishing glasses with which they could drink the brandy if they chose, he was properly convicted of selling liquor without a license.

Appeal from circuit court, Mississippi county; J. E. RIDDICK, Judge.
H. M. McVeigh, for appellant. D. W. Jones, Atty. Gen., for the State.

COCKRILL, C. J. The appellant was convicted of selling liquor without a license. He made no specific objection to the charge of the court at the trial, and urges none here. His contention is that the verdict is not sustained by the evidence. The proof was that he sold brandy cherries, and the case of *Rabe v. State*, 39 Ark. 204, is relied upon to reverse the judgment. *Rabe's Case* is only to the effect that it is not a violation of the law to sell fruit preserved by the use of brandy. The proof in the case in hand is to the effect that the defendant was engaged in business as a merchant; that knowing, as he stated to one of the witnesses, that customers would come to trade where they could get something to drink, he kept a stock of brandy cherries in pint and quart bottles, which he offered openly for sale, furnishing glasses to the purchasers when they desired to drink the liquor on the premises. The bottles were filled with fruit, but contained, nevertheless, one-half their capacity of liquor, which the proof clearly shows was intoxicating. The defendant himself testified that the use of it sometimes made his customers "boozy," which the jury doubtless understood to mean the incipient stage of drunkenness; and he would refuse to sell, he said, to persons in that condition. Having a fear of incurring the heavier penalties imposed by the act of congress, or as he expressed it on the witness stand, in order that he might not be "put to any trouble in the federal court," he procured a United States revenue license. He testified that he thought he had the right to sell brandy fruit. He was not prosecuted for selling brandy fruit, but brandy; and, in at least one of the sales put in evidence, he sold the liquor and retained the fruit, setting the bottle containing it back upon the shelf. But it is not necessary to resort to this sale to sustain the conviction. When, not mistaking the fact, one intentionally makes a sale that is prohibited by statute, he violates the law; it being no excuse for him that he deems what he does to be right. Bish. St. Crimes, § 1023; 1 Bish. Crim. Law, § 345; *Beard v. State*, 43 Ark. 284; *In re Jackson*, 25 Fed. Rep. 550; *Reynolds v. U. S.*, 98 U. S. 167.

The jury would have failed in their duty had they returned any other verdict.

Let the judgment be affirmed.

CLINE v. STATE.

(Supreme Court of Arkansas. January 5, 1889.)

1. WITNESS—IMPEACHMENT—REPUTATION.

Under Mansf. Dig. Ark. § 2902, allowing a witness to be impeached by evidence of his general reputation for truth or immorality, an inquiry as to whether one, from his knowledge of his "reputation for truth and veracity, morality and chastity," would believe him on oath, is not permissible.

2. SAME—EVIDENCE—CHARACTER.

A conviction will not be set aside on the ground that evidence was introduced that a state's witness bore a good reputation in the community where he resided 25 or 30 years before the trial, the admission of such testimony being in the discretion of the court.

8. HOMICIDE—TRIAL—INSTRUCTIONS—HARMLESS ERROR.

Where the fact of the killing is admitted, and attempted to be justified, an instruction that, "in considering whether the defendant was justified in taking the life of the deceased," etc., if erroneous as assuming the existence of the fact, is harmless.

4. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL.

A reversal will not be granted on the ground that the prosecuting attorney read in argument the report of another case, where it does not appear that it was used to oppose the court's charge, and no objection was made at the time.

Appeal from circuit court, Carroll county; J. M. PITMAN, Judge.

J. D. Walker, for appellant. Dan. W. Jones, Atty. Gen., for appellee.

COCKRILL, C. J. The appellant was indicted for murder. He was convicted of murder in the second degree, and sentenced to imprisonment for five years. On the trial he proposed to impeach a material witness for the state through numerous depositions which had been previously taken for the purpose. After the impeaching witnesses had testified that the general character for morality of the assailed witness was regarded as bad by his neighbors, they were asked whether, from their knowledge of his "reputation for truth and veracity, morality and chastity," they would believe him on oath. The court excluded the testimony given in response to the last two questions, and we are asked to reverse the judgment on that ground.

In the case of *Hudspeth v. State*, 50 Ark. —, 9 S. W. Rep. 1, we ruled in accordance with the established practice in this state, and what appears to be the general rule elsewhere, (see *Hamilton v. People*, 29 Mich. 186,) that it is proper to inquire of an impeaching witness whether, from his knowledge of the general reputation of the assailed witness among his neighbors, he regards him as worthy of belief on oath. But the rejected offer to discredit the witness in this case was based, not upon his general reputation, but upon his reputation for a particular vice.

It is a mixed question, on authority, whether it is the general moral character of a witness, or his general reputation for veracity, that is the proper subject of judicial inquiry. A provision of the Code of Civil Procedure extends the inquiry beyond the general reputation for truth to that of morality in general, (Mansf. Dig. § 2902,) and this provision has been construed by this court to apply to criminal causes. *Majors v. State*, 29 Ark. 112; *Lawson v. State*, 32 Ark. 220; *Anderson v. State*, 34 Ark. 262. But the statute, in terms, limits the inquiry to the general reputation for immorality, and it was intended only to make a legislative selection between the contending arrays of judicial authority.

The case of *Bakeman v. Rose*, 18 Wend. 146, is commonly cited as a leading case on the side of the more extended inquiry. But it is there distinctly announced that it is the general character only that can be inquired into,—whether it be a reputation for untruth, or such other general immorality as renders the witness unworthy of belief. Page 148. The law rejects the conclusion, it is said, that a person guilty of one immoral habit is necessarily disposed to practice all others. The term "general character" is used in this connection in contradistinction to particular facts or parts of character. *Ward v. State*, 28 Ala. 63. "It certainly is a salutary, and even necessary, rule of evidence," says TRACY, S., in *Bakeman v. Rose*, *supra*, "that the credit of a witness should only be impeached by proof of his moral character generally, and not by proof of a particular immoral act, or by proof of a general reputation for a particular immorality, unless that particular immorality be falsehood. This principle is concurred in by all elementary writers upon evidence, and has been maintained by courts everywhere." Page 153. Statutes similar to ours are in force in other states, and they have not been construed to extend the inquiry further than to the general reputation for morality. *State v. Egan*, 59 Iowa, 636, 13 N. W. Rep. 730; *Kilburn v. Mullen*, 22 Iowa,

498; *People v. Beek*, 58 Cal. 212. Evidence of want of chastity is not, therefore, permissible to impeach the credibility of a witness. *Bakeman v. Rose*, *supra*; *Kilburn v. Mullen*, *supra*; *State v. Larkin*, 11 Nev. 380; *Com. v. Churchill*, 11 Mete. 538; *Gilchrist v. McKee*, 4 Watts, 880; Rap. Wit. § 197; 1 Greenl. Ev. § 461.

As the naked question whether, from the witness' reputation for chastity, he was or was not worthy of belief, was inadmissible, it was improper to couple the question with one relating to his reputation for truth and morality, as it would still call for an expression of opinion as to the effect of chastity, or a want of it, upon the credibility of testimony. *Massey v. Bank*, 104 Ill. 334, 335. It was not error, therefore, to exclude the evidence.

The state introduced witnesses to sustain the character of the assailed witness. Some testified that they knew his reputation in the community where he resided at the time of the trial, and that he was worthy of belief; and others knew that he bore a good reputation in the community where he resided 25 or 30 years before. This evidence was all objected to by the appellant. There can be no question about its admissibility, except as to the limit that was given in going back to so remote a time to establish character. But the exclusion or admission of testimony in such cases rests in the discretion of the court, and where remoteness is the only objection, and the circumstances of the case show no abuse of judicial discretion, the rule is to allow the verdict to stand. *Snow v. Grace*, 29 Ark. 131. It may be that the evidence was too remote to shed much light upon the question, but it was relevant and responsive to the collateral issue raised by the appellant, and we cannot see how he was prejudiced by it.

In the course of a somewhat lengthy, but well-considered, charge, the court used this language: "In considering whether the defendant was justified in taking the life of the deceased at the time and in the manner that he did, you will consider" the circumstances, etc. It is said that this is erroneous, because it assumes that the appellant did the killing charged in the indictment. It is not the province of the court to instruct juries upon the facts. It is prohibited by the constitution, and instructions which assume that a controverted fact is proved, though the testimony on one side be slight, is erroneous. We have so held frequently. But where no other conclusion could be arrived at upon the evidence it is a harmless error, if error at all, to assume the existence of the fact, and a judgment is never reversed for a cause from which no prejudice could have resulted. Hayne, New Trials & App. § 121 [b.] pp. 344, 345. Sackett, Instructions to Juries, pt. 1, § 17, and cases cited. See *Overton v. Matthews*, 35 Ark. 155.

In this case there was no controversy about the fact of the killing. All the witnesses for the state and the defense who knew anything of that fact testified that the prisoner did it. The fact was never controverted by him at any time. He testified in his own behalf on the trial, admitting the killing, and undertook to justify it then, as he had done before, upon the plea of self-defense. The killing was not a disputed fact, and the charge affords no grounds for a reversal. It was so held upon a charge of murder in the case of *Davis v. People*, 114 Ill. 86. See *Hanrahan v. People*, 91 Ill. 142.

The only other objection urged against the charge is on the question of reasonable doubt. The court refused no instruction upon this point, but charged the jury to acquit the prisoner if they entertained a reasonable doubt of his guilt, and defined "reasonable doubt" in accordance with our decisions.

A reversal is asked because the prosecuting attorney read to the jury the report of the case of *Duncan v. State*, 49 Ark. 543, 6 S. W. Rep. 164. Granting that the obligation to retreat before taking the life of the assailant, which we held rested upon the defendant in that case, did not exist under the facts of this, it does not follow that the judgment should be reversed. The charge of the court was applicable to the facts of the case under trial; the *Duncan*

Case was read, not as controlling this case, but in argument; and there is no suggestion that it was used in opposition to the court's charge, but only by way of illustration; and the record does not disclose that any attempt was made to prevent its use, or that the court was asked to make any ruling in regard to it. Appellate jurisdiction is limited to the correction of errors committed by the circuit courts, and until the trial court has ruled upon the question, or grossly neglected its duty in not ruling, no error has been committed. The rule is applicable to this class of irregularities. *Green v. State*, 38 Ark. 318; *Railway Co. v. Cavenesse*, 48 Ark. 106, 2 S. W. Rep. 505. The court may permit law-books to be read to the jury, (*Curtis v. State*, 36 Ark. 292,) but it is not a practice to be commended.

Finding no error in the record, the judgment is affirmed.

SHARP v. STATE.

(Supreme Court of Arkansas. January 5, 1889.)

1. HOMICIDE—MURDER.

One who willfully and unlawfully inflicts upon another a wound not in itself mortal, but from which, and the erroneous treatment of the same, by a physician, the wounded person dies, is guilty of murder.

2. CRIMINAL LAW—APPEAL—HARMLESS ERROR.

Where two are jointly tried for murder, and it appears that appellant gave no active aid in inflicting the wound, but prevented his co-defendant from giving a second blow, and was implicated, if at all, by facts preceding the conflict, the refusal of an instruction as to the right of a weaker man to defend himself with a knife, when attacked by a stronger, need not be reviewed, after the death of the co-defendant by whom the wound was inflicted.

3. SAME—CONDUCT OF TRIAL—REMARKS OF JUDGE.

Witnesses saw defendants have knives shortly before and after the wounding. One witness described a conflict between one defendant and deceased, during which appellant, the other defendant, came in, and grabbed at them, and they left the room followed by appellant. He saw a knife in the hand of deceased, but saw none in appellant's hands. Held, that it was error for the judge to ask, "Do you mean to say that you saw these men fighting with knives, and did not interfere?" and to reply, when it was objected that the witness did not state that he saw them so fighting, that "the jury will be the judge of that;" as the jury might infer from such statements that by "these men" the judge referred to defendants, and was of opinion that they fought with knives.

Appeal from circuit court, Garland county; J. B. WOOD, Judge.

G. W. Murphy, for appellant. Dan. W. Jones, Atty. Gen., for appellee.

BATTLE, J. Appellant and Jasper Dunkin were jointly indicted for murder in the first degree, were jointly tried, and were convicted of murder in the second degree. They moved for a new trial. During the pendency of the motion Dunkin died. The motion was denied, and Sharp appealed.

It is alleged in the indictment that the accused murdered Mike Martin by stabbing him with a knife. The evidence shows that Dunkin stabbed him, and that a physician was called in to treat his wound. Defendants introduced the testimony of experts for the purpose of proving that the wound was not mortal, and that the death of the deceased was caused by the maltreatment of the physician.

As to the responsibility for the death of Martin, the court instructed the jury, over the objection of defendants, as follows: "When one willfully and unlawfully inflicts upon another a wound which is not within itself mortal, yet if, by improper treatment of such wound by the physician in charge, it becomes mortal, and the person so wounded dies from such wound, and the erroneous treatment of the same by such physician, the person inflicting such wound is originally responsible for the death." "If you find from the evi-

dence in this case that the defendants inflicted upon Mike Martin a mortal or dangerous wound with a knife, and you also find that said wound was erroneously treated by the physician, and that said Martin died from said wound, and such erroneous treatment of the same, you will find the defendants guilty of murder or manslaughter, according as the evidence may show."

Are these instructions erroneous? Chief Justice BIGELOW, after a careful examination of the authorities upon this question in *Com. v. Hackett*, 2 Allen, 141, said: "The well-established rule of the common law would seem to be that if the wound was a dangerous wound,—that is, calculated to endanger or destroy life,—and death ensued therefrom, it is sufficient proof of the offense of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskillful or improper treatment aggravated the wound, and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. 1 Russ. Crimes, (7th Amer. Ed.) 505; Rosc. Crim. Ev. (3d Ed.) 703, 706; 3 Greenl. Ev. § 139; *Com. v. Green*, 1 Ashm. 289; *Reg. v. Haines*, 2 Car. & K. 368; *State v. Baker*, 1 Jones, (N. C.) 267; *Com. v. McPike*, 3 Cush. 184. The principle on which this rule is founded is one of universal application, and lies at the foundation of all our criminal jurisprudence. It is that every person is to be held to contemplate and to be responsible for the natural consequences of his own acts. If a person inflicts a wound with a deadly weapon in such manner as to put life in jeopardy, and death follows as a consequence of this felonious and wicked act, it does not alter its nature or diminish its criminality that other causes co-operated in producing the fatal result. Indeed, it may be said that neglect of the wound, or its unskillful and improper treatment, which were of themselves consequences of the criminal act, which might naturally follow in any case, must in law be deemed to have been among those which were in contemplation of the guilty party, and for which he is to be held responsible. But, however this may be, it is certain that the rule of law, as stated in the authorities above cited, has its foundation in a wise and sound policy. A different doctrine would tend to give immunity to crime, and take away from human life a salutary and essential safeguard. Amid the conflicting theories of medical men, and the uncertainties attendant on the treatment of bodily ailments and injuries, it would be easy, in many cases of homicide, to raise a doubt as to the immediate cause of death, and thereby to open a wide door by which persons guilty of the highest crime might escape conviction and punishment."

In *Reg. v. Holland*, 2 Moody & R. 351, "it appeared by the evidence that the deceased had been waylaid and assaulted by the prisoner, and that, among other wounds, he was severely cut across one of his fingers by an iron instrument. On being brought to the infirmary, the surgeon urged him to submit to the amputation of the finger, telling him, unless it were amputated, he considered that his life would be in great hazard. The deceased refused to allow the finger to be amputated." At the end of two weeks lock-jaw followed as the result of the wound, and caused his death. It was held that the prisoner was guilty of murder.

Mr. Greenleaf, in his work on Evidence, § 139, says: "If death ensues from a wound given in malice, but not in its nature mortal, but, which being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for, if the wound had not been given, the party had not died."

Mr. Bishop, in his work on Criminal Law, says: "But where the wound is not of itself mortal, and the party dies in consequence solely of the improper

treatment, not at all of the wound, the result is otherwise. * * * But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death; and the wound need not even be a concurrent cause. Much less need it be the next proximate one; for, if it is the cause of the cause, no more is required." 2 Bish. Crim. Law, (7th Ed.) § 639; *State v. Morphy*, 33 Iowa, 270; *Kee v. State*, 28 Ark. 155; *Smith v. State*, 50 Ark. —, 8 S. W. Rep. 941; *Crum v. State*, 1 South. Rep. 1.

The instructions were properly given.

The defendants asked, and the court refused to give, the following and other instructions, to the same effect, to the jury: "The right of self-defense is measured by the necessity, or what appears to be the necessity, in the given case; and therefore if a person of great physical strength assaults a feeble one, without any manifest or apparent intent to kill him, but with much greater force and violence than he is able to resist by the mere use of his natural members, the person thus assaulted may, if he has no other reasonable way or means of avoiding or averting the violence and injury, avail himself of any reasonable instrument or means of defense in his possession or within his reach; and if, while defending himself therewith against such assault and injury, and not in a spirit of revenge, ill-will, wantonness, or recklessness, or for the purpose of unnecessarily injuring the assailant, he inflicts upon the assailant a wound or stab which is not mortal, but a person called as a surgeon, by performing upon it an unwarranted operation, renders it mortal, or makes an additional one, which is mortal, and death results therefrom, he (the person assaulted) cannot be held criminally liable for the death or homicide."

The death of Dunkin makes it unnecessary for us to decide the question raised by this instruction. The evidence shows that appellant was present when deceased was stabbed, and prevented Dunkin from stabbing him the second time. He gave no active aid or assistance to Dunkin in the inflicting of the wound. There was no positive evidence that he advised or encouraged it at the time it was done. The facts which implicated him, if any, preceded the conflict in which the wound was inflicted. In convicting him the jury must have concluded that there was an understanding between Dunkin and Sharp to do some unlawful act, and that Dunkin, when proceeding according to the common plan, inflicted the wound. Under this state of facts, the instructions asked and refused could have been of no service to appellant. All that is in them which could have been of any advantage to him was included in other instructions which were given; for the court expressly told the jury that they could not convict both of the defendants, unless the evidence showed that they inflicted upon the deceased the wound of which he died, or that one inflicted the wound and the other was present, and aided and assisted him therein, or was present and ready and consented to aid, abet, or assist; and that, if they believed from the evidence that the wound was not inflicted by Sharp, they must acquit him, unless they found from the evidence that he assisted the person who inflicted it by acting in concert with him, or counseled or advised him to inflict it. If Dunkin was assaulted by the deceased, and to protect himself, through no spirit of revenge, ill-will, wantonness, or recklessness, or for the purpose of unnecessarily injuring his assailant, stabbed him, it was the duty of the jury, under these instructions, to have acquitted the appellant.

On the trial one Woods testified that he saw the difficulty between Dunkin and the deceased; that he was talking with Dunkin, when deceased asked Dunkin where his (deceased's) wife was, and Dunkin replied he did not know. Deceased then said he (Dunkin) was a liar, and commenced striking at him. Dunkin retreated, and deceased followed. When they reached a corner of the room in which the difficulty occurred, Dunkin asked the deceased not to

cut him. About this time Sharp came into the room, and requested them to stop, and, they refusing to do so, he sprang forward, and grabbed at them, or one of them, and Dunkin fled, the deceased and Sharp following; and, as they went through the door, he (witness) saw a knife in the hands of the deceased, but did not see Sharp with any. Other witnesses had testified that they had seen Sharp and Dunkin with knives in their hands a short time before and after the deceased was wounded. Woods further testified that he made no effort to prevent or stop the fighting. After he had made this statement, and while he was testifying, the presiding judge asked him this question: "Do you mean to say that you remained there and saw these men fighting with knives, and did not interfere in any way to prevent it?" Whereupon defendants' attorneys stated that the witness had not said that he saw them fight with knives; and the judge responded: "The jury will be the judge of that. I am examining the witness, and you can object if you don't think it proper." And the defendants excepted, and appellant now insists he was prejudiced by this question, in the manner in which it was asked, and by the remark made by the judge in response to his attorneys, and on that account should have a new trial.

The judge has the right, in a criminal prosecution, to interrogate the witnesses. But he has no right to usurp the place of the state's attorney, "and prescribe the order of introduction of the witnesses, and become active in their examination;" nor has he the right to assume the duties resting on the prisoner's counsel in the general conduct of the defense. He may ask questions which the attorneys had the right to propound, and failed to ask, when the answers to the same may tend to prove the guilt or innocence of the accused. It would be a reproach to the laws of the state if he was required to sit and see the guilty escape, or the innocent suffer, through a failure of parties or their attorneys to ask a witness a necessary question. *State v. Lee*, 80 N. C. 483; 1 Whart. Ev. § 496.

In all trials the judge should preside with impartiality. In jury trials especially, he ought to be cautious and circumspect in his language and conduct before the jury. He should not express or intimate an opinion as to the credibility of a witness, or as to controverted facts; for the jury are the sole judges of facts, and the credibility of witnesses, and the constitution expressly prohibits the judge from charging them as to the facts. The manifest object of this prohibition was to give to the parties to the trial the full benefit of the judgment of the jury as to facts, unbiased and unaffected by the opinion of judges. Any expression or intimation of an opinion by the judge, as to questions of fact or credibility of witnesses, necessary for them to decide in order for them to render a verdict, would tend to deprive one or more of the parties of the benefits guaranteed by the constitution, and would be a palpable violation of the organic law of the state.

In *McMinn v. Whelan*, 27 Cal. 319, a witness, on cross-examination, was interrogated in respect to her residence and business. Objection was made to this course of examination. The court overruled the objection, at the same time remarking that the witness was a woman of respectability. The appellant insisted that the remark of the judge was an irregularity of sufficient magnitude to authorize the reversal of the judgment of the court below. Mr. Justice CURREY, in delivering the opinion of the court upon this question, said: "From the high and authoritative position of a judge presiding at a trial before a jury, his influence with them is of vast extent, and he has it in his power, by words or actions, or both, to materially prejudice the rights and interests of one or the other of the parties. By words or conduct he may on the one hand support the character or testimony of a witness, or on the other may destroy the same, in the estimation of the jury; and thus his personal and official influence is exerted to the unfair advantage of one of the parties, with a corresponding detriment to the cause of the other. We

regret the necessity for an expression of our disapproval of the irregularity of which complaint is made, and, though we do not impugn the expression as designed to aid the side of the plaintiff, we may say we should not hesitate to reverse the judgment because of it, if the same depended in any material degree upon the testimony of the witness whose character and standing was thus indorsed."

In *People v. Williams*, 17 Cal. 146, the judge charged the jury that "the fact that the deceased was a Chinaman gave the defendant no more right to take his life than if he had been a white person; nor did the fact, if you so find, that the defendant was seeking to enforce the collection of taxes against another Chinaman, or even against his victim, give the defendant any right to take his life. Our laws do not sanction the sacrifice of human life in order to enforce the collection of taxes or licenses." In reference to this charge the supreme court said: "The word 'victim,' in the connection in which it appears, is an unguarded expression, calculated, though doubtless unintentionally, to create prejudice against the accused. It seems to assume that the deceased was wrongfully killed, when the very issue was as to the character of the killing. We are not disposed to criticise language very closely in order to reverse a judgment of this sort, but it is apparent that, in a case of conflicting proofs, even an equivocal expression, coming from the judge, may be fatal to the prisoner. When the deceased is referred to as a 'victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person; and it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great, or even controlling, influence."

In *People v. Dick*, 84 Cal. 663, the judgment of the court below was reversed on account of the use of the following language in the charge to the jury: "The defendant is charged with having murdered, in this county, on or about the 12th day of May, 1866, one S. M. Simpson. Now, the first question for your decision is this: Was S. M. Simpson, on or about the 14th day of May, 1866, in this county, murdered? In determining that question, the court thinks you can have no hesitation whatever." In respect to this language, the court said: "We are of opinion, however, that the other portion of the charge noted is within the clause of the constitution which prohibits judges from charging juries upon matters of fact, and are unable to conceive of any state of facts under which, in view of that restriction, a judge can be allowed to address such language to a jury. * * * Whether wisely or not, the constitution has abrogated the rule of common law by which judges were allowed to express their opinions as to the facts in issue, or as to the weight of evidence. To weigh the evidence and find the facts is, in this state, the exclusive province of the jury, and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law."

The conviction of the appellant depended upon his participation in the wounding of the deceased. Upon this point the evidence was weak and unsatisfactory. When the judge said: "Do you mean to say that you remained there, and saw these men fighting with knives, and did not interfere to prevent it?"—the jury might reasonably have inferred that "these men" referred to were the defendants, and that the judge was of the opinion they were concerned in the stabbing of the deceased; and when the defendant's attorneys

stated that the witness had not said that he saw them fighting with knives, and the judge responded, "The jury will be the judge of that," they might reasonably have concluded that the men referred to by the judge in the question asked were the defendants, and that, in his opinion, they fought with knives, as they were selected to decide whether defendants were guilty or innocent of the killing of the deceased. In the midst of doubt as to what their verdict should be as to appellant, it was natural for them to seize upon and adopt any opinion which they understood the judge to have expressed or intimated upon the questions which they were required to decide. It is therefore evident he did not have a trial according to law,—such as was guaranteed to him by the constitution of this state,—and in this respect was prejudiced by the question and reply of the court. In so deciding, we do not mean to impute to the judge an improper motive. On the contrary, we are satisfied that the question was asked and the reply was made with no intention to influence the jury or prejudice the defendants. Judgment reversed, and a new trial granted.

PRATT v. STATE.

(*Supreme Court of Arkansas. January 12, 1889.*)

1. RAPE—ASSAULT WITH INTENT TO COMMIT.

Under an indictment for rape, a conviction may be had of assault with intent to commit rape, under Mansf. Dig. Ark. § 2288, providing that, under an indictment for an offense consisting of different degrees, defendant may be convicted of any degree not higher than that charged in the indictment, and of any offense included in it.

2. SAME—EVIDENCE.

Where it is conceded that the evidence is sufficient to sustain a verdict for rape, its sufficiency to convict of an assault with intent to rape cannot be questioned.

3. SAME—INSTRUCTIONS.

In such a case, the refusal to charge that, if the prosecutrix made the charge under the threats of her husband, the jury must acquit, is not reversible error, as it could not affect the question of defendant's guilt, but only the credibility of the prosecutrix.

Appeal from circuit court, Randolph county; N. W. BUTLER, Judge.

Defendant was indicted for rape, and convicted of assault with intent to rape. Mansf. Dig. Ark. § 2288, provides that, in indictment for an offense consisting of many degrees, defendant may be convicted of any degree not higher than that charged in the indictment, and of any offense included in it.

Appellant, *pro se*. D. W. Jones, Atty. Gen., for the State.

COCKRILL, C. J. 1. An assault with intent to commit a rape is included in the charge of rape, and a conviction may be had of the former offense under an indictment for the latter. Mansf. Dig. § 2288; *Davis v. State*, 45 Ark. 464; 1 Bish. Crim. Law, § 809.

2. It is conceded that the testimony would sustain a verdict for rape. That being true, there can be no question of its sufficiency to sustain the verdict for assault with intent to commit the offense. If it be conceded that the testimony would logically demand a verdict of guilty of rape or nothing, it does not follow that a conviction of an attempt to rape should be avoided here. The jury had the power to return the verdict, and the offense is less than the crime charged. The case is not distinguishable, in that respect, from *Fagg's Case*, 50 Ark. 506, 8 S. W. Rep. 829; *Green v. State*, 38 Ark. 310; *Allen v. State*, 37 Ark. 435.

3. The court refused to charge the jury as follows: "If the jury believe from the evidence that Nora Shaver, the woman upon whom the assault is charged to have been made, made the charge against the defendant, as mentioned in the indictment, under duress or threats of and from her husband, you will acquit."

There was evidence tending to show that the husband threatened to abandon the woman unless she made complaint of her treatment to the magistrate. This could not have affected the question of the defendant's guilt or innocence. The most that could be claimed was that, under the influence of the threat, the wife may have made a false charge of rape, and so affected her credibility. Affirmed.

BAILEY *et al.* v. TYGART VALLEY IRON CO.

(Court of Appeals of Kentucky. December 22, 1888.)

1. EJECTMENT—ADVERSE POSSESSION—INSTRUCTIONS.

Where defendant in ejectment proves continuous adverse possession of the land in controversy for 16 years under a title-bond, and 15 years under a deed, from his vendor, it is error to assume in an instruction that plaintiff has made out a perfect title from the commonwealth, and to charge that, if defendant has entered on the tract covered by the patent under which plaintiff claims, their verdict should be for plaintiff, without instructing as to the effect of such possession.

2. SAME—TITLE TO SUPPORT.

It is also error to instruct the jury to find for plaintiff, if defendant has entered upon another tract, which had been recovered of defendant in another action, by a party under whom plaintiff does not claim, as plaintiff can only recover on the strength of his own title.

3. SAME—CHAMPERTY—INSTRUCTIONS.

The question of champerty being raised by the pleadings, and there being evidence tending to show that plaintiff's title was acquired during defendant's adverse possession, an instruction upon that theory should be given, if requested.

Appeal from circuit court, Carter county; GEORGE N. BROWN, Judge.

Ejectment by the Tygart Valley Iron Company against A. J. Bailey and two of his tenants. Plaintiff claimed the land in controversy under a patent issued to C. S. Counts in 1860. Defendant Bailey claimed that in 1852 he purchased 150 acres of land from Thompson, and then took possession of it; that Thompson made him a deed to same in 1868; that 43 acres of the land conveyed by Thompson had been recovered of him (Bailey) by one Bays in the suit of *Bays v. Grahn*, and he made no claim to said 43 acres; that a patent for the land in contest had been issued to J. F. Bailey, whose heir defendant was, and under whom he claimed. Hence defendant relied upon (1) his adverse possession of the land since 1852; (2) his claim to title under the patent to J. F. Bailey; (3) upon the fact alleged by defendant that plaintiff had purchased his title to the land while defendant was holding and claiming it as his own,—plaintiff's acquisition was therefore champertous and void. There was a judgment for plaintiff, from which defendants appeal.

W. H. Julian and *J. D. Jones*, for appellants. *E. F. Dulin*, for appellee.

LEWIS, C. J. The lower court, assuming it to be true, instructed the jury in this case that the plaintiff appellee had made out a proper paper title to the land described in the patent for 284 acres, to C. S. Counts, dated January 2, 1860, and to find for the plaintiff the land in contest, if they believed from the evidence the defendant entered within the boundary of said Counts' patent or the 43 acres referred to in the suit of *Bays v. Grahn*, the record of which was read in evidence.

It seems to us that this instruction is erroneous and misleading in several particulars. The suit of *Bays v. Grahn* was instituted to recover judgment on notes given by Grahn to Bays for five several tracts of land, containing in the aggregate 403 acres. Grahn resisted payment of the notes upon the ground the present appellant Bailey was in possession of one of the tracts containing 43 acres, the same tract mentioned in the instruction; and, Bailey having been made a party defendant, judgment was rendered in favor of the plaintiff Bays against him for the land, and against Grahn for the

amount of the notes sued on. The tract of 43 acres, the title of which was involved in that action, seems to have been included in a patent to Gabriel Scott, though no such patent was then produced; and the recovery of it against Bailey, the present appellant, was by Bays, who is in no way connected with Counts, under whom plaintiff (appellee) claims the land in contest in this action. As, therefore, the right of appellee to recover the land in contest in this action does not necessarily or at all follow the right of Bays to recover the 43 acres in the action instituted by him, and as, moreover, the title to the 43 acres was not in issue in this action, it was erroneous and misleading to refer to it in the instruction to the jury, especially when the manner in which it was referred to authorized the jury to infer that in the opinion of the court the recovery by Bays involved *prima facie* the right of appellee, claiming under Counts, to recover the land now in controversy, which, if ever patented to Counts at all, was under an altogether different grant from Scott's.

But the court, as this record stands, was in error in assuming appellee had made out a proper paper title; for, though referred to by witnesses, no patent to Counts was filed or offered in evidence. Besides, as the record shows, appellant read in evidence a patent from the commonwealth of Kentucky to James F. Bailey of date February 22, 1855, anterior to the date of the patent to Counts, if there was ever one issued; and appellant, as a witness, testified the patent to James F. Bailey, of whom he was one of the heirs at law, covered the land in contest. Although that patent is not part of the record before us, for the reason, stated by the clerk in a note, that it could not, when he made out the transcript, be found among the papers, he states it was put in evidence, and it ought not to have been, as it was, ignored by the court altogether; for it is difficult to see how appellee, the plaintiff, in the face of that patent, could, in the language used in the instruction, "have made out a proper title to the lands described in the patent for 284 acres to C. S. Counts, of date 2d January, 1860," if the land in contest was covered by both patents.

Appellant proved the purchase, in 1852, of the land in controversy, from one Thompson, who then executed to him a title-bond, and the execution by the latter, in 1868, of a deed for all but about two acres, and the continuous possession and claim by him, under the deed and bond, from the first-named date to the commencement of this action, in 1888; but the court gave no instruction to the jury in regard to the possessory title alleged to have been thus acquired, as ought to have been done.

The question of champerty was raised by appellant in his pleading, but the court, though asked, improperly refused to instruct in regard thereto.

As appellee, nor those under whom it claims, has no possessory title, it cannot recover the land of appellant, who is in possession, without showing a connected chain of title from the commonwealth, and appellants can successfully resist a recovery by showing a superior and elder outstanding patent, or a continuous adverse claim and possession under his title-bond and deed, or by showing that he was in the adverse possession of the land in dispute when the sale and conveyance were made to appellees.

For the errors indicated the judgment is reversed, and cause remanded for a new trial, and further proceedings consistent with this opinion.

JOHNSON v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

1. CRIMINAL LAW—APPEAL—RECORD—WAIVER OF PLEA.

Where the record on appeal does not show any action taken on a demurrer to defendant's plea of former jeopardy, and the matter is not mentioned by counsel, defendant will be held to have waived the plea.

2. SAME—EVIDENCE OF NON-RESIDENT BEFORE CORONER.

Evidence on a trial for murder, that a witness who testified before the coroner's inquest over the deceased is a resident of another state, is sufficient to render admissible his testimony before the coroner.

3. HOMICIDE—JUSTIFIABLE—INSTRUCTIONS.

Where the evidence warrants the hypothetical case stated, that, prior to the shooting, the deceased forcibly seized defendant's money, or that which defendant fairly and reasonably believed was his, and refused to return such money, and that when defendant returned to where deceased was, he returned only for the purpose of making a quiet and peaceable demand for the money, and did make such demand, not contemplating that it would result in a difficulty causing death or serious bodily injury, and afterwards shot and killed the deceased, a charge that it would be "either murder in the second degree, or manslaughter, or justifiable homicide," according as the jury should find other facts, is erroneous, such facts showing a case of justifiable homicide.

4. SAME—SERIOUS DANGER.

It is error to refuse to charge that if defendant returned with an honest intention to demand of deceased the return of money which defendant honestly believed deceased had wrongfully taken from him, and that deceased in refusing such demand unlawfully attacked defendant so as to cause the latter reasonably to believe that he was in danger of serious bodily harm, and that, acting on such belief, he fired the fatal shot, he would be justified, where the evidence warrants the hypothetical case stated.

5. SAME—SELF-DEFENSE.

It is error to refuse to charge that if defendant re-entered the room where deceased was, intending to renew or provoke a difficulty with deceased in order to get a pretext to kill him, and after entering, declined the combat and retreated, he would have a right to defend himself against any attack thereafter made on him, when there is some evidence on which to base such an instruction.¹

Appeal from district court, Taylor county; T. H. CONNER, Judge.

John Johnson was convicted of murder in the second degree and appeals. The killing occurred in a gambling room, which adjoined a drinking saloon, and in which defendant and deceased, Gilstrap, had been gambling. The evidence showed that after a quarrel at the card table, during which Gilstrap claimed that defendant was cheating him, and seized two dollars from the table, which defendant insisted he should return, defendant left the room. He returned in about five minutes, and again demanded that deceased should return the money, and the latter refusing, the fatal difficulty ensued. Witnesses for the defense testified that defendant declined to fight, and that Gilstrap rushed upon him with an open knife in his hand, when defendant retreated a step or two, produced a pistol, and fired the fatal shot. Witnesses for the state testified that the shot was fired after Gilstrap had made an effort to escape, and when he seemed to be trying to catch defendant. The state proved that Carmichael, a witness who had testified before the coroner's inquest over the deceased, had removed from Texas, and was permanently residing in Chicago, Ill., and then reproduced his testimony given before the coroner.

C. J. Evans, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. There was a demurrer to defendant's plea of former jeopardy, but there is no direct or positive evidence in the record that any action whatever was taken by the court, either upon the demurrer or the plea, and counsel for appellant makes no mention of the matter. According to settled practice it will be considered that the plea is waived by appellant. *State v. Thompson*, 18 Tex. 527.

A proper predicate was laid for the introduction of the testimony of the absent witness Carmichael, as given at the coroner's inquest; said witness be-

¹For circumstances under which defendant can invoke the plea of self-defense, though he himself brought on the difficulty, see *Allen v. Com.*, (Ky.) 9 S. W. Rep. 703, and note; *State v. Parker*, (Mo.) Id. 728; *Varnell v. State*, (Tex.) Id. 65, and note. See, also, on the general subject of when a homicide is justifiable on the ground of self-defense, *Volmer v. State*, (Neb.) 40 N. W. Rep. 420, and note; *People v. Macard*, (Mich.) Id. 784.

ing shown to be beyond the jurisdiction of the court. *Conner's Case*, 23 Tex. App. 384, 5 S. W. Rep. 189; *Parker's Case*, 24 Tex. App. 61, 5 S. W. Rep. 653.

Most of the errors complained of and insisted upon in the brief of counsel are directed at various paragraphs of the charge of the court upon the law of manslaughter and self-defense. Two of the paragraphs seriously insisted upon as erroneous, in which the court announced the law with regard to the existence of adequate cause, and provoking a contest with intent to kill, are literal copies of articles 602 and 603 of the Penal Code, and have been the law of this state, at least since the adoption of our Codes.

We are of opinion, however, that error has been committed by the learned trial judge prejudicial to the rights of the defendant in his application of the principles of the law of self-defense to the evidence, and for which the judgment will have to be reversed. Among other matters the court instructed the jury as follows: "If you should find from the evidence that prior to the shooting the deceased forcibly and without defendant's consent seized money that was defendant's property, or that defendant fairly and reasonably believed was his property, and that deceased refused to give up such money, and that, when defendant returned to where deceased was, he returned, not for the purpose of provoking a difficulty and inflicting injury upon deceased, but, on the contrary, only for the purpose of making a demand, quietly and peaceably, and unaccompanied by force, of the said Gilstrap that the money should be returned; and if with such purpose and intent defendant did return to the room and quietly demanded the return of such money, not intending nor contemplating at the time that such demand would result in a difficulty in which death or serious bodily injury would result, then, and in such case, if defendant afterwards shot and killed W. T. Gilstrap, it would be either murder in the second degree, or manslaughter, or justifiable homicide, according as you should find the other facts of the case, under former instructions of the court." The evidence adduced called for a charge upon the hypothetical case stated, but the facts stated, if found to be true, would have made a clear case of justifiable homicide, and it was error to tell the jury that upon such a state of facts the offense committed would be either murder in the second degree, or manslaughter, or justifiable homicide.

To correct this palpable error in the court's charge, defendant's counsel requested a special instruction, which the court refused, and which was in these words: "If you believe from the evidence that the defendant returned to the gambling room, not for the purpose of renewing or provoking a difficulty with deceased for any purpose; but with an honest intention to demand of deceased the return of money which defendant honestly believed deceased had wrongfully taken from him, and that the deceased in refusing to comply with such demand made an unlawful attack upon defendant with a knife, of such a nature as to inspire defendant with the reasonable belief that he was in danger of serious bodily injury from such attack, and that, acting on such belief, defendant fired the fatal shot, he would be justified in so doing." This requested instruction presented the law as applicable to the facts stated, and the court erred in the charge as given, and in refusing said instruction. *Bonnard's Case*, 25 Tex. App. 173, 7 S. W. Rep. 862; *Alexander's Case*, 25 Tex. App. 260, 7 S. W. Rep. 867; *White's Case*, 23 Tex. App. 154, 8 S. W. Rep. 710; *Meuly's Case*, 9 S. W. Rep. 563, (this term.)

Another requested instruction which was refused was in these words: "If you believe from the evidence that defendant re-entered the gambling room with the intention of renewing or provoking a difficulty with the deceased in order to get a pretext to kill him, and after entering the room he declined the combat, and retreated, then, under these circumstances, the defendant will not be considered to have forfeited his right of self-defense, but the same would be complete, and he would have a right to defend himself against any

attack thereafter made upon him by deceased." There was some evidence in the case upon which to base the instruction, and it was error to refuse it.

Other errors are assigned and argued in the brief, but they are of a character not likely to arise on another trial, and are therefore not discussed. For the errors pointed out the judgment is reversed, and the cause remanded.

HIGH v. STATE.

(Court of Appeals of Texas. December 8, 1888.)

1. HOMICIDE—SELF-DEFENSE.

Defendant, a depot officer, acting within his authority, ordered deceased off the platform, and put his hand against him to push him. They cursed each other, and deceased shook his fist in defendant's face, and, as defendant pushed it away, struck him in the mouth, knocking out a tooth, and sending him staggering several feet against a car. As soon as defendant recovered, he drew a pistol, and shot deceased, who was within a few feet, with his fist doubled up, and arm drawn back as if to strike again. Held, that the jury should have been instructed that if defendant had received serious bodily injury, and believing that the danger of receiving additional bodily injury was threatening and imminent, shot and killed deceased, the killing would be justifiable, in self-defense, under Pen. Code Tex. art. 570, permitting homicide in self-defense to prevent murder, maiming, or serious bodily injury.¹

2. MAYHEM—WHAT CONSTITUTES.

Under Pen. Code Tex. art. 507, making it mayhem "to willfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear, to put out an eye, or in any way to deprive the person of any other member of his body," it is mayhem to knock out a front tooth.

3. SAME—EVIDENCE.

The evidence being that a "corner tooth" was knocked out, it is a question of fact for the jury whether the "corner tooth" was a "front tooth."

4. HOMICIDE—JUSTIFIABLE—INSTRUCTIONS.

It was error to refuse to instruct the jury that under Pen. Code Tex. art. 570, killing would be justifiable if done to prevent maiming, and that the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense; it being a question of fact for the jury whether deceased was still mistreating defendant with violence when the shot was fired.

5. SAME—EVIDENCE OF CORPUS DELICTI.

After the shot, deceased having been attended by physicians, and having died at a physician's office on the following day, the proof of the *corpus delicti* is unsatisfactory, where no one who attended him or was present at his death was called to testify to the nature or extent of the wound; the only evidence being that of two companions of deceased, who testified to the shooting and that deceased was dead.

Appeal from district court, Smith county; F. T. McCORD, Judge.

Indictment of W. R. High for the murder of Louis McDougald. Defendant was found guilty of murder in the second degree.

J. M. Duncan and N. W. Finley, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. "Manslaughter is voluntary homicide committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified nor excused by law." Pen. Code, art. 598. Two of the adequate causes enumerated in our statutes as being sufficient to reduce a homicide from murder to manslaughter are "(1) an assault and battery by the deceased causing pain or bloodshed; and (2) a serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons or other in-

¹In general, as to when a homicide is justifiable on the ground of self-defense, and instructions on that subject, see *Burgess v. Territory*, (Mont.) 19 Pac. Rep. 558, and cases cited; *Vollmer v. State*, (Neb.) 40 N. W. Rep. 420, and note; *Allen v. Com.*, (Ky.) 9 S. W. Rep. 708, and note; *People v. Macard*, (Mich.) 40 N. W. Rep. 784.

struments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made with intent to bring on a conflict, and for the purpose of killing." Id. art. 597. And it is expressly declared that "an assault and battery so slight as to show no intention to inflict pain or injury" is not an adequate cause. Id. art. 596.

But a homicide is permitted by law in necessary self-defense, when inflicted for the purpose of preventing (among other offenses) murder, or maiming, or serious bodily injury; and the only qualification prescribed is "that the attack upon the person of an individual, in order to justify homicide, must be such as produces a reasonable expectation or fear of death or some serious bodily injury." Id. art. 574. A defendant so attacked is neither bound to retreat, nor to resort to any other means, before slaying his assailant. *Hunnicut v. State*, 20 Tex. App. 684; *Lee v. State*, 21 Tex. App. 241; *Williams v. State*, 22 Tex. App. 497, 4 S. W. Rep. 64; *State v. Burke*, 80 Iowa, 381.

But when a necessarily deadly weapon is not used by the assailant in making the attack, it oftentimes becomes a nice, if not difficult, matter to properly determine the rights of the defendant, as between manslaughter upon the one hand, and self-defense upon the other. As, for instance, in this case, where the attack and injury were by the fists of the deceased, with intention of inflicting a beating upon the defendant. If the assault and battery in such a case is so slight as to show no intention to inflict pain or injury, then to kill the assailant would be murder; if pain, bloodshed, or great bodily injury be inflicted, then to kill the assailant will be either manslaughter or justifiable self-defense. Mr. Wharton says: "If such intended beating is of a character to imperil life, or to maim, then the intent is felonious, and the assailed is excused in taking life, when necessary to repel the assault. On the other hand, the killing of the assailant under such circumstances, the design of the assailant being to beat, * * * is not murder, and at the highest is manslaughter." Whart. Hom. (2d Ed.) § 480. It will be noticed that he limits the self-defense which would excuse "to imperil life, or to maim," and not to an attack which might produce serious bodily injury, or without imperiling life.

We are of opinion the correct doctrine is more fully and lucidly expressed by the supreme court of Pennsylvania in the case of *Com. v. Drum*, 58 Pa. St. 20, than in any authority to which we have had access, and it occurs to us that the following excerpts are peculiarly in harmony with our statutes upon the subject. AGNEW, J., says: "The act of the slayer must be such as is necessary to protect the person from death or great bodily harm, and must not be entirely disproportioned to the assault made upon him. If the slayer use a deadly weapon, and under such circumstances as the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life or great bodily injury. If there be nothing in the circumstances indicating to the slayer at the time of his act that his assailant is about to take his life, or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal, or nearly equal, strength in taking his assailant's life with a deadly weapon. In such a case it requires a great disparity of size and strength on the part of the slayer, and a very violent assault on the part of his assailant, to excuse it. The disparity on the one hand and the violence on the other must be such as to convince the jury that great bodily harm, if not death, might have been suffered unless the slayer had thus defended himself, or that the slayer had a reasonable ground to think it would be so. * * * The true criterion of self-defense, in such a case, is whether there existed such a necessity for killing the adversary as required the slayer to do it in defense of his life, or in the preservation of his person from great bodily harm. If a man approaches another with an evident intention of

fighting him with his fists only, and where, under the circumstances, nothing would be likely to eventuate from the attack but an ordinary beating, the law cannot recognize the necessity of taking life with a deadly weapon. In such a case (pain or bloodshed supervening) it would be manslaughter. * * * But a blow or blows are just cause of provocation, and, if the circumstances indicated to the slayer a plain necessity of protecting himself from great bodily injury, he is excusable if he slays his assailant in an honest purpose of saving himself from this great harm." See *Kingen v. State*, 45 Ind. 519; also reported in *Horr. & T. Cas.* 183. And in such a case, as in all cases of resistance to violence to the person, the assailed party is not bound to retreat, and the reasonable expectations and appearances of serious bodily injury must be judged of from his stand-point.

Article 570 of our Penal Code, which defines the circumstances under which homicide is permitted by law in the prevention of other felonies, "comprises all cases in which from the acts of the assailant, or his words coupled therewith, it reasonably appears that his purpose or intent is to murder, ravish, rob, maim, disfigure, castrate, or do other serious bodily injury to the assailed party. In such case the assailed party may lawfully kill the assailant while he is committing the offense or injury, or when he has done some act evidently showing his intent to commit it, and the assailed party need not first resort to other means of prevention." Willson, *Crim. St.* § 970. One important condition annexed to the right of self-defense by that article (570) is that the killing must take place before the offense committed by the party killed is actually completed. Subdivision 3.

Now, to apply the foregoing principles of law to the facts as they are exhibited in the record before us. We only recount, in substance, the salient features of the evidence.

Defendant, an officer at the depot, and empowered with authority to do so, ordered deceased to get off the platform. He also put his hand against the deceased, to push or shove him back. Deceased cursed him; told him not to shove him, or he "would knock a lung out of him." Defendant cursed back; told deceased if he got upon the platform he would push him off. Deceased shook his fist in defendant's face, and, as defendant pushed or knocked it away, deceased struck him a severe blow in the mouth, which knocked out a "corner tooth," and sent him staggering several feet against the side of a car, which prevented his falling entirely upon the ground. As soon as defendant could recover himself, and straighten up, he drew his pistol, and immediately fired the fatal shot at deceased, who was within a few feet, standing with his fist doubled, and his arm drawn back as though intending to strike again. These, in brief, are all the facts necessary to illustrate what, in our opinion, was an important and material failure or omission in the charge of the court upon the law of self-defense.

According to defendant's theory, he was struck, bruised, maimed, and, to all intents and purposes, stricken down. Actual and serious bodily injury has been inflicted upon him. Defendant has, in fact, suffered mayhem of his body, whether deceased intended such consequences or not; for to knock out a front tooth is to maim him. 2 *Bouv. Law Dict.* "Mayhem;" 2 *Bish. Crim. Law*, (7th Ed.) § 1001. Smarting under the injury, he recovers himself, sees his antagonist to all appearances prepared, ready, and in the act of repeating the injury. He draws and fires. From the beginning to the end the whole transaction occurs in a very few seconds. It may be said to be almost simultaneous. When defendant recovers himself from the effects of the blow, the combat is not over, for deceased, to all appearances, has squared himself to deliver another such blow. Can it be said that he has completed his offense? It may not reasonably appear so to defendant. From his stand-point, it may be reasonable that deceased has not completed his offense, but is in the very act and has the ability of inflicting the same or greater injury, and, *dum ferret opus*,

the shot is fired. This is the defendant's theory of the case; we are not expressing our opinion as to the evidence.

Now, if defendant had already received serious bodily injury at the hands of deceased, and it reasonably appeared to him from the acts and conduct of deceased that the combat was not over; that he was about to receive additional bodily injury from deceased; that deceased had the ability to inflict the injury; that the danger was threatening and imminent; and under such circumstances, and so believing, he shot and killed deceased,—then, under the law as above announced, and under our statute, he would be justifiable upon the grounds of necessary self-defense, and, if a jury should so believe from the evidence, it would be their duty to acquit him. In the otherwise able exposition of self-defense announced by the learned judge, this phase of the law, which, in our opinion, was manifestly called for by the facts, if as above stated, was not submitted in plain and affirmative terms.

Again, defendant's counsel asked the court to instruct the jury as follows: "The jury are charged that a person has the right to take the life of another in order to prevent himself from being maimed or disfigured, and the killing may take place at any time while the offender is mistreating him with violence, though the maiming or disfiguring may have been already completed;" and error is assigned upon the refusal thereof, as also upon the refusal of the court to submit any instructions upon the law of maiming, in connection with the defendant's right of self-defense. The instruction, though sufficient to call the court's attention to the matter of maiming, was not legally correct with reference to the facts as to the term "disfigured;" there being no evidence of disfiguring, as defined in our statutes. Pen. Code, art. 509.

"To maim is to willfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear, to put out an eye, or in any way to deprive the person of any other member of his body." Id. art. 507; Willson's Crim. St. § 877. "To constitute the offense of maiming, the act must be done both willfully and maliciously. A willful act is one committed with an evil intent; with legal malice, * * * and without legal justification. A malicious act is one committed in a state of mind which shows a heart regardless of social duty, and fatally bent on mischief; a wrongful act intentionally done, without legal justification or excuse." *Bower's Case*, 24 Tex. App. 542, 7 S. W. Rep. 247.

We have seen that to deprive one of a front tooth is to maim him, as understood at common law. The "front tooth" is not, however, used in terms in our Code as a "member of the body," but we think it clear that it comes within the import of the word "member," as used in the Code, and in common acceptance; and, under the authorities cited above, we believe that as to the "front tooth" the court may well assume that it is a "member" of the body, without submitting the question as a matter of fact to the jury. *Slatery v. State*, 41 Tex. 619, appears to hold otherwise. It would be, however, in this case, a question of fact to be found by the jury whether a "corner tooth" was a "front tooth."

It may be said that deceased did not, perhaps, intend to maim defendant, and that, therefore, the act was not willfully and maliciously done; but it is statutory that "the intention to commit an offense is presumed whenever the means used are such as would ordinarily result in the commission of the forbidden act," (Pen. Code, art. 50;) and it is elementary that "a man is always presumed to intend that which is the necessary or even probable consequences of his acts, unless the contrary appears," (Willson's Crim. St. § 109.)

In cases of maiming it is provided that the killing will be justifiable, if done in its prevention, and "the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense. Pen. Code, art. 570, subd. 6. Was the deceased mistreating the defendant with violence when the latter fired the fatal shot?

This was a matter of fact to be found by the jury under appropriate instructions from the court. We have already stated the facts in another connection. The tooth had already been knocked out, if at all, when defendant fired. The maiming was therefore complete. If deceased had his fist doubled, and arm drawn back to strike again, was attempting to strike, and had an immediate intention, coupled with an ability, to strike, he was committing an assault. (Id. art. 484:) the test being, was there in fact a present purpose of doing an injury? Willson's Crim. St. § 811. To commit an assault upon a party is certainly to "mistreat" him. But an assault, merely, is not "violence," and, as we have seen, there must be "mistreating with violence." Under the facts of this case, the question was, had there been any cessation of violence by the deceased? The blow, the injury, the fall, the recovery, the doubling of the fist, and drawing back to strike, the drawing and the firing of the pistol, all appear to have been instantaneous acts of the transaction, with scarcely a pause or even let-up in the continuity of the acts. In such a state of case it was for the jury to determine from the facts whether there was any cessation of active hostilities and violence. We are of opinion, also, that the court erred in declining to submit the law of maiming in connection with defendant's right of self-defense.

It is questionable if the *corpus delicti* is sufficiently established. It is certainly not as definitely proved as it might have been by the testimony of the physicians who examined the wound and ministered to the dying man. The deceased was shot between 8 and 9 o'clock Sunday night, and died about 6 o'clock the following Monday evening. He was attended by physicians, died at a physician's house, yet no physician or other person who attended him was introduced as to the nature, extent, or location of the wound, or as to whether it was a bullet wound, or as to what caused his death. John Jessup, a companion of deceased, testified that "Louis was shot at the Kansas & Gulf Short-Line depot. He is dead. He died from being shot. Died at Dr. Hicks' office. Was shot in the stomach. Defendant shot him." He also testified that he was at Dr. Hicks' office a few minutes after the deceased was shot, and that "the next time I saw him was about three or four o'clock Monday evening, and then again a few minutes after six. He died at six." This shows that he was not present when the deceased died. This witness does not testify that he ever saw the wound, nor as to its character; whether it entered the cavity, or whether it was at all serious. Bob Jessup, also a hack driver, and a companion of the deceased, testified: "I knew Louis McDougald. He is dead. Mr. High shot him. I suppose that was the cause of his death." This is the whole of the testimony touching the question of the cause of the death of Louis McDougald, and no excuse is shown why other evidence was not produced on that point.

No other questions are deemed of sufficient importance to require discussion.

For the errors discussed as to the charge of the court the judgment is reversed, and the cause remanded.

CLORE v. STATE.

(Court of Appeals of Texas. December 19, 1888.)

1. HOMICIDE—MANSLAUGHTER—SUDDEN PASSION.

Shortly before the killing defendant and deceased had a quarrel, which was amicably settled, and they returned to their wagon appearing friendly, but soon began quarreling and cursing, but who began it, or for what cause, did not appear. No blows were struck until defendant stabbed deceased, saying, "I will not take it any longer;" though defendant, when arrested, exhibited knife cuts in his coat, which, however, he said he did not know were there until the morning after the killing, and did not know when they were made. Held, that the homicide was not

reduced to manslaughter on account of sudden passion, under Pen. Code Tex. arts. 598, 596, providing that insulting words or gestures are not adequate causes for sudden passion.

2. SAME—INTOXICATION AS A DEFENSE—INSTRUCTIONS.

Under Pen. Code Tex. art. 40a, providing that intoxication shall not constitute any excuse for nor mitigate the degree nor penalty of crime, but that temporary insanity, produced by use of ardent spirits, may be given in evidence in case of murder, to determine the degree, defendant cannot complain of an instruction that "intoxication, produced by the recent voluntary use of ardent spirits, constitutes no excuse for the commission of crime, nor does intoxication mitigate either the degree or the penalty of the crime;" the jury being further told that they could "take into consideration the mental condition of the defendant for the purpose of determining the degree of murder," if they found defendant guilty.¹

3. CRIMINAL LAW—INSTRUCTIONS—CIRCUMSTANTIAL EVIDENCE.

Where the evidence is positive that defendant did the killing, no charge is required as to circumstantial evidence.

4. SAME—CONTINUANCE—ABSENT WITNESSES.

It is not error to refuse a continuance for the absence of witnesses whose testimony is immaterial, incompetent, or contradictory to declarations of defendant, and probably untrue.

Appeal from district court, Hopkins county; J. A. B. PUTMAN, Judge.

George C. Clore was convicted of murder in the second degree, and appeals. Under Pen. Code Tex. art. 598, "manslaughter is voluntary homicide, committed under the immediate influence of sudden passion arising from an adequate cause, but neither justified or excused by law." Article 596: "Insulting words or gestures, or an assault and battery, so slight as to show no intention to inflict pain or injury, * * * are not adequate causes."

King & Whittle, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. It is urgently insisted that the court erred in refusing to give the special instructions requested by defendant upon manslaughter, and in failing to submit in his charge the issue of manslaughter. "Manslaughter is predicated upon adequate cause, and, unless adequate cause exists, the homicide will not be reduced from murder, although it was committed under the immediate influence of sudden passion, rendering the mind incapable of cool reflection." Willson, *Crim. St.* § 1018; *McKinney v. State*, 8 Tex. App. 626; *Hill v. State*, 11 Tex. App. 456; *Neyland v. State*, 13 Tex. App. 536. In our opinion there is no evidence in this case tending to show adequate cause. Defendant and deceased had had a previous quarrel just a few minutes before, but that had been amicably settled, and defendant invited deceased to get back into his wagon, and, in the language of one of the witnesses, "they appeared friendly when they got back into the wagon." No one knows what occasioned or who commenced the second altercation. P. H. Williams, who was in the wagon with them, says: "Directly they commenced quarreling and cursing. They stopped for a little bit, and then I heard the defendant, Clore, say, 'I will not take it any longer;' and I heard the thud of a blow, and I heard the blood gushing out, and deceased pitched forward, face downward, in the front part of the wagon, and expired. He never spoke nor made a noise." In the first difficulty the parties did not come to blows. If in the second difficulty the deceased merely cursed the defendant, such conduct would not be adequate cause. Pen. Code, art. 596. Defendant never claimed that deceased had inflicted pain or bloodshed upon him, and no injuries or bruises appeared upon his person. When arrested, two days afterwards, several cuts were found in his coat, as though they had been made with a knife, but he himself said that "he never knew that his coat was cut until the morn-

¹ On the general subject of intoxication as an excuse for crime, see the note to *State v. Tatlow*, (Kan.) 8 Pac. Rep. 267; *Territory v. Davis*, (Ariz.) 10 Pac. Rep. 359, and note; *Buckhannon v. Com.*, (Ky.) 5 S. W. Rep. 358, and note; *Wilkerson v. Com.*, (Ky.) 9 S. W. Rep. 836; *U. S. v. King*, 34 Fed. Rep. 802.

ing after the killing." It is singular that none of these cuts penetrated deep enough to touch or leave the slightest mark upon the person of defendant. As to these cuts the charge of the court was amply sufficient upon the law of self-defense. From our view of the evidence, we concur in opinion with the learned trial judge, that there was no manslaughter in the case; no adequate cause being shown.

It is contended that the court erred in its charge to the jury upon the defense of intoxication, as raised by the evidence. That portion of the charge was as follows: "The jury are charged that intoxication produced by the recent voluntary use of ardent spirits constitutes no excuse for the commission of crime, nor does intoxication mitigate either the degree or the penalty of the crime. However, in cases where the defendant is accused of murder, as in this case, the jury may take into consideration the mental condition of the defendant for the purpose of determining the degree of murder, if the jury should find the defendant guilty of murder under the evidence and the law as given them in charge." This instruction is in almost the exact language of an instruction held by us to be correct in *Charles v. State*, 13 Tex. App. 658. Counsel for appellant cite us to *Williams' Case*, 25 Tex. App. 76, 7 S. W. Rep. 661.

It occurs to us that there is a general misapprehension of the meaning of the language used in the statute regulating intoxication as a defense to crime. Gen. Laws, 17th Leg. Reg. Sess. 9. We copy the statute as found in Willson, Crim. St. § 92. It reads: "Section 1. Neither intoxication nor temporary insanity of mind produced by the voluntary recent use of ardent spirits shall constitute any excuse in this state for the commission of crime, nor shall intoxication mitigate either the degree or the penalty of crime, but evidence of temporary insanity produced by such use of ardent spirits may be introduced by the defendant in any criminal prosecution in mitigation of the penalty attached to the offense for which he is being tried, and, in cases of murder, for the purpose of determining the degree of murder of which the defendant may be found guilty. Sec. 2. It shall be the duty of the several district and county judges of this state, in any criminal prosecution pending before them, where temporary insanity is relied upon as a defense, and the evidence tends to show that such insanity was brought about by the immoderate use of intoxicating liquors, to charge the jury in accordance with the provisions of section 1 of this act." Pen. Code, art. 40a; Willson, Crim. St. § 92.

We think it clear that the legislative intention was, (1) that mere intoxication from the recent use of ardent spirits should not, of itself, in any case, excuse crime; (2) that mere intoxication should neither mitigate the degree nor the penalty of crime; (3) that temporary insanity, produced by such use of ardent spirits, is evidence which may be used in all cases in the mitigation of the penalty, and also in murder for the further purpose of determining the degree. Of itself, intoxication is neither justification, mitigation, nor excuse for any sort of crime. It must go to the extent of producing temporary insanity before it will be allowed to mitigate the penalty, and in murder before it can be considered in determining the degree. This is our understanding of the proper construction to be placed upon the language of the statute. In the case in hand, the instruction is more favorable than the statute, because the court did not limit and restrict the jury to temporary insanity, but allowed them to take into consideration his mental condition, whatever it might be, in determining the degree of murder of which he was guilty. We cannot conceive that the defendant has any just ground of complaint at the charge.

It was contended that the court should have charged on the law of circumstantial evidence. This was not a case of that character. That defendant, and he alone, killed the deceased, there cannot be the shadow of a doubt. The testimony is as positive to the fact as it could well be. Defendant himself said: "I have killed Jim Marion Garrett, and have to leave."

Without discussing the other several supposed errors with regard to the charge, suffice to say that, in our opinion, it was a full and sufficient exposition of the law applicable to all the legitimate phases of the evidence, and we can perceive no error in the refusal of the special requested instructions.

Appellant's first bill of exceptions was saved to the action of the court in overruling his application for continuance. As to the proposed testimony of the absent witness, Deacon, it appears to us to be neither material nor probably true. By the witness Mollie Clore, defendant's wife, he expected to prove that when he got to his home, a short while after the killing, he was excited, and his clothing was freshly cut, showing the appearance of knife cuts; that he told her of the killing, and that he was forced to do it; that deceased was trying to kill him, and was cutting at him, and had cut his clothing several times before he (defendant) cut deceased. It is in evidence that the defendant's house was two and a half or three miles from the place of the homicide. With reference to the cuts in his coat, the statements as to what his wife would swear does not tally with the defendant's own statement to Johnson, the constable, who pursued and arrested him two days afterwards, in Kaufman county. He told Johnson that "he didn't know when the cuts were made; he never knew his coat was cut until the morning after the killing." Under these circumstances, we think we would be fully warranted in the conclusion that the proposed testimony, as to the cuts in the coat, would not probably be true, though it might be admissible as evidence. *Good v. State*, 18 Tex. App. 89. His statements to his wife, however, would not have been admissible. Such declarations were not part of the *res gesta*, and come within the category of self-serving declarations. *Good v. State*, 18 Tex. App. 39; *Hobbs v. State*, 16 Tex. App. 517; *Caldwell v. State*, 12 Tex. App. 302; *West v. State*, 7 Tex. App. 150; *Hall v. State*, 48 Ga. 607. No error is perceived in the action of the court in reference to the motion for continuance.

Other errors assigned are not maintainable, and will not be discussed, and we have found none such as would require a reversal of the judgment, and it is therefore affirmed.

TAYLOR v. ROBINSON, Collector.

(Supreme Court of Texas. December 31, 1883.)

1. TAXATION—STATE LANDS—PAYMENT FOR CAPITOL.

Land set apart by the state for the contractor, as payment for the construction of the new capitol of Texas, to be conveyed to him from time to time when earned in the progress of the work, is not subject to taxation under Rev. St. Tex. art. 4691, as land "held under a contract for the purchase thereof, belonging to this state."

2. SAME—LEASE TO CONTRACTOR.

Nor did a lease executed after the original contract, under which the contractor took possession of all the land so set apart at a stipulated rent, until the title should vest in him by the completion of the building, give him such a holding as to make the land taxable.

Appeal from district court, Dallas county; GEORGE N. ALDRIDGE, Judge. Suit by Abner Taylor against J. N. Robinson, tax collector, for money paid him upon unearned capitol lands. Judgment for defendant. Plaintiff appeals.

Robertson & Coke, for appellant. *Brown, Watts & Hall*, for appellee.

WALKER, J. Abner Taylor, the contractor for building the new state capitol, appeals from a judgment against him in a suit against appellee, the tax collector of Oldham county, for money paid him upon unearned capitol lands, included within the contract for building the new capitol, assessed for the years 1886 and 1887. The only question submitted to the court is whether, upon the facts shown, the lands described in the petition were "held under a

contract for the purchase thereof belonging to the state." It is not questioned that the legislature had the power to include lands so held as subject to taxation. Article 4681, Rev. St., so providing, was in force at the execution of the contract for building the capitol. It would enter into all contracts subsequently made for the purchase of lands belonging to the state. If the contract, in its legal effect, places these lands within the meaning of the statute, any intent otherwise, on the part of the state officials, in making it, would be immaterial. They could not exempt the lands from the effect of the statute, had they attempted to do so. The original contract for building the new capitol, after stipulating the dimensions, material, and style of workmanship required, the time within which it was to be constructed, and after the stipulations undertaken by the contractor, obliges and binds the state "to convey to said party of the second part [the contractor] the complete and perfect title to three million acres of land, situated in the state of Texas, and in the counties of Dallam, Hartley, and Oldham; and in section 19 of the contract "the party of the second part shall receive, in the manner herein set forth, titles to the lands herein agreed to be conveyed, in the numerical order heretofore mentioned, at successive stages of the construction, as follows," etc. July 25, 1885, after the work of construction had been entered upon, a supplemental contract was executed, making changes in the style and material, and extending the time within which it should be completed. It was further stipulated that the lease of even date "should be a part of the contract as fully and expressly as if the same had been at length set forth." The lease contained the following: "* * * And whereas, it was an important consideration in inducing said Taylor to consent to said changes that his right to use the lands set apart to pay for the erection of said building should be settled; it is therefore agreed between said state and said Taylor as follows: (1) Said state hereby leases to said Taylor and his assigns, upon the terms hereafter stated, all of three million acres of land set apart for the building of a new state capitol not yet earned by said Taylor, said land being described as follows," etc. It was further stipulated that Taylor should pay rent at six cents per acre; but, if Taylor should "complete the capitol according to contract, then no rent whatever is to be paid for said lands; said lands then being the property of Taylor, of said Taylor or his assigns, free from any claim on the part of the state for rent, as though this agreement had not been made.

* * * Said Taylor or his assigns are to have, and are hereby vested with, full rights to possess, use, and enjoy all of said lands until," etc. After this lease was made, and under it, the contractor took and held possession of the land. Possession, theretofore, had been denied him.

It was admitted that all the lands had been earned and conveyed to Taylor after January 1, 1887, and within less than three years from July 25, 1885. Considering the contract with reference to the main object on the part of the state, it was made for the construction of the new capitol building. The land had been set apart by law for the purpose and was used in payment as the consideration or price, to be conveyed, in a stipulated order of surveys, in parcels, from time to time, when earned in the progress of the work of construction under the contract. No money valuation or price was fixed to the lands. The land was as a fund, to be passed to the contractor in payment upon the several stages towards completion of the work. On the other hand, Taylor's object in the contract was the acquisition of the land, of the several surveys named, and in the order as in the contract; the consideration on his part being the labor and materials furnished upon the building. The contract provided a mode by which he could earn them, and to have title to them, in parcels, when earned. Until earned, he had but the contract by which he could earn them; and, when earned, his right to title to them accrued. When he should obtain them his acquisition would be a purchase, and he a purchaser, even in the popular signification of the terms. It is contended that these

lands were not held in any legal sense under the capitol contract. "As a technical term, 'held' embraces two ideas,—that of actual possession of some subject of dominion or property, and that of being invested with legal title or right to hold or claim such possession." *Wittsell v. Charleston*, 7 S. C. 99, cited in *Winfield's Adjudged Words and Phrases*.

By the terms of the capitol contract, possession of the lands was not conceded by the state. If the contractor claimed it, it does not appear that he could have obtained it. The contract was silent upon the subject. It provided for his earning the lands, and that when earned the title should be made to him. It may be questioned whether the state officials had any power to lease the lands. *State v. Cattle Co.*, 9 S. W. Rep. 130, (Austin term, 1888.) However, the lease did convey the possession. This use of the land was of value, and formed part of the consideration from the state to Taylor in the supplemental contract. It is also evident that no greater estate in the lands would pass by the lease by reason of the want of authority to make it, nor would the holding under it be more onerous from the absence of such authority. Until the making of the supplemental contract and lease, Taylor neither had the possession, nor the right to it. He did not have the legal title to the lands until the state issued such titles, nor did he have the equitable title until earned, when an equitable claim to them would arise, and with such claim would be the right to possession. The tenure of lands held by contract of purchase belonging to the state applies completely to a large class of landholders, under the laws providing for the sale of the public school, university, and asylum lands. Purchasers of these lands held by contracts stipulating the price and time of payment, title to be acquired upon payment. By these sales the settler without means is enabled to buy, the state securing settlers upon the lands and interest upon the price and taxes. In these sales the purchaser in all cases had the right to possession, and in most cases took actual possession. Contrasting these contracts for the purchase with the capitol contract, the difference is evident as to the quantity and quality of the estate obtained by the parties dealing with the state. In the one there is complete ownership, conditioned only upon the payment of the stipulated purchase money; in the other, none of the rights of property are given,—only the right to earn the lands, and to the title when earned. The state could dictate the terms of sale in both cases. Nothing passed against the state but what was conceded by the terms of the several contracts. It is reasonable that the article 4691 referred to the lands, which answer fully to the description. The lands claimed by Taylor do not answer to the description as held under any such contract as expressed in this section. It seems that the absence of any holding or tenancy of the lands in any legal sense would be fatal to the claim for taxes under the statute.

Considering together the facts constituting the grounds for the claim for taxes upon these lands, we have (1) the contract for the building of the new capitol, that being the main object, the lands to be used in payment when earned; (2) in this contract the right of Taylor to the possession is not given, and under it there was no holding in fact; (3) under the lease of July, 1885, possession was conceded to and was taken by Taylor, and during the years for which the taxes were collected the lands were held under the so-called lease; (4) until earned, Taylor had no title, legal or equitable, in the lands,—when earned, an equitable claim would arise to them; and finally, contrasting the tenure of these lands with the estate of the purchasers from the state, under contracts as provided upon the sales of the public school and other lands belonging to the state, we conclude that these lands were not subject to taxation as lands held under a contract for their purchase. The lands were held under the lease contract, but the taxes are not claimed upon the value of the term of the lease. The judgment should have been for the plaintiff.

Judgment reversed, and here rendered for the amount sued for, and costs.

COLLINS v. BALLOW *et al.*

(Supreme Court of Texas. December 18, 1888.)

1. TRESPASS TO TRY TITLE—PURCHASE FROM DEFENDANT—PLEADING—ALLEGATIONS.

Plaintiff in trespass to try title can only recover on his superior title existing at the institution of the action; and unless a subsequent purchase of defendant's interest be alleged in an amended petition, evidence of it is inadmissible.

2. VENDOR AND VENDEE—CONTRACT—PERFORMANCE.

Defendant claimed under an oral contract made between his grantor and an agent of the owner of the lot, by which he was to have the premises by building a shop thereon, and carrying on his trade there for three years. The agent had authority to make contracts subject to the owner's approval. One W. secured an adjacent lot in the same manner, his deed reciting a contract to carry on his trade for five years, though he testified that the contract was for three years. W. and defendants' grantor, upon making their contracts, erected a shop by their joint labor, partly on each lot, W. furnishing the lumber and owning the shop. Defendant's grantor only worked a short time, when he abandoned the lot, and engaged in other business, his reason being that he had learned that he could get a deed only by working at his trade for five years. *Held*, that the evidence was insufficient to support a verdict for defendant.

3. NEW TRIAL—RIGHT TO THIRD TRIAL—INSUFFICIENCY OF EVIDENCE.

Under Rev. St. Tex. art. 1370, permitting only two new trials upon the motion of one party, unless for misconduct or error in law of the jury, a third new trial may be granted for insufficiency of the evidence to support the verdict, though the record does not show that the former verdicts were set aside for such misconduct or error.

Commissioners' decision. Appeal from district court, Wichita county; B. F. WILLIAMS, Judge.

Trespass to try title by C. F. Collins against David Ballow and W. H. Ballow. Verdict and judgment for defendants. Plaintiff appeals.

William W. Flood and *R. E. Huff*, for appellant. *L. T. Miller* and *R. Cobb*, for appellees.

ACKER, J. Appellant brought this suit against David Ballow in trespass to try title to lot 13, in block 182, in the town of Wichita Falls. In 1888 there was a trial which resulted in verdict and judgment for appellee D. Ballow, from which Collins appealed, and that judgment was reversed, and the cause remanded at the Austin term, 1885, (not reported.) At the April term, 1886, appellant filed an amended petition, making appellee W. H. Ballow a party, alleging that he was claiming some interest in the lot. The trial, resulting in the verdict and judgment from which this appeal is prosecuted, was upon the amended petition and the plea of not guilty. Execution issued from the supreme court against David Ballow on the 15th of June, 1885, for costs of the former appeal, which was levied on the lot in controversy, under which it was sold by the sheriff on the 4th day of August, 1885, to R. E. Huff, and deed executed therefor on the same day. On the 5th day of October, 1885, Huff conveyed the lot to appellant.

It is admitted by appellees that appellant proved a *prima facie* legal title, independent of the title acquired through the sheriff's sale. Appellees claimed the lot under a parol contract alleged to have been made in 1880 by F. M. Davis through M. W. Seeley with H. M. Trueheart, who was the general agent and attorney in fact for the parties who owned the lot at that time. Appellees claimed that Seeley was the local agent at Wichita Falls of Trueheart, the attorney in fact, and authorized to make contracts for him. It was claimed by appellees that the contract between Seeley and Davis was to the effect that Davis should have the lot as a donation, upon condition that he would erect a workshop thereon, and pursue his trade therein for a term of three years, and that the conditions had been performed by Davis and appellees, his transferees. It was claimed by appellant that Seeley had authority to make any contract for either the owners or Trueheart, their attorney in

fact; that Trueheart proposed to donate the lot upon condition that Davis would erect the shop on the lot, and carry on his trade therein for a term of five years; and that he had wholly failed to comply with the conditions. On the trial appellant offered in evidence the judgment and execution against David Ballow, the sheriff's levy, sale, and deed thereunder to Huff, and Huff's deed to him; all of which were excluded on objection by appellees, upon the ground that they were of dates subsequent to the institution of the suit. This ruling is assigned as error.

In trespass to try title, as in the common-law action of ejectment, the plaintiff must rely for recovery upon the title he had at the institution of the suit. If he had no title, then he must fail in his suit, though he may have acquired, after suit brought and before trial, a perfect title. *Bradford v. Hamilton*, 7 Tex. 58; *Teal v. Terrell*, 48 Tex. 509. If appellant held the superior title at the institution of the suit, upon which he was entitled to recover, the exclusion of the evidence of his after-acquired title was immaterial. If he relied upon the after-acquired title to make it available, he should have set it up by amended petition, which would have been, in effect, bringing a new suit, and would have subjected him to the payment of all costs that had accrued. We do not think the court erred in excluding the evidence of the after-acquired title.

To entitle appellees to recover as against appellant's *prima facie* legal title, it devolved upon them to prove that the party with whom the parol contract was made had authority to bind the owners by such contract; also, to clearly prove the terms of the contract, and their compliance therewith. Both Trueheart and Seeley testified that Seeley had no authority to make any contract by which either the owners or Trueheart would be bound, but was authorized to negotiate contracts, subject to Trueheart's approval; and we find nothing in the statement of facts tending to contradict their testimony. It appears from the evidence that, early in the year 1880, Davis and one Wattenberg had a conversation with Seeley in regard to acquiring the lot in controversy for Davis, and the adjoining lot for Wattenberg, as donations. Wattenberg testified that Seeley said he would try and secure the lots for them upon condition that they would each build a shop on their respective lots, and carry on their trades for a term of three years. Soon after this Wattenberg procured lumber, and Davis assisted him in erecting a shop across the line between the two lots; most of the shop being upon the Wattenberg lot. Both of them pursued their respective trades of blacksmith and wood-workman in the shop for a short while, when the shop was blown down and rebuilt by Wattenberg alone, who continued to carry on his trade therein for several years, after which he rented it to another mechanic. The deed to Wattenberg for his lot recited the consideration to be the construction of the shop, and the pursuit of his trade therein for five years. Both Wattenberg and Davis testified that the shop belonged to Wattenberg. Davis did not erect a shop on the lot in controversy. After working in the shop with Wattenberg for a time, some time in the year 1880 Davis abandoned his trade, and engaged in other business. Some time after this, Davis sold his residence, situated upon another lot, and transferred his claim to this lot to appellee David Ballow. Davis testified that he abandoned the lot when he learned that he could not acquire it without building a shop thereon, and carrying on his trade therein for five years. Trueheart testified that he never consented to donate the lot, except upon the terms and conditions recited in the deed to Wattenberg. It clearly appears that the contract with Davis was the same as the contract with Wattenberg. We think the evidence wholly insufficient to sustain the verdict and judgment, and that the court should have granted the motion for new trial.

We deem it unnecessary to consider other questions presented by appellant, as none of them are of importance in view of the conclusion we have reached. Article 1370 Rev. St. provides that "not more than two new trials shall be

granted to either party in the same cause, except when the jury have been guilty of some misconduct, or have erred in matter of law." Appellees have brought up a separate transcript, from which it appears that three verdicts have been returned, and judgment entered in their favor, two of which have been set aside, and new trials granted by the court below on motions of appellant. It also appears that appellant did not allege in either of his motions upon which new trials were granted that the jury had been guilty of misconduct, or had erred in matter of law. Appellees insist that, under this state of the case, the statute above quoted applies, and that the verdict and judgment are conclusive of appellant's rights. We do not so construe the statute. We understand it to mean that where the court has committed no errors, either in rulings upon the trial or in giving the law of the case to the jury, and the jury have followed the law so given, and have not been guilty of any misconduct, no more than two new trials can be granted to either party. But so long as the trial court commits errors in its rulings upon the trial, or in giving the law to the jury, or the jury disregards the law when correctly given, and the trial court, on proper motion, refuses to grant a new trial, the injured party has the right to appeal to this court for redress; and if it appears that errors have been committed by the court or the jury prejudicial to the rights of the appellants, a new trial will be granted, notwithstanding two new trials have been granted to the complaining party in the court below. We are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and the judgment reversed, and cause remanded.

CHAYTOR *et al.* v. BRUNSWICK-BALKE-COLLENDER CO.

(Supreme Court of Texas. October 26, 1888.)

1. CHATTEL MORTGAGES—FORECLOSURE—EVIDENCE—PRESUMPTIONS.

In an action to foreclose a chattel mortgage against the mortgagor, and one in whose possession the mortgaged goods are, where the notes secured by the mortgage are given for the purchase price, and bear even date with the mortgage, and declarations of the mortgagor that he had sold to his co-defendant are admitted without objection, and both defendants absent themselves from the trial to avoid testifying, the evidence warrants a presumption that the sale to the co-defendant was after the mortgage was executed.

2. PLEADING—NON EST FACTUM—VERIFICATION.

Under Rev. St. Tex. art. 1265, § 8, providing that an answer denying the execution of a written instrument upon which a pleading is founded shall be verified by affidavit, where the mortgagor pleads a general denial, not verified by oath, no proof of the execution of the mortgage is necessary as to him.

3. CHATTEL MORTGAGES—EXECUTION—EVIDENCE.

Where it is shown by declarations of the mortgagor, who absents himself from the trial though served with process, that the subscribing witness to the mortgage is a non-resident, positive evidence of two qualified witnesses, as to the mortgagor's signature, which is not contradicted, is sufficient proof of the execution of the mortgage to admit it in evidence.

4. SAME—RECORDING—ACKNOWLEDGMENT.

Under Sayles, Rev. St. Tex. art. 8190b, §§ 1, 2, providing that chattel mortgages may be recorded by filing with the county clerk either the original or a copy, but that "a copy can be filed only when the original has been acknowledged," acknowledgment and proof is not required when the original is filed.

5. SAME—DESCRIPTION OF RESIDENCE.

A chattel mortgage registered in Bowie county, Tex., which recites that the mortgagor is of "Texarkana, Bowie county, Tex.," shows *prima facie* that the mortgagor is a resident of Texas, and that the mortgage is registered in the county of his residence, as required by statute, without proof that the property was in that county.

Error from district court, Bowie county; W. P. McLEAN, Judge.

Action on promissory notes, and to foreclose a mortgage brought by the Brunswick-Balke-Collender Company, a corporation, against J. M. Dowsing and D. O. Chaytor. Judgment for plaintiff, and defendant Chaytor brings error.

Todd & Hudgins, for plaintiff in error. *Talbot & Turner*, for defendant in error.

GAINES, J. This suit was brought in the court below by the Brunswick-Balke-Collender Company, a corporation, against J. M. Dowsing and D. O. Chaytor, to recover the amount of three promissory notes, executed by Dowsing, payable to the company, and to foreclose a chattel mortgage upon certain saloon furniture alleged to be in possession of Chaytor. To the petition the defendants pleaded jointly a general denial. The judgment was for the plaintiff for the recovery of the debt, interest, and attorney's fees, as provided in the contract, and for the enforcement of the mortgage against both defendants by a sale of the property. The assignments of error raise the question of the sufficiency of the proof of the execution of the mortgage to admit it in evidence, and of the sufficiency of the evidence to support a judgment of foreclosure against Chaytor. The mortgage was made a part of the petition, and was alleged to have been executed by defendant Dowsing. There being no plea of *non est factum*, verified by oath, no proof of execution was necessary as to him. Rev. St. art. 1265.¹ If it be conceded that, under the pleadings, it was incumbent upon the plaintiff to prove the execution of the instrument by Dowsing, so as to enforce it against Chaytor, we think the proof was sufficiently made. It was attested by one subscribing witness, and it was shown by the declarations of Dowsing, admitted without objection, that the witness was a resident of the state of Ohio. He was probably the agent of the plaintiff, who filed the mortgage, and who, as the clerk testified, was a stranger,—at least, as to him. The evidence also shows that both Dowsing and Chaytor were in the court-room just before the trial began, and that they left promptly, and could not be found to give testimony as the trial progressed. A subpoena was issued for both of them on behalf of the plaintiff, and had been served upon Dowsing. Under these circumstances, we think the court was warranted in concluding, *prima facie*, that the subscribing witness was beyond the jurisdiction of the court, and in admitting proof of Dowsing's signature to the mortgage by persons who knew his handwriting. Two of the witnesses swore positively to his signature, after having properly qualified themselves to testify as to the fact. There was no conflicting evidence. This was sufficient proof to admit the mortgage in evidence, and it is not important whether the evidence of Dowsing's admissions as to its execution were properly admitted or not. The case was tried before the judge without a jury, and, even if improper evidence had been admitted upon this point, it does not operate to the prejudice of the plaintiff in error.

It is also urged that the mortgage, having neither been acknowledged nor proved under the statutes for the registration of deeds, was not properly recorded, and therefore was not notice to Chaytor. The statute for the registration of chattel mortgages prescribes that the registration may be effected by filing with the county clerk either the original or a copy of the instrument, (Sayles, Rev. St. art. 3190b, § 1.) but also provides that "a copy can be filed only when the original has been acknowledged," (Id. art. 3190b, § 2.) If the original is deposited, it is not necessary that it should either be acknowledged or proved. The provision being express that the mortgage shall be authenticated in order to warrant the registration of a copy, it is to be implied

¹Sec. 8. An answer setting up "a denial of the execution * * * of any instrument in writing upon which any pleading is founded, in whole or in part, and charged to have been executed by him, [the pleader,] or by his authority, and not alleged to be lost or destroyed," shall be verified by affidavit.

that no such authentication is necessary when the original is filed. The object of registration is merely to give notice; and it was doubtless considered that an original mortgage, having the mortgagor's own genuine signature, would be as effectual for the purpose as if accompanied with his acknowledgment, or the affidavit of a subscribing witness.

It is further claimed that the judgment is erroneous because it was not proved upon the trial that the property was in Bowie county, where the mortgage was registered, or that Chaytor had in fact bought it subsequent to the execution of the mortgage, or was setting up any claim to it. The defendants, as before remarked, pleaded only a general denial; and it would seem that, if they proposed to defend upon the ground that the mortgage was not recorded in the proper county, they should have apprised the plaintiff of this by pleading the fact specially. But, however this may be, the mortgage recites that the mortgagor, Dowsing, is of "Texarkana and the county of Bowie and state of Texas." This we think sufficient to show, at least *prima facie*, that the mortgagor was a resident of the state, and that the mortgage was registered in the county of his residence, as the statute requires. 2 Sayles, Rev. St. art. 8190b.

It is also complained that the judgment is erroneous because there was no proof that Chaytor purchased the property after the mortgage was executed. That he did not purchase it before, we think, is shown by the recitation in the mortgage that the notes secured by it were given for the purchase money of the property, and by the further fact that all the instruments bear the same date. The general denial interposed by defendant Chaytor puts in issue the plaintiff's right to enforce a lien upon the property; but does it put in issue the fact that he is setting up a claim to it? It, however, appears in evidence that, after the mortgage was executed, Dowsing told the witness Cook that he had sold the property to Chaytor for \$4,750. So much of the conversation between Dowsing and this witness as admitted the execution of the mortgage was objected to by defendant Chaytor, but no objection was interposed to the statement of Dowsing that he had sold to Chaytor. This testimony, though hearsay, was before the court, and, under all the circumstances, was amply sufficient to warrant the finding of the judgment upon the issue of the sale to Chaytor. The testimony leaves but little doubt that both defendants absented themselves from the court-room at the time of the trial to avoid giving testimony in the case. Their failure to testify affords a strong presumption that, as a matter of fact, there was no defense to the action on the part of either. We do not think the assignments that the judge's conclusions were without evidence were well taken.

There is no error in the rulings of the court which requires a reversal of the judgment, and it is affirmed.

LAZARUS v. HENRIETTA NAT. BANK *et al.*

(Supreme Court of Texas. December 21, 1888.)

1. CHATTEL MORTGAGES—LIEN—PRIORITIES.

The lien of a chattel mortgage is not affected by a prior parol agreement between the mortgagors and third persons, that other mortgages to be executed by the mortgagors shall have priority over it, where it is actually executed and delivered in violation of such agreement, and with intent to give it priority; and it is immaterial whether or not the mortgagees had notice of the prior parol agreement.

2. PAYMENT—APPLICATION—SECURED DEBTS—RIGHTS OF SURETIES.

A firm executed a mortgage to secure a partnership indebtedness to a bank, and at the same time another of the bank's debtors executed to it a mortgage to secure notes upon which the partners were sureties, and the amount of such notes was not included in the estimate of the debt for which the firm mortgage was given. *Held*, that a payment by the firm should be applied first on their own debt, and that the bank should go upon the mortgage given to secure the notes before attempting to collect them from the sureties.

Appeal from district court, Clay county; P. M. STINE, Judge.

Suit by Sam Lazarus against the Henrietta National Bank and Thomas P. West, to enjoin a proposed sale of cattle under a mortgage given by Curtis & Atkinson, a copartnership, consisting of W. R. Curtis and T. J. Atkinson, to said West to secure a note due said bank, and to have four mortgages held by plaintiff on the same property adjudged prior in right to defendants' mortgage. Plaintiff alleged that it was agreed at the time of the execution of the five mortgages—all having been executed at one and the same time—that his mortgages should have priority. From a judgment for defendants, plaintiff appeals.

Davis & Garnett, for appellant. *J. A. Carroll* and *Robertson & Coke*, for appellees.

WALKER, J. Appellant insists that his lien should have priority over the deed of trust to secure the bank, upon the principle that where several mortgages are executed together by the same parties in accordance with an agreement as to the order in which they shall rank in priority, that such agreement will control regardless of the order in which the mortgages were actually signed. Appellee insists that although there may have been such an agreement, yet in this case the mortgages were not in fact executed together, but that the mortgage to West, trustee, for the benefit of appellee, was executed before the others, and with the intent on the part of the makers to give the appellee preference, and in violation of the agreement. While there is great confusion in the testimony to this point, yet, taking the testimony of West and Carter, who distinctly testify to the reason and motives for the change of intention on part of Curtis & Atkinson, and to the fact that the deed of trust to West was in fact signed by Curtis & Atkinson, and was delivered to W. S. Ikard, vice-president of the bank, and acting for it, some hours before the others were signed, we cannot set aside the findings of the court of such priority of execution, and of the intent that it should rank before them. The circumstances detailed by these witnesses, and especially those affecting the change of purpose, and the manner of its delivery, etc., are persuasive, and add to the weight of their testimony against the adverse testimony of Lazarus, Curtis, and E. F. Ikard. Considering it a fact that the deed of trust to West was executed before the others, and with intent that it should have priority, the questions remain whether the beneficiary had notice of the prior agreement, and the effect of it if shown. There is no testimony to any participation in behalf of the bank in the negotiations, nor any assent to the agreement made. W. S. Ikard, the vice-president, who received the security, testified that he knew nothing of the agreement until after this suit was filed. The court held that notice to West, the trustee, and to E. F. Ikard, a director, was not notice to the bank. But what would be the effect if notice was shown? The deed of trust to West being first in date and first of record, it would not be affected by any subsequent conveyances. Its validity, if at all, will be attacked by the prior parol agreement. It has been held that a mortgage upon personal property, without delivery, cannot be made by parol, (*Gay v. Hardeman*, 31 Tex. 250;) and chattel mortgages, as to their execution and effect, are regulated by statute. Rev. St. § 3190b. Whatever effect, as between Curtis & Atkinson and Lazarus, the parol agreement had, it could not affect the property. If valid, the parties could sue for its violation. But as there was no consideration paid or promised by Curtis & Atkinson, damages could not be had, nor specific performance enforced. It follows then that appellant took no rights in or to the stock of cattle as security by the agreement which could be enforced. We conclude, therefore, that the matter of notice is immaterial.

But the rights of the parties upon the facts found by the court are not equitably adjusted. It is found by the court that the note for \$20,000, made July 19, 1887, and secured by the deed of trust to West, was made to cover

the estimated indebtedness by Curtis & Atkinson to the bank. In fact, the amount was ascertained to be \$23,481. In addition to this they were sureties of W. S. Ikard on two notes held by the bank,—one for \$5,000, and the other for \$3,500. Further copying from the findings: "About the 25th August, 1887, and after the bank had closed, * * * and while it was under the control of the bank examiner, the sum of \$10,000 was paid by Curtis & Atkinson out of their partnership funds, and with the understanding with the directors of the bank that when the bank opened, and the said Curtis & Atkinson secured the remainder of their indebtedness to the bank, the said mortgage for \$20,000 should be transferred to any party that might be named by Curtis & Atkinson. That said bank never opened, and the remainder of the indebtedness to said bank was never secured to said bank by them. That said bank held as further security for the firm indebtedness of Curtis & Atkinson an obligation due to Curtis & Atkinson from one Glasgow for the sum of \$10,000, less \$2,112, deducted by agreement of parties. Upon such obligation, after the bank had suspended, and before the receiver took charge, the said Glasgow paid into said bank the sum of \$5,564, and the further sum of \$2,324 was deposited in a bank in Fort Worth by Glasgow, to remain there till June 1, 1888, to secure said Glasgow against any loss in cattle up to said date; said obligation having been executed by Glasgow to said Curtis & Atkinson for purchase money of said cattle, and Curtis & Atkinson having agreed to credit on said contract any loss on said cattle that might occur up to June 1, 1888. That Curtis & Atkinson made no application of either of said payments to any particular part of the partnership indebtedness. * * * That in addition to the above indebtedness of W. S. Ikard (for which Curtis & Atkinson were sureties) the said Ikard, together with E. F. Ikard, owed said bank the sum of \$4,425, making a total indebtedness of \$12,925 and interest, upon which there had been a payment of \$3,000. To secure the remainder of said indebtedness the said Ikard had mortgaged property of the market value of \$12,000. That attachments have been run on said property by the creditors of the Ikards since the said securities have been given to the bank. * * * The court finds that the indebtedness of the firm of Curtis & Atkinson to the bank (outside of the W. S. Ikard two notes) amounts to the sum of \$23,481, \$20,000 of which is secured by the note and trust deed. That their firm indebtedness as security for W. S. Ikard amounted to \$8,500, as shown above. I applied \$11,981 of the \$15,585 paid by Curtis & Atkinson on the \$11,981 not secured by said \$20,000 trust deed; the remaining \$3,583 was applied on said \$20,000 note and mortgage, leaving a balance of \$16,417 due on said note and mortgage."

In the conclusions of law is the following: "That the payments made by Curtis & Atkinson to the bank having been made from the partnership funds of said Curtis & Atkinson, the same must be appropriated to the partnership debts." The fifth and sixth and seventh assignments of error were as follows: "*Fifth*. The court erred in applying any portion of the ten thousand dollars paid by Curtis & Atkinson to the Henrietta National Bank to the two notes of W. S. Ikard, aggregating eight thousand five hundred dollars, upon which Curtis & Atkinson were the sureties of said Ikard. *Sixth*. The court erred in applying any portion of the five thousand five hundred and sixty-four dollars collected of Glasgow to the two notes of W. S. Ikard, upon which Curtis & Atkinson were sureties. *Seventh*. The court erred in not applying the \$10,000 paid by Curtis & Atkinson to the Henrietta National Bank towards the satisfaction of the mortgage executed to West to secure said bank."

These assignments question the appropriation of the funds of the firm to the payment of the Ikard indebtedness. Bearing upon this we find in the record the details of the execution of the trust deed by W. S. Ikard to secure his indebtedness to the bank. At the same time and place at which Curtis & Atkinson executed their trust deed to West, Ikard also executed his deed of trust, both to secure the bank. Curtis was president, and W. S. Ikard vice-

president, of the bank. Curtis, when proposing to execute the note and security, was assisted by Ikard in computing the amount, and it was estimated by them at \$20,000. This was the indebtedness on account of which the probable criminal prosecution was feared,—the motive to the act. The security debts of which Ikard was principal were not of the estimated items. Upon the estimate being reached of the amount, the note was executed to cover it, with the deed of trust to secure it. Ikard, as vice-president, acting for the bank, received the note and trust deed. As part of the same transaction, Ikard made a deed of trust to secure his indebtedness, including the notes on which Curtis & Atkinson were his sureties. This security was delivered to Curtis, the president of the bank. These two trust deeds were made at the same time, and to secure two separate debts by different parties,—the one by Curtis & Atkinson, the other by Ikard. The bank was represented in each part of the transaction, and no reason appears why the agreement as to the debts covered by the two trust deeds should not be valid, and enforced in applying the securities to the indebtedness intended. If so, the bank should go upon the Ikard security before attempting collection from the firm of Curtis & Atkinson.

It is evident from the testimony, and it is substantially in the findings of facts by the court, that the payment of the \$10,000, made in August, 1887, was upon the note and mortgage of the 19th July, as it was accompanied with the expressed intent that when full payment should be made the security should be transferred as directed, etc. That the contingency expected never came did not divert the payment from the purpose intended, and it discharged so much of the indebtedness of Curtis & Atkinson. The holding otherwise is in conflict with the facts ascertained by the court. However, the final designation by the court for the application of the firm assets to firm debts, if applied, will reach substantial justice. Touching the Glasgow claim, and the funds realized upon it, they were not appropriated to any particular part of the indebtedness of the firm. The payment of \$10,000 made in August, 1887, must be credited upon the firm indebtedness of \$23,481, leaving \$13,481 unpaid. The bank, while required first to exhaust the security furnished by Ikard and accepted by it, would have the right to apply, if necessary, the funds realized upon the Glasgow claim (\$5,564) to any balance remaining of the Ikard indebtedness.

The decree should perpetuate the injunction restraining any sale for any amount beyond the sum of \$13,481 and interest; should dissolve the injunction as to \$7,918; and as to the amount realized upon the Glasgow claim, the injunction should be held in force until it be shown that the money realized upon the Ikard securities and said sum of \$5,564 were exhausted upon the Ikard indebtedness; and upon it being shown to the court below by satisfactory proof that said sum of \$5,564, or any part thereof, was used upon the Ikard indebtedness after the sale of the Ikard securities, then for said sum, or so much thereof, as may have been so used after realizing upon the said securities, the injunction should then be dissolved. No note is taken of the Glasgow claim not realized. If additional funds should be realized upon it they are subject to like disposition with those in hand. The costs should have been adjudged against the defendants, for the complainant obtains partial relief.

The judgment below is reversed, and rendered in accordance with this opinion.

GREENING v. KEEL *et al.*

(Supreme Court of Texas. December 4, 1888.)

TRESPASS TO TRY TITLE—EVIDENCE TO SUPPORT TITLE.

Upon trial of an action for land patented by virtue of a certificate issued to one S. K., the theory of the defense being that the plaintiffs are heirs of an S. K. other than the one to whom the certificate was in fact granted, which there was evidence

to establish, it is error to refuse to charge, on behalf of defendant, that the legal title to the land was vested in the person to whom the certificate was in fact granted; that, if the jury believe from the evidence that there were two men of that name, they should determine to which one the certificate was granted; and that, if it was to a person other than plaintiffs' ancestor, the legal title was not in them, and the verdict should be for defendant.

Appeal from district court, Grayson county; E. D. McCLELLAN, Judge.

Action by James W. Keel and others, heirs of Solomon Keel, deceased, to recover 320 acres of land of defendant, T. M. Greening. Verdict and judgment for plaintiff, and defendant appeals.

E. C. McLean and Hare, Edmundson & Hare, for appellant. C. N. Buckler, for appellees.

WALKER, J. This is an appeal from a judgment in favor of appellees, who sued as heirs of Solomon Keel, for 320 acres of land surveyed and patented by virtue of certificate No. 314, issued April 20, 1850, by the commissioner of Peter's colony. The defendant pleaded limitation and not guilty. The defense was limited to testimony tending to show that the grantee of the land was not the ancestor of the plaintiffs, but was another Solomon Keel; to show a legal outstanding title. The testimony showed that the plaintiffs were the heirs of one Dr. Solomon Keel, who, it appeared, had caused the survey to be made, and had obtained the patent. The defendant proved the residence in Peter's colony of another Solomon Keel, with testimony tending to show that the certificate No. 314 was issued to him. It was also shown that the residence of Dr. Solomon Keel was not within the colony. Without detailing the testimony, nor commenting upon it, it is sufficient to say that the evidence was such that, had the verdict been for the defendant, it would not have been set aside as without or against evidence; and that testimony was necessary to the identity of Dr. Solomon Keel, and to his connection with the land, to entitle plaintiffs to recover. The court charged the jury: "If you find from the evidence that Solomon Keel, the ancestor of the plaintiffs, was the same person who located and caused to be surveyed the land in controversy, and to whom the patent adduced in evidence was granted, then you will find for plaintiffs." The defendant asked the court to instruct the jury: "(1) The certificate by virtue of which the land in question was located was granted to Solomon Keel, and the patent is issued upon said certificate in the name of Solomon Keel, which patent vested the legal title in the person to whom the certificate was in fact granted. (2) If you believe from the evidence that there were two men in Peter's colony by the name of Solomon Keel, you will determine from the evidence to which one of said men of that name the certificate was in fact granted. If you believe from the testimony that the certificate upon which the patent to the land in controversy was in fact granted and issued to and in right of a Solomon Keel, who was a different man from the Dr. Solomon Keel under whom plaintiffs claim, then the legal title to the land is in the Solomon Keel to whom the certificate was in fact granted, and you will find for the defendant."

It is self-evident that the grantee of a land certificate who has not parted with the ownership is the owner of the land located and patented under it, and such owner has the legal title. If the charge of the court was intended to convey any other rule, as does the literal meaning of the charge, then it was not the law, even if the Dr. Solomon Keel did locate the certificate and obtain the patent, when the certificate had not been granted to him: If he did not own the certificate, he did not own the land. This defect was sought to be remedied by the charges asked by the defendant, and which were refused. The charges asked presented the issue of fact made by the testimony. It was the duty of the court to submit it. The refusal was error for which the judgment must be reversed.

Reversed and remanded.

MAZZIA v. STATE.

(Supreme Court of Arkansas. January 19, 1889.)

1. INTOXICATING LIQUORS—ILLEGAL SALES—LICENSE.

Under Acts Ark. 1883, p. 193, providing that one who sells liquor in territory where sales are prohibited may be convicted for a violation of the license law or of the local option law, the penalties of the license act are in force in prohibition districts.

2. SAME—SALES IN PROHIBITED DISTRICTS.

Revenue act Ark. 1883, imposing a license on the business of a liquor seller, amended by implication the general license law, and became a part thereof; and one carrying on such business in a prohibition district is liable to the penalty of the revenue act by virtue of act 1883, p. 192, authorizing a conviction for violation of the license law in prohibition districts.

3. TRIAL—WRITTEN CHARGE BY JUDGE—VERBAL EXPLANATIONS.

Under Const. Ark. art. 7, § 23, requiring the judge to reduce his charge to writing at the request of either party, it is error for the court to make verbal explanations of the written charge.

Appeal from circuit court, Saline county; J. B. WOOD, Judge.

G. W. Murphy and L. Leatherman, for appellant. D. W. Jones, Atty. Gen., for appellee.

COCKRILL, C. J. The appellant was convicted of carrying on the business of a liquor seller, without license, in the city of Hot Springs, Garland county, where the local option law was in force. It is argued that the penalties of the statute defining the offense are suspended in the territory, where no license can be issued; and, to sustain the position, we are cited to the case of *State v. Cathey*, 41 Ark. 308, where it was held that the liquor seller was liable only to the penalties pronounced by the local option law for sales in local option districts. See, too, *De Bois v. State*, 34 Ark. 381; *State v. Orton*, 41 Ark. 305. But the legislature remedied this defect in the license law by an amendment passed in 1883, known as the "drag-net proviso to the license law," (Acts 1883, p. 192,) by which it was provided that one who sold liquor in territory where sales were prohibited might be convicted as for a violation of the license law, or of the local option or special law which prevailed in the territory where the sale was made. Since that enactment we have regarded the penalties of the license act as in force in prohibition districts, and have adjudged that a conviction for selling without a license may be sustained even in a locality where no license could be legally issued. *Chew v. State*, 43 Ark. 361.

But the offense of carrying on the business of a liquor seller, as distinguished from the offense of casual selling without license, was created by the revenue act of 1883, which was enacted subsequent to the license law; and it is argued that this offense is not within the terms of the drag-net proviso above mentioned, and that the case is controlled, therefore, by the decision cited *supra*. The drag-net proviso was enacted prior to the revenue law of 1883, and by its terms extends the penalties of the general license law to sales in prohibition territory. Now, as penal acts are construed strictly so as not to extend their terms beyond the clearly-expressed intent of the legislature, the proviso mentioned cannot be said to cover the subsequently defined offense, unless it is apparent that the act creating it became a part of the license law to which the proviso is attached. The rules for construing a proviso are not different from those that govern any other legislative expression. *Friedman v. Sullivan*, 48 Ark. 214, 2 S. W. Rep. 785. It is the intent that is to be arrived at from the context in all cases. The proviso here is not coupled with any particular provision of the license law, but it was the evident intention to extend it to all the penalties denounced by that law. Hence its denomination as the drag-net proviso. If the license act had been expressly

amended subsequent to the proviso, so as to change the penalties, or add a new offense, the terms of the proviso would attach to the amendment without doubt, because the intention to make the new provisions part and parcel of the old law would be express. But an act may be modified, changed, or amended by implication as effectually as by express reference, (*Coats v. Hill*, 41 Ark. 149; *Scales v. State*, 47 Ark. 476, 1 S. W. Rep. 769; *People v. Mahaney*, 13 Mich. 481;) and when that is done the law is read as one harmonious whole, just as though it had been originally so arranged by the law-making power. It is the only method of arriving at the legislative intent where there are several acts upon the same subject. Following this well-understood and common practice, the learned gentleman who revised the statutes in 1884 incorporated the liquor license provision of the revenue act of 1883 into the general license act, making the drag-net proviso read as applicable to the new penalty denounced by the revenue act. *Mansf. Dig.* §§ 4511, 4522. It is true we held in *Blackwell v. State*, 45 Ark. 90, that the revisers fell into error in substituting the penalties of the revenue act for those of the license act, but that was only upon the theory that the two acts were consistent in that respect, both penalties remaining in force; but there is nothing in that case from which it can be inferred that the revisers erred in applying the proviso to the new penalty.

The provisions of the revenue law about the liquor traffic were not designed for revenue only, else the traffic would not have been prohibited and made illegal, except upon the condition of taking out a license. The heavier penalty imposed shows it a severer disciplinarian than the former license act. The price to be paid for the liquor license provided for in it superseded the regulation of the license act, both as to wholesale and retail licenses; leaving the machinery for obtaining license to be governed by the latter act, as was ruled in *Drew Co. v. Bennett*, 43 Ark. 364. The license provisions of the revenue act have thus been treated by the court as modifying and amending the general license act, thereby becoming a part of it. When thus amended, the general proviso of the former act became applicable to the act as amended, and made the liquor seller chargeable with the heavier penalty wherever he carries on the business illegally. We applied the same rule in construing the several statutes of limitation in the case of *Railway Co. v. Manes*, 49 Ark. 248, 4 S. W. Rep. 778; and there are numerous instances in which it has been silently recognized. The body of the statute law would be in inextricable confusion under any other rule of construction.

In sustaining a conviction for selling without a license, where the law prohibits the issue of a license, the courts thus follow the expressed will of the legislature; but, if the appellant's contention were true, that the provisions of the revenue act above referred to were directed solely to the purpose of taxation for revenue, with no other object in view, he could derive no relief from it, for the seeming inconsistency of condemning one for selling without paying the tax where no tax is legally payable is not real. The assumption that to charge one with selling without paying the tax implies (falsely) that the payment of the tax would have legalized the business in a prohibited district, rests upon the judicial anomaly that a violation of the local option law, which prohibits the traffic, is a justification for a violation of the taxing law. But the two acts tend to the same end,—the heavier tax of the revenue law being in aid of and not antagonistic to the local option law. *Youngblood v. Sexton*, 32 Mich. 406; *License Tax Cases*, 5 Wall. 462.

When the court was about to instruct the jury, the defendant made a special request that the charge be wholly in writing. The court charged the jury in writing, but in doing so made "verbal explanations," as the bill of exceptions has it, "of the written instructions, explaining to the jury how they were to be construed, and what the court considered they meant." Objection to this mode of charging was renewed at the time, and the action of the

court was assigned as a ground for new trial. The verbal charge was not reduced to writing.

The constitution requires the judge to reduce his charge or instructions to the jury to writing, at the request of either party. Article 7, § 23. The law is mandatory, and cannot be evaded, when a party demands its execution. *Lumber Co. v. Snell*, 47 Ark. 407, 1 S. W. Rep. 708.

A judgment will not be reversed, however, for an unsubstantial error in this regard more than any other; as where provisions of the statute are read to the jury without being transcribed, (*Palmore v. State*, 29 Ark. 268;) or where the oral charge is simple, and without complication, and is accurately reduced to writing without unnecessary delay, and is set out in the bill of exceptions, (*Lumber Co. v. Snell*, *supra*.) In such cases we can judicially determine that the error was not prejudicial, (*O'Donnell v. Segar*, 25 Mich. 379, 380;) but, when it does not affirmatively appear that the error is harmless, we cannot disregard the mandate of the constitution. The right guaranteed by the fundamental law would be worthless if it was incumbent on the defendant to show that the charge was erroneous, because that error itself would be ground for reversal. The object of the law was to obtain a carefully considered charge, and to prevent any misconception and after-misunderstanding as to its exact tenor and phraseology when the bill of exceptions came to be considered. *Barkman v. State*, 13 Ark. 705. Oral explanations of the written charge are within the mischief as well as the oral charge. *O'Donnell v. Segar*, *supra*; *Head v. Langworthy*, 15 Iowa, 235; *Ray v. Wooters*, 19 Ill. 82; *O'Hara v. King*, 52 Ill. 306; *Bradway v. Waddell*, 95 Ind. 170; *Sackett*, Instructions to Juries, p. 11, § 1; *Thomp. Char. Jur.* § 104.

It would not do to indulge the presumption that the oral explanation did not change or modify the written charge any more than the presumption that the charge is right in a case where the court refuses to reduce it to writing.

For the error the judgment must be reversed. It is so ordered.

In re McCULLOUGH et al.

McCULLOUGH et al. v. BLACKWELL et al.

(Supreme Court of Arkansas. January 12, 1889.)

1. APPEAL—FROM JUDGMENT OF COUNTY COURT—CONSTITUTIONAL LAW.

Appeals from all judgments of county courts to the circuit courts being guaranteed by Const. Ark. art. 7, § 33, and required to be granted as a matter of right by Dig. Ark. § 1436, which also provides the practice therefor, the petitioners for an order for the prohibition of the sale of liquor under the "three-mile law" (Dig. Ark. § 4524 *et seq.*) may appeal from the order of the county court denying their petition, though the latter statute makes no provision for an appeal.

2. INTOXICATING LIQUORS—PETITION FOR "THREE-MILE LAW"—WITHDRAWING SIGNATURE.

A petitioner for putting the "three-mile law" in operation, which the county court is required to do on being petitioned by a majority of the inhabitants, (Dig. Ark. § 4524,) cannot withdraw from the petition after it has been acted upon by the county court, and while an appeal is pending in the circuit court, though in the latter court the issues are tried anew, the petition and action of the county court in such case being in the nature of an election in which the votes have been cast and returns made.

3. SAME—VALIDITY OF SIGNATURES.

The allegations of a remonstrance that certain signatures to the petition were unduly obtained are not evidence thereof.

Appeal from, and *certiorari* to, circuit court, Faulkner county; J. W. MARTIN, Judge.

Blackwell and others filed in the county court a petition for an order prohibiting the sale of liquor within three miles of a certain point in Faulkner county, as provided by the "local option" or "three-mile law." Section 4524 *et seq.*, Mansf. Dig. McCullough and others filed a counter-petition or remonstrance. The county court refused to make the order, and Blackwell and others appealed to the circuit court, where the judgment of the county court was reversed, and the prohibitory order made as prayed for. In the circuit court McCullough and others filed their counter-petition or remonstrance, alleging that some 81 names which appeared upon the petition for the order were unduly obtained, and asking that those names be stricken from the petition. But no proof of fraud or undue influence in obtaining the names was offered, and the circuit court refused the prayer to strike them off. McCullough and others appeal. Pending this appeal, McCullough and others sued out a writ of *certiorari* to quash the judgment of the circuit court reversing the order of the county court, on the ground that the action of the county court was final, because the law makes no provision for appeal in this special statutory proceeding.

The following sections are from Dig. Ark.:

"Sec. 4524. Wherever the adult inhabitants residing within three miles of any school-house, academy, college, university, or other institution of learning, or of any church-house, in this state, shall desire to prohibit the sale or giving away of any vinous, spirituous, or intoxicating liquors of any kind, or alcohol, or any compound or preparation thereof, commonly called 'tonics' or 'bitters,' and a majority of such inhabitants shall petition the county court of the county wherein such institution of learning or church-house is situated, praying that the sale or giving away of the intoxicating liquors and alcohol enumerated in the premises be prohibited within three miles of any such institution of learning or church-house, said county court, upon being satisfied that a majority of such inhabitants have signed such petition, shall make an order in accordance with the prayer thereof, and thereafter, for a period of two years, it shall be unlawful for any person to vend or give away any spirituous, vinous, or intoxicating liquors of any kind, or alcohol, or any preparation thereof, commonly called 'tonics' or 'bitters,' within the limits aforesaid: provided, that nothing in this act shall be construed as affecting or repealing any special law now in force prohibiting the sale or giving away of spirituous or intoxicating liquors in any particular locality: and provided, further, that nothing herein contained shall prohibit the sale or giving away by manufacturers of wine made from grapes or berries, in quantities of one quart or more, in sealed bottles."

"Sec. 1436. Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court, at any time within six months after the rendition of the same, either by the court rendering the order or judgment, or by the clerk of the circuit court, with or without *supersedeas*, as in other cases at law, by the party aggrieved filing an affidavit and prayer for an appeal with the clerk of the court in which the appeal is taken; and upon the filing of such affidavit and prayer the court rendering the judgment or order appealed from, or the clerk of the circuit court, shall forthwith order an appeal to the circuit court, at any time within six months after the rendition of the judgment or order appealed from, and not thereafter. * * *

Cohn & Cohn, for appellants. *E. A. Bolton* and *W. S. McCain*, for appellees.

COCKRILL, C. J. To sustain the *certiorari*, it is argued that the circuit court acquired no jurisdiction to reverse the order of the county court refusing the prayer of the local option petitioners, because the law makes no provision for appeal in this special statutory proceeding. Our decisions do not

sustain the position. Appeals from all judgments of county courts to the circuit courts, under such regulations and restrictions as the legislature may prescribe, are guaranteed by the constitution. Article 7, § 38. In practice, the terms of the act passed in aid of this provision of the constitution have been applied habitually in special proceedings where the statute regulating them contains no provision about appeals. Mansf. Dig. § 1436; *Ex parte Levy*, 43 Ark. 48; *Phillips Co. v. Lee Co.*, 34 Ark. 240; *Dodson v. Fort Smith*, 33 Ark. 513; *Williams v. Citizens*, 40 Ark. 290, *Trammell v. Bradley*, 37 Ark. 374; *Boyd v. Bryant*, 35 Ark. 69.

Most nearly analogous to this case of any in which the question is discussed is that of *Ex parte Levy*, *supra*, where a petitioner, whose prayer for the issuance of a license to sell liquor had been denied by the county court, was permitted to prosecute his appeal. In *Ex parte Miller*, 49 Ark. 18; 3 S. W. Rep. 883, the petitioner's right of appeal to this court from an order of the circuit court refusing to put the three-mile law in operation was silently recognized, as it had been previously in *Williams v. Citizens*, *supra*, from the county to the circuit court. The petitioners, in such cases, like the liquor-dealer in *Levy's Case*, are parties to the record by virtue of the statute, and their right to test the validity of the proceeding by *certiorari* or appeal is clear. But no provision is made by the statute for a remonstrance against the issue of a license where the county court is authorized to issue licenses, nor is provision made for a hearing of those who desire to oppose the prayer of a petition under the local option law. The right of remonstrance has nevertheless been ruled to exist in the former case, (*Austin v. Atlantic City*, 48 N. J. Law, 118, 3 Atl. Rep. 65; *Dufford v. Nolan*, 46 N. J. Law, 87; *Ferry v. Williams*, 41 N. J. Law, 332,) as it unquestionably does in the latter, (*Williams v. Citizens*, 40 Ark. 290.) As against the petition to prohibit the sale of liquor, the licensed dealer, or one who has taken the necessary steps to procure a license, who moves to be made a party for the purpose of showing that the petition does not contain a majority of the signatures, legally obtained, of the adult residents of the district, does not manifest the impertinent interference of a stranger without interest, and, when made a party by order of the court, may sue out a writ of *certiorari*, or prosecute an appeal from the judgment thereafter rendered, just as the petitioners may do. *Ferry v. Williams*, *supra*; *Miller v. Jones*, 80 Ala. 89; *McCreary v. O'Flinn*, 63 Miss. 204. The right to prosecute an appeal on the part of the liquor-dealer was recognized by this court in the case of *Boyd v. Bryant*, 35 Ark. *supra*, and in *Williams v. Citizens*, 40 Ark. 290, and we affirm those rulings.

2. The question arising on the appeal is this: Where a petition to put the three-mile law in force has been acted upon by the county court, and an appeal from the order prosecuted to the circuit court, has the petitioner the unqualified right to withdraw from the petition in the circuit court? The question is answered in the negative by the decision in *Williams v. Citizens*, *supra*. Speaking of the right of a petitioner to withdraw from the petition in the county court,—the court of first instance,—it is said that if the original signatures were obtained intelligently and without fraud, and have not been erased before presentation, or afterwards by leave of the court for cause, they fulfill the requirements of the statute. See *Grinnell v. Adams*, 34 Ohio St. 44; *Hays v. Jones*, 27 Ohio St. 218; *Dutton v. Village of Hanover*, 42 Ohio St. 215. The petition is in the nature of an election. When the county court has acted, the votes have been cast, and the election returns made, and an appeal does not invest the petitioner with the power to change his vote, or to withdraw it except for good cause, as is indicated in *Williams v. Citizens*, *supra*. While the circuit court tries the issue on appeal *de novo*, it can award or refuse a prohibitory order only upon the petition as signed when acted upon by the county court. No cause for striking from the petition the names to which objection was made was shown or offered. The remonstrance

alleged that they were unduly obtained, but that the allegations of the remonstrance are not evidence was decided in *Williams v. Citizens, supra*. No proof was offered to sustain the allegation. Let the judgment be affirmed.

RUBLE v. STATE.

(Supreme Court of Arkansas. January 12, 1889.)

INTOXICATING LIQUORS—SALES TO MINORS—FORMER JEOPARDY.

A conviction for selling a pint of liquor without a license is no bar to an indictment for selling it to a minor without the written consent of his parent or guardian.¹

Appeal from circuit court, Boone county; R. H. POWELL, Judge.
Cramp & Watkins, for appellant. D. W. Jones, Atty. Gen., for the State.

BATTLE, J. Appellant sold one pint of ardent spirits to Peter Dees, a minor, without the consent of his parents or guardian. For doing so he was indicted for and convicted of selling liquor without license, and fined in the sum of \$200, and was indicted for selling alcoholic, ardent, and vinous liquors and intoxicating spirits to a minor without the written consent of his parents or guardian. After he was convicted under the first indictment, he pleaded such conviction and not guilty to the second indictment, and was convicted of the offense therein charged, and fined. Were the trial and conviction under the second indictment lawful? It is sometimes difficult to determine whether the offense for which an accused party stands charged is the same offense of which he has before been acquitted or convicted, and this is the only inquiry in this case. Mr. Justice Blackstone says: "It is to be observed that the pleas of *autrefois acquit* and *autrefois convict* must be upon a prosecution for the same identical act and crime." 4 Bl. Comm. 336.

In *Com. v. Roby*, 12 Pick. 496, Chief Justice SHAW, in delivering the opinion of the court as to what is necessary to constitute offenses charged in two indictments the same, said: "It must therefore appear to depend upon facts so combined and charged as to constitute the same legal offense or crime. It is obvious, therefore, that there may be great similarity in the facts, where there is a substantial legal difference in the nature of the crimes; and, on the contrary, there may be a considerable diversity of circumstances, where the legal character of the offense is the same; as where most of the facts are identical, but by adding, withdrawing, or changing some one fact the nature of the crime is changed; as where one burglary is charged as a burglarious breaking and stealing certain goods, and another as a burglarious breaking with an intent to steal. These are distinct offenses. *King v. Vandercomb*, 2 Leach, 716. So, on the other hand, where there is a diversity of circumstances, such as time and place,—where time and place are not necessary ingredients in the crime,—still the offenses are to be regarded as the same. In considering the identity of the offense, it must appear by the plea that the offense charged in both cases was the same in law and in fact. The plea will be vicious, if the offenses charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact; as,

¹ A conviction for maintaining an intoxicating liquor nuisance, under Code Iowa, § 1543, is no bar to a prosecution for keeping intoxicating liquors for sale, under section 1542. *State v. Graham*, 35 N. W. Rep. 628. The plea of former conviction must be upon a prosecution for the same identical crime. A single act may be an offense against two statutes, and the test is not whether defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. *State v. Stewart*, (Or.) 4 Pac. Rep. 128. In general, as to what will support a plea of former jeopardy, see *People v. Carty*, (Cal.) 19 Pac. Rep. 490, and cases cited; *Willis v. State*, (Tex.) 6 S. W. Rep. 857, and note.

if one is charged as accessory before the fact, and acquitted, this is no bar to an indictment against him as principal. But it is not necessary that the charge in the two indictments should be precisely the same. It is sufficient if an acquittal from the offense charged in the first indictment virtually includes an acquittal from that set forth in the second, however they may differ in degree. Thus an acquittal on an indictment for murder will be a good bar to an indictment for manslaughter; and, *e converso*, an acquittal on an indictment for manslaughter will be a bar to a prosecution for murder. For, in the first instance, had the defendant been guilty, not of murder, but of manslaughter, he would have been found guilty of the latter offense upon that indictment; and, in the second instance, since the defendant is not guilty of manslaughter, he cannot be guilty of manslaughter under circumstances of aggravation which enlarge it into murder."

Chitty, in speaking of the identity of the offense necessary to sustain a plea of former acquittal or conviction, says: "As to the identity of the offense, if the crimes charged in the former and present prosecution are so distinct that evidence of the one will not support the other, it is inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal of the one will be a bar to the prosecution for the other." 1 Chitty, *Crim. Law*, 453; *State v. Hall*, 50 Ark. 29, 6 S. W. Rep. 20; *Emerson v. State*, 43 Ark. 372; *Wilson v. State*, 24 Conn. 57; *State v. Nash*, 86 N. C. 650; *King v. Vandercomb*, 2 Leach, 716, 723; *State v. Stas*, 17 N. H. 558; *Durham v. People*, 4 Scam. 172; *Guedel v. People*, 43 Ill. 226; *Freeland v. People*, 16 Ill. 380; *Foster v. State*, 39 Ala. 233; *Dominick v. State*, 40 Ala. 680; *Hite v. State*, 9 Yerg. 375; *State v. Glasgow*, Dud. (S. C.) 43; *State v. Warner*, 14 Ind. 572; *Lewis v. State*, 1 Tex. App. 323; 1 Russ. Crimes, 881; Whart. *Crim. Pl.* (8th Ed.) §§ 471, 472; 1 Bish. *Crim. Law*, (7th Ed.) §§ 1051-1065.

Mr. Bishop says: "Looking, further, to see when the offenses are the same, we have, in reason, the following propositions: They are not the same—*First*, when the two indictments are so diverse as to preclude the same evidence from sustaining both; or, *secondly*, when the evidence offered on the first indictment, and that intended to be offered on the second, relate to different transactions, whatever be the words of the respective allegations; or, *thirdly*, when each indictment sets out an offense differing in all its elements from that in the other, though both relate to one transaction,—a proposition of which the exact limits are difficult to define; or, *fourthly*, when some technical variance precludes a conviction on the first indictment, but permits it on the second; yet, *fifthly*, the offenses are the same in all other circumstances wherein the evidence to support one of the indictments sustains also the other; and, *sixthly*, if the two indictments set out offenses which are alike, and relate to one transaction, yet, if one contains more of criminal charge than the other, but upon it there could be a conviction for what is embraced in the other, the offenses, though of differing names, are, within the constitutional protection from a second jeopardy, the same." 1 Bish. *Crim. Law*, (7th Ed.) § 1051.

In *Com. v. Bubser*, 14 Gray, 83, it was held that "an acquittal upon an indictment for a nuisance in keeping a tenement used for the unlawful sale of intoxicating liquors is no defense to an indictment for being a common seller of intoxicating liquors at the same time and place." Mr. Justice HOAR, in delivering the opinion of the court, said: "The offenses were not identical. The gist of one offense is the keeping a tenement for an illegal purpose, which makes it a nuisance; of the other, the doing certain acts which constitute an offense, to the commission of which it is not necessary that the defendant should have been the keeper of any building or tenement whatever. On the trial of the first indictment the jury would have been properly instructed to acquit the defendant if he did not keep the tenement described, however

great a number of sales of intoxicating liquors he might have made within it."

Tested by the authorities cited and quoted from, was appellant twice indicted for the same offense? The sale of ardent or spirituous liquor within and of itself is no offense. Whether it be criminal or not depends on other facts. One statute makes it an offense to sell it without license, and another makes it an offense to sell it to a minor without the consent of his parent or guardian. The objects of the two statutes are entirely different. The object of the first is the enforcement of the law which requires licenses to be granted, and fees therefor to be paid, and of the other to protect the morals of minors, and prevent them from being led into intemperance. The act or circumstance which makes the sale illegal in one case is entirely different from the facts which make it an offense in the other. Under the first statute he was guilty if he had no license, although he sold to a minor with the written consent of his parent or guardian; and under the other he was guilty if he sold to a minor, without the written consent of his parent or guardian, although he had or had not license. The acts necessary to constitute the offenses are so wholly unconnected and distinct as not to be comprehended, the one within the other. The essential and constituent elements of the same are different. A party may be guilty of one and innocent of the other, or guilty of both; and the acquittal of one is not an acquittal of the other. They are separate and distinct offenses.

In holding that the two offenses charged against appellant are not the same we are not without precedents. In South Carolina two statutes were in force at the same time. One imposed a penalty of £50 on persons retailing liquors without license to persons of any description, and the other a penalty of \$1,000 and imprisonment on those trading with a negro without a ticket. In *State v. Sonnerkalb*, 2 Nott & McC. 280, it was held that a person who sold liquor to a negro without a license and a ticket was lawfully convicted under these statutes of two offenses, and subject to the penalties imposed by both. In *State v. Taylor*, 2 Bailey, 49, the same court held that the act of buying goods of a negro, knowing them to be stolen, subjected the purchaser to two punishments,—one for trading with a negro without a ticket, and the other for receiving stolen goods. And it was adjudged in *State v. Inness*, 53 Me. 586, that "to punish a person for keeping a drinking-house and tippling-shop, and also for being a common seller of intoxicating liquors, although the same illegal acts contributed to make up each offense, is not a violation of the law which forbids a prisoner to be put in jeopardy twice for the same offense." In *Com. v. Harrison*, 11 Gray, 308, it was held that a conviction for an illegal sale of intoxicating liquor is no bar to a subsequent charge of keeping open a shop for the transaction of business on the Lord's day, although the business transacted was the sale of liquor for which the party had been previously convicted. And in *State v. Faulkner*, 2 South. Rep. 539, it was held that the accused, who, being intrusted with cotton for a particular purpose by the owner, obtained money on it from a third person, by falsely representing himself as the owner and selling it to him, was lawfully indicted for embezzling the cotton, and for obtaining the third person's money under false pretenses, and that the conviction of the latter offense was no bar to a prosecution for the other.

According to the rule laid down by some authorities, one of the tests to determine the identity of offenses is, if the evidence of the facts alleged in the second indictment is not within itself sufficient to convict under the first indictment, the offenses charged in the two indictments are not the same. Tested by this rule, are the offenses charged in the two indictments against appellant the same? In *Com. v. Thurlow*, 24 Pick. 374, it was held that it was necessary, in an indictment for selling spirituous liquors without a license, to allege that the defendant was not duly licensed, and on the trial it

was incumbent on the state to produce *prima facie* evidence of that fact. According to that case, the offenses charged against appellant were clearly not the same. But this court has held that the state, in such trials, is not required to prove that the accused had no license, because, if he has, it is particularly within his own knowledge, and within his power, to produce or prove it; and, if he has not, it is not convenient for the state to prove that he was not licensed. *Hopper v. State*, 19 Ark. 146; *Williams v. State*, 35 Ark. 434. It is nevertheless true that the sale alone does not constitute an offense, and in a trial for selling without a license the state must introduce *prima facie* evidence that the accused had no license when he made the sale, or the defendant fail to prove he had. The failure of the accused to prove he had, is evidence that he had none; for, if he had, it is presumed he would have proven it. So that proof of a sale of spirituous liquors to a minor, without the written consent of his parent or guardian, without other material evidence, would not be sufficient to prove a sale without a license; and, according to the rule, the offenses charged against appellant are not the same. But reverse the order of the indictments, and suppose that the appellant has been convicted upon the first indictment of selling liquor to a minor without the written consent of his parent or guardian, and pleaded such conviction in bar of the second, would the evidence necessary to sustain the second indictment, in that case, have been sufficient to procure a legal conviction on the first? Most unquestionably it would not. Then they are not the same offenses. The evidence of the one will not support the other, and "it is," in the language of Chitty, "inconsistent with reason, as it is repugnant to the rules of law, to say that the offenses are so far the same that an acquittal [or conviction] of the one will be a bar to the prosecution for the other." Judgment affirmed.

HANLON v. STATE.

(Supreme Court of Arkansas. January 19, 1889.)

1. INTOXICATING LIQUORS—ILLEGAL SALES—PAYMENTS TO CITY OFFICIALS.

An instruction that the fact that officials allowed defendant to carry on the business of a liquor seller, and collected money from him for the privilege, was no justification, is not erroneous, as being without evidence to support it, where a police sergeant testified that he collected money of defendant on several occasions, without explanation as to the purpose of the collection, but with a statement that he was instructed by his superior to collect that amount from each of the liquor dealers in the city.

2. SAME—EVIDENCE.

It is competent to show that, during the time defendant is charged with having carried on the business, freight and transfer agents received and delivered large quantities of intoxicating liquors consigned to him.

3. APPEAL—REVIEW—HARMLESS ERROR.

Hearsay evidence admitted without objection, and afterwards withdrawn on defendant's motion, cannot be assigned as error.

Appeal from circuit court, Saline county; J B. Wood, Judge.

G. W. Murphy and L. Leatherman, for appellant. D. W. Jones, Atty. Gen., for appellee.

COCKRILL, C. J. The appellant was convicted of carrying on the business of liquor selling without a license, in territory where the local option law was in force. He contends that the penalties of the law creating the offense are not in force in such territory. We have determined otherwise in *Mazza v. State*, ante, 257. At the trial the court instructed the jury that the fact that the officials of the city of Hot Springs, where the offense was charged to have been committed, may have allowed the defendant to carry on the business of

a liquor seller, and collected money from him for the privilege, was not a justification for a violation of the liquor law. It is not contended that there is error in the proposition of law involved in the instruction, but that it is misleading because it is abstract, being without testimony to justify it. A police sergeant of the city testified that he had collected money of the defendant on several occasions, without explanation from either of them as to the purpose of the collection, but that he was instructed by his superior to collect the amount which the defendant paid him from each of the liquor dealers in the city, and that he collected of the defendant because he knew he was engaged in the business. There was ample proof that he was in fact engaged in the business. The payment, under the circumstances, was a criminating fact, from which the jury might have inferred that the defendant was undertaking to purchase immunity from punishment by payment to the city officials, and the instruction was appropriate to prevent any misapprehension as to the law governing the case.

The sergeant also testified, without objection, that his superior had informed him that there was an agreement between the city authorities and this defendant to pay the amount collected from him, but, upon the subsequent motion of the defendant, this statement was withdrawn from the jury by the court as hearsay, and it cannot be assigned as error.

The railroad and transfer agents testified that they had, at different times, received for, and delivered to, the defendant, large quantities of freight consigned to him, consisting of intoxicating liquors, during the period he is charged to have been carrying on the business. It is objected that the testimony is irrelevant. While the fact of having the liquor in possession did not of itself constitute the offense, receiving supplies from time to time, as any dealer in the business would, tended to prove the fact that defendant was engaged in the liquor traffic. The testimony leaves no doubt of the fact. Affirmed.

GREEN v. STATE. JONES v. SAME. MITCHELL v. SAME.

(Supreme Court of Arkansas. January 19, 1889.)

1. HOMICIDE—MURDER—INSTRUCTIONS—INTENT.

Instructions that defendant is guilty of murder if he inflicted the wounds charged "with the intent formed in the mind at the time of the injuries to take deceased's life," and that "an unlawful act coupled with malice, and resulting in death, will not of itself constitute murder in the first degree, but "the killing must have been intentional, after deliberation and premeditation," are correct as to the intent.

2. SAME—EVIDENCE.

Evidence that defendants and others banded together to take deceased from his room and whip him; that on a certain night they forcibly carried him from the room, where he was sleeping, and beat him; and that on the next day his dead body, lacerated with switches, was found wrapped in a quilt, with the skull fractured, three ribs, the collar-bone, and an arm broken, and with switches and sticks lying near by,—is sufficient to sustain a verdict of murder, although it does not appear by whom the fatal blow was struck.

3. SAME—ACCOMPLICE.

Failure of a witness for two days to report what he knew about the murder does not render him an accomplice, when such failure was induced by threats of the accused to kill him if he disclosed.

Appeals from circuit court, Clark county; R. D. HEARN, Judge.

A. Curl, for appellants. Dan. W. Jones, Atty. Gen., for appellee.

BATTLE, J Willis Green, Dan. Jones, Anderson Mitchell, and others were jointly indicted for the murder of Arthur Horton. They severed their trials, and Green, Jones, and Mitchell were separately convicted of murder in the first

degree. They filed separate motions for new trials, which were denied, and severally appealed to this court.

One of the grounds of Green's complaint is, the court did not properly instruct the jury in his trial as to the intent necessary to constitute murder in the first degree. In order to constitute the killing of a human being murder in the first degree, there must be a specific intent to take life formed in the mind of the slayer before the act of killing was done. It is not necessary, however, that the intention be conceived for any particular length of time before the killing. It may be formed and deliberately executed in a very brief space of time. If it was the conception of a moment, but the result of deliberation and premeditation, reason being on its throne, it would be sufficient. The law fixes no time in which it must be formed, but leaves its existence as a fact to be determined by the jury from the evidence. *Bivens v. State*, 11 Ark. 455; *McAdams v. State*, 25 Ark. 405; *McKenzie v. State*, 26 Ark. 339; *Fitzpatrick v. State*, 37 Ark. 256; *Casat v. State*, 40 Ark. 524; *State v. Wieners*, 66 Mo. 13; *Com. v. Drum*, 58 Pa. St. 9; *People v. Majone*, 91 N.Y. 211; 2 Bish. Crim. Law. (7th Ed.) § 728; Whart. Crim. Law, (9th Ed.) § 380.

As to what is necessary to constitute murder in the first degree, the court charged the jury in the trial of Green as follows: "All murder which shall be perpetrated by means of poison or by lying in wait, or by any other kind of willful, deliberate, malicious, and premeditated killing, * * * shall be deemed murder in the first degree." "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, either by himself or in connection with others, inflicted the wounds or injuries on deceased, Horton, as charged in the indictment, with the intent, formed in the mind at the time of the injuries, to take deceased's life, and that such wounds or injuries did cause the death of deceased, they may convict of murder in the first degree." "An unlawful act coupled with malice, and resulting in death, will not of itself constitute murder in the first degree, but, in order to constitute murder in the first degree, the killing must have been intentional, after deliberation and premeditation." In order to constitute a homicide murder in the first degree, according to these instructions, the killing must have been willful, deliberate, malicious, and premeditated; there must have been an intent to take the life of the deceased in the mind of the slayer at the time the act of killing was done; and the intent must have been formed after deliberation and premeditation. This is, in effect, telling the jury that the intent must have preceded the killing. This is the only construction which can be fairly placed upon these instructions, and, construed in that way, they are correct.

Appellants insist that the verdicts against them are contrary to law and evidence. The evidence shows that they and others banded together to take Arthur Horton from his room and whip him; that during the night of the 21st of May, 1888, they entered the room in which he was sleeping, and forcibly took and carried him away for a short distance, and whipped and beat him most cruelly. On the next day his dead body was found wrapped in an old quilt, and near it a number of switches, or small sticks, with "frazed ends." The skull was fractured; there was a severe cut across the face; three of his ribs were broken down; the front of the body was lacerated with switches; and one arm and the collar-bone were broken. His death was, doubtless, caused by these wounds. There was evidence to sustain the conclusion of the juries that they were inflicted by those who had taken him out with the avowed purpose of whipping him. But there was no evidence to show who struck the fatal blow. But this does not relieve appellants of responsibility for the crime thereby committed. Having combined to commit a crime, they are responsible for the crime committed in the prosecution of their common design.

In Wharton's Criminal Law the author says: "All those who assemble themselves together, with an intent to commit a wrongful act, the execution whereof makes probable in the nature of things a crime not specifically de-

signed, but incidental to that which was the object of the confederacy, are responsible for such incidental crime. * * * It is not necessary that the crime should be a part of the original design. It is enough if it be one of the incidental, probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus, when A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan and in furtherance of the robbery, kills C., B. is guilty of the murder. In such cases of confederacy all are responsible for the acts of each, if done in pursuance of or as incidental to the common design." Volume 1, (9th Ed.) § 220; *Reg. v. Jackson*, 7 Cox, Crim. Cas. 357.

Mr. Bishop says: "A man may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, from some other specific or general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable." 1 Bish. Crim. Law, (7th Ed.) § 636.

In 1 Hale, P. C. 441, it is said: "If divers persons come in one company to do any unlawful thing, as to kill, rob, or beat a man, or to commit a riot, or to do any other trespass, and one of them in doing thereof kills a man, this shall be adjudged murder in them all that are present of the party abetting him, and consenting to the act, or ready to aid him, although they did but look on."

In *Brennan v. People*, 15 Ill. 512, a large number of defendants were indicted for the murder of one Story. Instructions were asked which "required the jury to acquit the prisoners, unless they actually participated in the killing of Story, or unless the killing happened in pursuance of a common design on the part of the prisoners and those doing the act to take his life." The court said: "Such is not the law. The prisoners may be guilty of murder, although they neither took part in the killing, nor assented to any arrangement having for its object the death of Story. It is sufficient that they combined with those committing the deed to do an unlawful act, such as to beat or rob Story, and that he was killed in the attempt to execute the common purpose. If several persons conspire to do an unlawful act, and death happens in the prosecution of the common object, all are alike guilty of the homicide."

In *Williams v. State*, 81 Ala. 1, 1 South. Rep. 179, it was held that if five or six men combine together to invade a man's household, and they go there armed with deadly weapons for the purpose of attacking and beating him, and in furtherance of this common design, all of the confederates being present or near at hand, one of them gets into a difficulty with their common adversary, and kills him, all may be guilty of murder, although they did not all entertain a purpose to kill. The court said: "The natural and probable consequences of this [conspiracy] is homicide,—either of one or more of the assailants or of the party thus assailed; and such homicide, when committed by any one of the conspirators, can be nothing less than murder in all who combine to commit the unlawful act of violence, especially if they be near at hand, inciting, procuring, or encouraging the furtherance of the act of assault and battery."

In *Peden v. State*, 61 Miss. 268, several persons conspired to take one Walker from his house, and whip him. They accordingly took him from his bed, and severely beat him, and in executing this design one of the confederates, named Davis, struck him a fatal blow with a spade, from which he died. It was held that they all were equally guilty, whether they intended to kill or not. The court said: "It is claimed that as the fatal blow was struck by Davis, and the evidence negatives the idea that there was any intent on the part of the accused to kill, he could not be guilty of murder; but, on the principle of joint responsibility between the parties unlawfully engaged, the guilt of Davis is imputable to the accused. Whether or not Davis was guilty of murder depends on whether he struck the fatal blow with deliberate design to effect the death of Walker. If he did, he was guilty of murder." In all

these cases the appellants, or a part of them, were convicted of murder in the highest degree, and were sentenced to death, and the sentence was affirmed by the appellate court.

In *Carr v. State*, 42 Ark. 206, several persons confederated to arrest one Wyatt, and in the prosecution of this design one of them killed him. The court said, in that case: "The law upon this subject is that a man may be guilty of a wrong which he did not specifically intend, if it came naturally, or even accidentally, from some other specific or general evil purpose. When, therefore, persons combine to do an unlawful thing, if the act of one, proceeding according to the common plan, terminates in a criminal result, though not the particular result meant, all are liable."

We think there was evidence to show that the killing in this case was done in the furtherance or prosecution of the common design of appellants and their associates to whip the deceased. It is highly probable that in the execution of their design they were met by resistance on the part of the deceased, and in overcoming that resistance the fatal blow was struck. The circumstances accompanying the killing, and the nature of the injuries inflicted, indicate a purpose to kill. The cruel and brutal treatment the deceased received shows an intention to do something more than to whip. They are presumed to have intended the natural consequences of their acts. There was evidence to sustain the verdicts of the juries in these cases.

But it is contended that one of the principal witnesses in these cases was an accomplice in the killing of Horton, and that appellants could not be lawfully convicted on his testimony without corroboration. The evidence on which this contention is based is the witness' own testimony. He testified that he did not report what he testified he knew for two days, and that his reason for not doing so was the accused had threatened to kill him if he did. The inference is he remained silent through fear. If the jury believe what he said to be true, they had the right to receive and act upon it; for he was not an accomplice if his failure to report was caused by fear, as was held in *Melton v. State*, 43 Ark. 367.

Judgment affirmed.

KENTUCKY CENT. R. CO. v. COMMONWEALTH.

(Court of Appeals of Kentucky. December 18, 1888.)

RAILROAD COMPANIES—CONSOLIDATION—TAXATION—JUDICIAL SALE.

Act Ky. Feb. 23, 1871, incorporating the K. C. R. Co., and investing it with "all the powers, privileges, rights, immunities, and franchises" of the C. & L. R. Co., whose road it had bought at judicial sale, did not grant it the commutation of taxation conferred by act March 3, 1851, on the C. & L. R. Co., nor was that right transferred by the judicial sale. The road, therefore, is subject to taxation under the general railroad tax act approved April 8, 1878.

Appeals from circuit court, Franklin county; W. MONTFORT, Judge.

Actions by the commonwealth for taxes for the years 1884–1886, assessed and levied in accordance with the act approved April 3, 1878. The court found for plaintiff as to the Maysville & Lexington road, Northern and Southern divisions, and the Richmond branch of the Louisville & Nashville road, but held that the Covington & Lexington, (composed of the Covington & Paris and Paris & Lexington roads,) afterwards the Kentucky Central, was only taxable as specified in its charter of 1851. Both parties appeal.

Hallam & Meyers, for the Railroad. *P. W. Hardin*, for the Commonwealth.

LEWIS, C. J. This is an appeal from a judgment rendered in two actions, tried together, which the commonwealth of Kentucky instituted against the Kentucky Central Railroad Company to recover the amount of taxes alleged

to be due and unpaid for the years 1884, 1885, 1896, according to returns made by the officers of the company to the auditor of public accounts of the state, and the valuation made by the board of equalization, as provided by an act approved April 3, 1878, entitled "An act to prescribe the mode of ascertaining the value of the property of railroad companies for taxation, and for taxing same."

As appears from a copy of the returns made to the auditor, the defendant owns and operates, as parts of its system, the following roads: The Covington & Paris road, the Maysville & Lexington road, Southern and Northern divisions, the Paris & Lexington road, and the Richmond branch of the Louisville & Nashville road. We think there is no room for controversy about the liability of the defendant to pay taxes in some mode upon all of those roads: for it not only controls, has the possession, and operates each one of them, but they were all returned to the auditor as subject to taxation; and the only question is as to the mode in which they ought to be taxed, and the amount of taxes the company is liable for.

In 1847 the Licking & Lexington Railroad Company was incorporated, with the right to construct a road from Covington to Lexington; it being provided in the charter that a tax of 25 cents on each share of stock of \$50, owned and held by any stockholder, should be annually paid into the state treasury by the president and directors of the company. In 1849, by amendment to the charter, the name of the corporation was changed to "Covington & Lexington Railroad Company;" and March 3, 1857, an act was passed further amending, section 4 of which is as follows: "That on the 1st day of January next after the first declaration of dividends on the capital stock of said railroad company, and on every 1st day of January thereafter, it shall be the duty of the president and directors of said company to pay into the treasury of the commonwealth a tax on each one hundred dollars' worth of stock in said railroad company equivalent to the rate of tax on each one hundred dollars' worth of property for state revenue, and no more, and resident stockholders shall not list their stock in said company for revenue tax, nor be liable to payment of tax on the same in any other mode whatever."

But February 22, 1871, "An act to incorporate the Kentucky Central Railroad Company" was passed, the first section of which is as follows: "That Geo. H. Pendleton, John W. Stevenson, Wm. Ernst, J. C. Gedge, G. Bowler, and E. H. Pendleton, their associates and successors, be, and are hereby, created a body corporate and politic, under the name and style of the 'Kentucky Central Railroad Company,' for the purpose of operating the Covington & Lexington Railroad, of which they are the owners by purchase under judgment and order of sale of the Fayette circuit court; and shall have, and are hereby invested with, all the powers, privileges, rights, immunities, and franchises, subject to the restrictions and limitations, contained in the original charter of incorporation authorizing the construction of said railroad, and the various acts amendatory thereof: provided, nothing in this act shall be held to subject the said powers, rights, immunities, and privileges purchased under judgment and order of sale of the Fayette circuit court, and hereby vested in the corporation by this act created, to the operation of the act entitled 'An act reserving the right to amend or repeal charters or other laws,' approved February 14, 1856; but the same are exempted therefrom," etc.

It is contended that according to a proper construction of section 4 of the act of April 3, 1851, quoted, the defendant is not liable to pay taxes on the stock according to its face, but only according to its actual value. But it is not material how that section should be construed, unless it be determined that the Kentucky Central Railroad Company, in virtue of its purchase at the judicial sale mentioned, and of the act of incorporation passed in 1871, is exempt from the operation of the act of April 3, 1878, applicable to railroad companies generally.

It appears that at the time the property of the Covington & Lexington Railroad Company was sold under the judgment mentioned it had constructed and was operating under its charter only so much of the road it was authorized thereby to build as extended from Covington to Paris, where it connected with the Maysville & Lexington road, which was constructed and operated under the charter of another corporation; and all the other roads reported to the auditor as owned and controlled by the Kentucky Central Railroad Company have been constructed or acquired by it since 1871. We therefore think no part of the system belonging to the defendant, if any at all, is exempt from the general law prescribing the mode of assessing and taxing railroad property in the state, unless it be that portion between Covington and Paris, and it was so decided by the lower court. *Railroad Co. v. Com.*, 10 Bush, 43.

There are two propositions of law which have been so often announced by this court, and by the supreme court of the United States, and are so just and necessary to the sovereignty and dignity of the state, and the general welfare, that they cannot be now called in question. The *first* is that immunity from taxation is a mere personal privilege, pertaining alone to the corporation or natural person originally invested by the legislature with it, and as a consequence not transferrable by sale or succession; *second*, that the taxing power of a state is never presumed relinquished, unless the intention of the legislature to relinquish is declared in clear and unambiguous terms. *Morgan v. Louisiana*, 93 U. S. 221; *Wilson v. Gaines*, 103 U. S. 417; *Railroad Co. v. Palmes*, 109 U. S. 250, 3 Sup. Ct. Rep. 193; *Railroad Co. v. Commissioners*, 112 U. S. 617, 5 Sup. Ct. Rep. 299; *Railroad Co. v. Com.*, 9 Bush, 439; *Railroad Co. v. Com.*, 10 Bush, 43; *Com. v. Temple Co.*, 8 S. W. Rep. 699.

This is, it is true, not a case where entire immunity from taxation is claimed, but it does involve the claim by one corporation of exemption from the mode provided by a general law of assessing and taxing the property of similar corporations, whereby it will be practically relieved of paying its fair and equal share of taxes; and in our opinion the same rule of construction should be applied in this case as if the claim was for entire exemption from taxation. In fact, while under certain conditions an exemption may be granted, we do not know upon what principle a corporation, the power to tax it being conceded, can claim an exemption from tax laws made applicable to all other similar corporations, and a consequent invidious preference to it in respect to the amount imposed.

The Kentucky Central Railroad Company did not acquire by its purchase at the judicial sale the privilege now claimed, which is in its nature partial and exclusive; nor does the language used in the act of incorporation, passed in 1871, clearly and in express terms confer it, for the terms used in that act import nothing more than the rights, privileges, and immunities usually granted, and such as are necessary to the corporate existence and ordinary conduct of the business of railroad companies. Certainly the language used does not clearly express an intention to grant to the company the extraordinary and exclusive privilege of exemption from conditions and burdens imposed upon railroad companies generally, and which are deemed necessary for the support of the government.

In our opinion, section 4 of the act of March 3, 1851, intended alone to regulate the mode of assessing the property of the Covington & Lexington Railroad Company, which no longer exists, is now obsolete, and the Kentucky Central Railroad Company is subject to the general law applicable to other railroad companies in the assessment and collection of taxes, and the lower court consequently erred in fixing the amount of taxes due from it upon the basis of an assessment of stock.

Wherefore the judgment is affirmed on the appeal, and reversed on the cross-appeal, of the commonwealth of Kentucky, and remanded for further proceedings consistent with this opinion.

MERRIWETHER et al. v. MERRIWETHER et al.

(Supreme Court of Kentucky. December 18, 1888.)

DEED—CONSTRUCTION—NATURE OF ESTATE CONVEYED.

A purchaser of a life-estate at execution sale agreed with the debtor's wife to hold the same in trust for her and her children, and to convey to her and her children on reimbursement of expenses. After payment he conveyed by deed to the debtor and his wife, "representing themselves and their children," but the children were not named as parties in the deed. *Held*, that the wife held a life-estate in the life-estate of her husband, with remainder to her children.

Appeal from circuit court, Shelby county; S. E. DE HAVEN, Judge.

This was an agreed case submitted to the trial court by Blanche Merriwether and others, children of G. W. Merriwether, and his wife, plaintiffs, and by G. W. Merriwether and his wife, Jane L. Merriwether, defendants. The agreed facts are these: G. W. Merriwether was the owner of an estate for his life in a certain tract of land, which life-estate Z. M. Sherley purchased at a sheriff's sale under execution. After making said purchase, Z. M. Sherley executed a written agreement with Mrs. Jane L. Merriwether, reciting that he had made said purchase in trust for her and her children, and promising to convey said life-estate to her and her children as soon as the rents and profits of said land should have reimbursed him for his outlay in making the purchase. Sherley died, and his heirs and executor made a deed of conveyance of the life-estate of G. W. Merriwether to Mrs. Jane L. Merriwether and her children. "G. W. Merriwether and Mrs. Jane L. Merriwether, representing themselves and their children," are parties to this deed, but the children themselves are not named as parties to it. Mrs. Jane Merriwether claims that she has a life-estate in the estate of G. W. Merriwether so conveyed to her, with remainder to her children. The children assert that they are joint tenants with their mother, taking a like interest with her. The trial court held that Mrs. Merriwether had a life-interest in the contested estate, with remainder to her children, and the children appeal.

L. A. Weakley, for appellants. *Gilbert & Force*, for appellees.

PRYOR, J. The question involved in this case is whether Mrs. Merriwether holds, as long as she lives, the life-estate of her husband, with remainder to her children, should the husband survive her, or are they joint tenants, each having the same interest. The court below held that the mother took the estate, and the children were entitled after her death, if their father survived their mother. The agreement with Sherley, who purchased the life-estate of Woods Merriwether, the father, in the land, was made with Mrs. Jane Merriwether, in which he agrees to convey unto her and her children the life-estate of the husband and father after the debt for which he purchased it had been satisfied. The debt was paid, and a conveyance made. This court in *Webb v. Holmes*, 8 B. Mon. 404; *Davis v. Hardin*, 80 Ky. 672; *Rogers v. Payne*, 14 B. Mon. 185; and other cases,—held that under such an agreement the children took in remainder.

Judgment affirmed.

MEADE et al. v. STAIRS.

(Court of Appeals of Kentucky. December 20, 1888.)

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY—DEBTS OF HUSBAND.

The proceeds of the wife's land were paid to the husband with her consent, it being agreed that they should be reinvested in a home. He used a portion in his business, and afterwards purchased a mill, but with what funds did not positively appear. The wife acquiesced for several years in his holding the title to the mill,

and united in a mortgage of it. He afterwards sold the property, and assigned the notes for the price to the wife. *Held*, that she could not hold the notes as against the husband's creditors, whose debts were contracted while he held the property, though Gen. St. Ky. c. 52, art. 2, § 8, provides that the proceeds of the wife's lands shall be hers unless otherwise provided in the conveyance or obligation of the purchaser.¹

Appeal from circuit court, Carroll county; P. U. MAJOR, Judge.

Action by Prentiss Meade and others against Mrs. N. M. Stairs. Plaintiffs appeal.

A. Duvall and J. A. Donaldson, for appellants. Masterson & Garnet and John W. Rodman, for appellees.

HOLT, J. January 11, 1883, G. S. Stairs sold and conveyed to George T. Thompson a mill property to which he had the title and undisputed right. He was then involved in debt. Thompson executed to him two \$1,000 notes, payable in one and two years respectively, for that much of the purchase money. January 12, 1883, he assigned them to his wife, the appellee, N. M. Stairs, and immediately left the country, and never returned. Soon after doing so his creditors, the appellants, sued out attachments against the fund owing by Thompson. The wife upon her petition was made a party, and claimed the notes under the assignment to her upon the following state of case: Her father conveyed to her, in 1871, a tract of land situated in Bracken county, in this state, and then worth \$10,000, for the recited consideration of \$3,000, reserving a lien upon it for the payment of the last-named sum, and thus giving her, as was then estimated, \$7,000 in land. She and her husband sold a part of the land in 1877, and the remainder in 1879; there being a verbal agreement between them that he would reinvest the proceeds, less the sum necessary to discharge the lien upon the land, in a home for her. In this way he received, as net proceeds, something over \$4,000. It was paid to him with her knowledge and consent. They removed from the land, in 1877, to the town of Carrollton, in this state, and there lived in rented property, the husband engaging in buying and selling tobacco, until 1879. In this business he used at least a portion of the proceeds of the sale of her land,—how much the record does not disclose. This he did with her knowledge. In 1879 he quit trading in tobacco, and purchased a mill-site, which he improved by the erection of a mill, containing valuable machinery, and which property is the same purchased by Thompson.

It is not shown, unless inferentially, that any portion of the proceeds of the wife's land was invested in this property. It is true there is some testimony tending to show that when they moved to Carrollton the husband did not have any large amount of means derived through himself; but how much he made while engaged in the tobacco business does not appear. He seems to have made something. The title to the mill property was taken to him. This was in 1879. The wife knew of it soon after, and then complained to him of the non-investment of the proceeds of her land in a home. He thereupon purchased one at the price of \$2,200, had the title made to the wife, and appears to have represented to her that the most of the purchase money had been paid, although in fact but \$750 had been paid. She acquiesced in the title to the mill property remaining in her husband, and took no steps to have any equity or right of her own established in it, even admitting that a portion of the proceeds of her land had been invested in it; and thus the matter rested from 1879 until 1883. In the *interim*, her husband sold an interest in the

¹ As to the rights of the husband's creditors in the separate property of the wife, used by the husband in business, see *Shay v. Dickson*, (N. J.) 15 Atl. Rep. 253, and note; *Wahl v. Murphy*, (Ky.) 9 S. W. Rep. 375; *Buhl v. Peck*, (Mich.) 37 N. W. Rep. 876. See, as to what will support a conveyance from husband to wife, note, *Id.*; *Jenkins v. Middleton*, (Md.) 13 Atl. Rep. 155, and note. See, also, *Beck v. Lincoln*, (Iowa,) 41 N. W. Rep. 61, and cases cited.

property, and then repurchased it. He also mortgaged it, and the wife united in the mortgage. She now claims that her husband held the proceeds of her land in trust for her under the agreement between them, above recited; that by way of its execution, in part at least, he transferred to her the two Thompson notes, amounting to \$2,000; and as he had never invested for her, of the \$4,000 and over received by him, but the \$750 paid on her home, that she is entitled to hold the notes. The creditors of her husband, whose debts were created in 1881, 1882, and 1883, in response, assert—*First*, that the transfer of the notes to her was without consideration, and fraudulent; but, *secondly*, that, if this were not so, then she was but a creditor of the husband, and the transfer was a forbidden preference of her by the debtor, and operated as an assignment of his estate for the benefit of all his creditors. The notes were adjudged to Mrs. Stairs, and the creditors have appealed.

Our duty is to look at the question, divested of all sympathy for her and her children. There has evidently been no fraud upon her part, and whatever loss results to her comes from that trusting confidence which, while it ennoble the true wife, yet, when misplaced, brings misfortune. Satisfied of her honesty and truthfulness, we have in the main based the above statement of the case upon her own testimony; but, admitting that she is in no respect mistaken, yet the agreement, if it may be called such, between her and her husband, as to the reinvestment of the proceeds of her land, was very general. It fixed no time or place or particular property for the reinvestment. No property was purchased for two years thereafter, and it does not appear that any of the money arising from the sale of her land was then used in paying for or improving it. The circumstances above recited distinguish this case from *Latimer v. Glenn*, 2 Bush, 535; *Miller v. Edwards*, 7 Bush, 894; and *Campbell v. Campbell's Trustees*, 79 Ky. 395.

Here there was no loan to the husband of the money arising from the sale of her land, but she allowed him to receive it upon a promise of reinvestment for her. He converted it to his own use, and she sanctioned the conversion. It is uncertain how he used it; but, if any of it was invested in the mill property, yet the title was taken to him, and, although she learned of it soon thereafter, she not only acquiesced in it for several years, during which the debts of the appellants were created, but joined in a mortgage of it as his property. By the common law, contracts between the husband and wife were void *in toto*. They were considered as one person. The rule is otherwise in equity. For many purposes it treats them as distinct persons, and contracts between them will, under some circumstances, be enforced even against his creditors. To do so in a case like the one now presented would, however, be extending the rule to an unwarrantable and dangerous extent. Not only did one deed divest the wife of title, and another vest the title to the property thereafter purchased in the husband with acquiescence on her part after it came to her knowledge, but it is utterly uncertain whether any of the proceeds of her land were invested in the property so purchased.

This is a much stronger case against any equity upon the part of the wife than existed in the case of *Pryor v. Smith*, 4 Bush, 379. There a tract of land was in part paid for with the land of the wife. She refused to part with it unless its value was secured to her in the tract purchased, and to this the husband consented. The title was taken to him, however, and subsequently, in a contest with his creditors, she was denied relief; this court saying: "These transactions constituted a complete conversion and reduction of her estate in the land by her husband to his possession; and, generally, where this is done, a court of equity will not interpose to provide for the wife to the exclusion of the claims of creditors."

In the subsequent case of *Darnaby v. Darnaby's Assignee*, 14 Bush, 485, and where the circumstances were calculated to appeal still more strongly in behalf of the wife, the same rule was announced; and, in our opinion, to hold

otherwise, would not only be unjust to the rights of innocent creditors, but would open a door to fraud and perjury. It would, moreover, give the husband a delusive credit, and enable him to deceive those dealing with him upon the strength of appearances, which in this instance were known to the wife, and acquiesced in by her. Indeed, she was not only silent as to any claim or interest in the mill on her part, but she said to the world, by uniting in the mortgage of it as belonging to her husband, that she had no right or equity in it. She first permitted her husband to obtain the proceeds of her land under a promise of reinvestment. Subsequently she acquiesced in his converting the same to his own use, and not only is its identity gone, but it does not appear what use he made of it. This conduct made it his own. The mill property was indisputably his, and the notes were also. Under such circumstances, their transfer to the wife was unsupported by any equity which can prevail against the rights of his creditors. It is true, section 3, art. 2, c. 52, Gen. St., provides that the husband and wife may sell and convey her land, but in such case "the proceeds shall be hers, unless otherwise provided in the conveyance or the obligation of the purchaser."

This statute, adopted in 1873, changed the law theretofore existing, and which provided that in such a case "the proceeds shall be his, unless otherwise expressly provided in the conveyance, or the obligation of the purchaser." 2 Rev. St. c. 47, art. 2, § 2. But this change should not be construed to make the wife the creditor of the husband to the prejudice of creditors in a case like this one, where she has not only permitted the husband to reduce her estate to his possession, although under a promise of reinvestment for her, but has subsequently allowed him to convert the proceeds to his own use and benefit, thus making it by her consent and in law his own. Such conduct upon her part, however innocent, would operate as a fraud upon innocent parties, if she could still assert a claim to the prejudice of their rights. In such a case, if either is to suffer, she must bear the loss. She could have secured herself at the proper time, and in the proper way; and cannot be allowed, when in fault herself, to say that third parties, who have been misled by not only her silence when she should have spoken, but by her positive acts in recognizing the property as her husband's, shall suffer instead of herself. The present statute declares that the proceeds of a sale of her land shall be hers, in the absence of the deed or obligation of the purchaser providing otherwise; thus affording her an opportunity to have the same settled upon her, or to hold it. This was the object of the change in the law. If, however, she does not avail herself of this right, but permits her husband to convert and use it as his own, then she cannot thereafter assert a claim therefor against his estate to the prejudice of his creditors. The appellants are entitled to be first paid their debts out of the proceeds of the Thompson notes. Whatever may remain Mrs. Stairs will be entitled to, and the judgment is reversed for further proceedings in conformity with this opinion.

KYLE v. O'NEIL, *et ux.*

(Court of Appeals of Kentucky. January 15, 1889.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—EQUITY.

A creditor cannot sue in equity to set aside as fraudulent a conveyance by his debtor, or one made by a third party at his instance, of property belonging to the debtor, until after judgment against the debtor, and a return of *nulla bona*, or after a proceeding against the property by attachment.

Appeal from Louisville chancery court; I. W. EDWARDS, Chancellor.

This was a suit by R. B. Kyle against Henry J. O'Neil and his wife, to recover on a promissory note executed by H. J. O'Neil, and to set aside as fraud-

ulent a deed of conveyance from one Higgins to Mrs. O'Neil, and subject the property therein attempted to be conveyed to satisfy plaintiff's demand. Mrs. O'Neil filed a demurrer to the petition, which was sustained, and from the judgment dismissing the petition as to her plaintiff appeals.

Lane & Burnett, for appellant. *Matt O'Doherty*, for appellees.

HOLT, J. This action is brought upon the promissory note of the husband alone. It assails a conveyance made to the wife by a third party subsequent to the creation of the debt, and seeks to subject the land to its payment. The averments of the petition must be taken as true upon demurrer. The material ones to the question presented are that the husband is insolvent; that he paid the grantors for the land, and had it conveyed to his wife to defraud his creditors. The demand is purely a legal one, and in such a case the creditor cannot invoke the aid of a court of equity to assail as fraudulent a conveyance made by his debtor, or one made by a third party at the debtor's instance, of property really belonging to him, save in two ways, to-wit: He must first obtain a judgment and a return of *nulla bona*; or, if he desires to proceed against the property at the outset, then he can only do so by suing out and prosecuting an attachment as provided by the Code of Practice. This rule is now so well settled in this state that its propriety is not open to question. Both its existence and its wisdom have been declared by repeated decisions of this court. It has long been the rule that actions to annul voluntary conveyances, and those made to defraud creditors, cannot be maintained without first having judgment, and a return of "No property." *Napper v. Yager*, 79 Ky. 241. The reason is that a resort to the legal remedy may satisfy the demand. Moreover, the conveyance cannot be questioned by the parties to it, and, if the legal remedy be first pursued, third parties, whose rights may be entirely well founded, may never be involved in what may prove to be vexatious and prolonged litigation. In order, however, to give a more speedy remedy, the Code authorizes the creditor to proceed in the first instance against the property by suing out an attachment. This, while it affords the creditor an ample remedy, protects both the debtor and the grantee. The latter, if it appear he purchased in good faith, may sue for a wrongful seizure of his property, while the debtor, if the attachment be discharged, may look to the bond for indemnity. In this mode of proceeding a lien is created, and the court subjects the property by virtue of its seizure under the attachment, provided it be sustained.

It the creditor could at the outset, and without either a return of *nulla bona* or suing out an attachment, assail the conveyance, third parties would be involved, when the legal remedy, had it been pursued, might have proven ample; and this, too, however wrongful might be the proceeding, without any bond being executed to the debtor, or any seizure of the property, although a *lis pendens* would be hanging over it, however protracted might be the litigation. Former decisions have, however, presented the reasons for the rule so fully and forcibly that further discussion of the matter would be but repetition; and it is sufficient to merely redeclare the rule. *Barton v. Barton*, 80 Ky. 212; *Martz v. Pfeiffer*, Id. 600. It matters not whether the debtor is the grantor, or whether, having paid the consideration, he cause another to make the conveyance to the third party. In the one case the statute declares the conveyance to be void, and in the other fraudulent. The reasons for the rule apply equally in each case. In this instance the creditor had obtained no judgment and return of *nulla bona* against the husband, who was the debtor, nor had he sued out any attachment against the property; and the lower court properly held that the averments of the petition were insufficient to authorize any relief against the wife, who was the grantee.

Judgment affirmed.

CLARK v. MILLER.

(Court of Appeals of Kentucky. January 10, 1889.)

1. HUSBAND AND WIFE—ANTENUPTIAL DEBTS OF WIFE—LIABILITY OF HUSBAND.

Under Gen. St. Ky. c. 52, art. 2, § 4, declaring that the husband shall not be liable for any debt of the wife contracted before marriage, except to the amount of whatever he may receive from her independent of realty, a husband is liable for his wife's antenuptial debts to the extent of property received by him from her, though such property before and after the marriage was exempt from seizure. *PYTOR, J.*, dissenting.

2. ATTACHMENT—AFFIDAVIT BY ATTORNEY.

Under Civil Code Ky. § 196, authorizing an order of attachment upon an affidavit of plaintiff, and section 550, permitting any affidavit required of a party to be made by his attorney, if he is absent from the county, the petition, the statements of which purport to be those of the plaintiff, verified by his attorney, the verification stating that plaintiff is absent from the county, may be used for an affidavit.

3. SAME—VERIFICATION.

A verification "that statements in" the petition are true, omitting the word "the" before the word "statements," is sufficient.

Appeal from court of common pleas, Jefferson county; *EMMET FIELD*, Judge.

Charles Carroll, for appellant. *Farleigh & Straus*, for appellee.

HOLT, J. The appellee, *W. H. Miller*, sues to recover a personal judgment against the appellant, *S. W. Clark*, upon a debt created by the wife of the latter prior to her marriage to him, upon the ground that he received by her personal property greater in value than the debt. A recovery is resisted upon the ground that before and at the time of their marriage she was a *bona fide* housekeeper with a family of this commonwealth; that all the personal property then owned by her, and received by her husband from her, was under the law exempt from seizure for debt; and that upon their marriage he at once became and has ever since remained a housekeeper with a family, owning no personally save that received from his wife. Section 4, art. 2, c. 52, Gen. St., provides: "The husband shall not be liable for any debt or responsibility of the wife contracted or incurred before marriage, except to the amount or value of whatever he may receive by her independent of real estate." It is urged that his liability should be confined to the value of such property derived by him from the wife as was liable for her debts prior to the marriage; that this is the proper construction of the statute; and that it would be unreasonable to hold him responsible to her creditor for the value of property, which, when it was held by her, could not be reached for her debt, and, as is now claimed, cannot now be taken from him by reason of the exemption; in other words, that the change of ownership by reason of the marriage has not prejudiced the creditor. The language of the statute is quite comprehensive. It makes the husband liable for the value of whatever he receives by the wife, aside from real estate. Its terms certainly include property which was exempt to the wife prior to the marriage.

In arriving, however, at the proper construction of a statute, the words are not alone to be considered; but the intention of the law-maker, as well as the reason for its enactment, and indeed the spirit and purpose of it, are rather to be regarded. The language employed is but an aid to their ascertainment. By the strict rule of the common law the husband is liable during coverture for all the debts of the wife contracted prior to their marriage, although she may come to him entirely portionless. This rule was not only unjust, but inimical to the creation of the marital relation. Our legislature, therefore, changed it, and made the husband responsible only to the extent of the value of the property received by him. The only reason for and the only test of this liability, furnished in the act by the law-making power, is the reception

of the property; and to it we must look in determining the extent of this innovation upon the common law, instead of the condition of the wife's creditor before and after her marriage. Prior thereto she was personally liable for the debt. Her right to say that the property was exempt from seizure for its payment was personal to her, arising out of her condition. She might have paid it if she had chosen to do so, through means derived from this property. She might have pledged it for its payment, or, if she had ceased to be a housekeeper, it would have been liable. By her marriage, however, it became the property of her husband, and in truth it may be properly said that her creditor is prejudiced by the change, or at least may be, unless the husband can be held liable for its value. The reason for this statutory liability is that his estate has been increased to the extent of the value of the wife's property. This much has been added to it; and whether the identical property thus received be exempt or not to him as the head of the family, yet we see no just or sufficient reason why he should not be personally liable to the extent of its value. Indeed, a different rule would lead to injustice. Here the creditor has attached a debt owing to the husband, and claims the right to subject enough of it to satisfy his claim created by the wife, because the husband received more in value by the marriage than the amount of it. Now, suppose A. has \$10,000 owing to him. He marries B., who at the time owes C. \$200, and gets by her property worth \$500. It becomes absolutely his by the marriage. He sells it, and his estate then amounts to \$10,500, and all opportunity of payment to C. is gone, unless A. is to be held personally liable. In such a case there is no good reason why the husband should not be personally liable for this antenuptial debt of the wife. His estate has been increased that much, and more; he has received the property; and this is the ground upon which the legislature, and justly, in our opinion, based his personal liability. It should not be made to depend upon the amount of property he owns at his marriage, nor upon its previous *status*, but upon its value when he obtains it. He is not to be regarded as a donee or a purchaser. The common law made him liable during the coverture for all of the antenuptial debts of the wife, whether he received property by her or not, upon the score of duty to discharge all of her obligations. He was not liable as a debtor, but as the husband. Our legislature, recognizing the hardship of this rule, restricted this liability to the value of what he might receive by her. The limitation as to the liability was for his benefit, and in conferring it the legislature have seen proper to say, as they had a right to do, that he shall be liable to the extent of the value of all the property derived from her. The law upon marriage vests the title to the wife's personality in the husband absolutely. The common law made him pay all of her debts, if enforced during the marriage, without regard to what she might bring him; and the statute has merely narrowed this liability, based upon duty, to a certain limit. In our opinion, the language of the statute, the history of the law upon this subject, as well as justice and reason, demand this construction.

The grounds of the attachment in this case were set out in the petition. It of course purported to be the statement of the plaintiff. It was verified, however, by the attorney; the verification stating that the plaintiff was absent from the county. Section 196 of the Civil Code authorizes the making of an order of attachment upon the filing of an affidavit of the plaintiff, setting forth certain grounds for it; and section 550 provides: "Any affidavit which this Code requires, or authorizes a party to make, may, unless otherwise expressed, be made by his agent or attorney, if he be absent from the county." It is admitted that the attorney may, in the absence from the county of his client, make the affidavit; but it is insisted that a statement purporting to be that of the client, and then a verification of it by the attorney, is not sufficient; in other words, that the statement or affidavit of the latter must set

forth the grounds of the attachment. He, however, verifies the statements of the petition. He says they are true. He makes the statement of the client his own affidavit. It has frequently been held that if a verified petition contains a statement of all the grounds necessary to the issuance of an attachment, it will be regarded as supplying the place of a separate affidavit, and that it may be verified by the agent or attorney in the absence from the county of the client. *Institution v. Bank*, 1 Metc. (Ky.) 156.

It is also contended that the verification is defective, upon the ground that the word "the" is omitted in the statement,—“he says that statements in the foregoing petition are true.” It is manifest it was a mere omission of the draughtsman; and, as it is, it is substantially sufficient. These two objections to the sufficiency of the order of attachment are quite technical. It is true the remedy is an extraordinary one, born of the statute, and its provisions must be substantially complied with; but mere technical objections should not be allowed to defeat their operation.

The judgment of the lower court conformed to the views above expressed, and is therefore affirmed. .

PRYOR, J., (*dissenting*.) The husband is not liable in this case for several reasons: *First*. The creditors of the wife had no right to subject the exempted property to the payment of their debts. *Second*. The wife had the right to give or sell this property to another without making the purchaser or donee responsible to the creditor of the wife; and, the contract of marriage vesting the title in her husband as against creditors, he like any other purchaser, is not liable for its value to satisfy the debts of the wife. *Third*. The husband owning no property but this obtained by the marriage, and it being exempt by law, and he a housekeeper, the exemption followed the property. *Fourth*. There can be no such rule in law or equity that would forbid the creditor from selling the property because it is exempt, and at the same time make the debtor liable for its value. *Fifth*. In no case can a purchaser for value from the debtor be held liable to the creditors of the debtor for property purchased, where the consideration has passed, if that property at the time was exempt from seizure and sale under execution. Whether the consideration was that of marriage or the payment of money is immaterial.

MAXWELL v. BRYANT *et al.*, (two cases.)

LUDLOW v. MAXWELL.¹

(Court of Appeals of Kentucky. June 16, 1888.)

1. APPEAL—DISMISSAL—ATTORNEY'S FEES.

An appeal will not be dismissed on the motion of one to whom the appellant has sold all his interest in the property in litigation, with the agreement that he (the purchaser) shall pay all costs and attorney's fees, until payment or tender of such fees and costs is made.

2. SAME—DEATH OF APPELLEE—RIGHTS OF HEIR.

Where, pending an appeal from a judgment concerning land, the appellee dies, and one of the heirs conveys her interest to a trustee, and afterwards prepares to sue for cancellation of the conveyance, a motion by the trustee, the other heir, and the appellant, to reverse the judgment and remand the cause, with instructions to the trial court to dismiss the suit, to which the grantor in the deed of trust objects, will be overruled.

Appeals from circuit court, Kenton county; W. E. AUTHUR, Judge.

Edward H. Maxwell offered for probate in the county court of Kenton county a writing purporting to be the will of his deceased wife, Louisa Max-

¹Publication delayed by failure to receive copy.

well, in which he was named executor. Helen A. Bryant and others, children of the deceased, contested the will. Probate was allowed, and an appeal was taken to the circuit court of Kenton county, where the judgment of the county court was reversed, and the proponent appeals. Maxwell moved for his costs, to be allowed out of the decedent's estate, which were refused, and he also appeals from this order. In the life-time of Mrs. Maxwell she had had a suit involving the division of land with one W. S. Ludlow, and obtained a decree, from which Ludlow appealed.

O'Hara & Bryan and W. W. Cleary, for Maxwell and Mrs. Conner. Hal-lam & Myers, for appellees.

PRYOR, C. J. In the first two cases of *Maxwell v. Bryant* it appears that Maxwell, the appellant, had transferred his interest to the property in controversy to McCoy, for a moneyed consideration paid, and upon the further consideration that McCoy was to pay the attorney's fees of counsel for Bryant, and all costs. McCoy and the appellees in those cases come now, and move the court to dismiss the appeals. This motion is objected to by Maxwell, and by his counsel, O'Hara, Bryan, and Cleary. No tender has been made of the attorney's fees, or offer to pay, and a compliance with the terms of settlement must be shown before this court will dismiss the appeals over the objection of the appellant and his counsel.

In the case of *Ludlow v. Maxwell* it appears that this was a proceeding in the court below to divide a valuable tract of land and lots in the county of Kenton; that Mrs. Maxwell obtained a judgment below favorable to her interest, and against that of Ludlow, who prosecutes the appeal. Mrs. Maxwell is now dead, having left two children. One of them, Mrs. Conner, conveyed her interest in this land to a trustee, who now unites with Ludlow, the appellant, and with the other child of Mrs. Maxwell, in a motion asking this court to reverse the judgment below, with directions to dismiss the petition. Mrs. Conner, by her counsel, opposes the motion, and says that the trust deed is void, and she has employed counsel to have it canceled. Her counsel is the same employed by her mother to bring the original action for a division. If the statement of counsel be true, the beneficiary, Mrs. Conner, has a direct interest in the controversy; and if this action was pending below she could be made a party, and allege her complaint. She has the right to be heard here, and therefore the motion in each case is overruled.

VERSAILLES & N. TURNPIKE CO. v. TOWN OF VERSAILLES.

(Court of Appeals of Kentucky. January 15, 1889.)

TURNPIKES AND TOLL-ROADS—LIABILITY FOR REPAIRS.

Where part of the road of a turnpike company lies within the limits of a town, and it is the duty of the company, under its charter, to keep its road in proper repair, and the toll it is authorized to collect is fixed in the ratio of the length of the road, and the full amount of the toll authorized by the charter is collected, and the town, in performance of its duty to keep its streets in order, repairs the street upon which the turnpike road is situated, it can recover from the company the amount expended, not in excess of that necessary to put the road in the condition required by the company's charter.

Appeal from circuit court, Woodford county; J. R. MORTON, Judge.

This was an action by the town of Versailles against the Versailles & Nicholasville Turnpike Company, to recover of defendant a sum of money which plaintiff had expended in making repairs upon the portion of defendant's road that is situated within the corporate limits of Versailles. Judgment for plaintiff, and defendant appeals.

J. D. Hunt and E. M. Wallace, for appellant. D. L. Thornton and W. O. Davis, for appellee.

LEWIS, C. J. The trial of this action being submitted to the court without a jury, the following conclusions of fact were found and stated in writing: That appellant, under its charter granted by the legislature in 1848, constructed a turnpike road from Versailles to Nicholasville, beginning at a point within the corporate limits of the first-named town, called "Dean's Corner;" that, although the limits of Versailles have been extended from time to time by acts of the legislature, the last one having been passed in 1868, whereby about 800 yards of the turnpike road was included, appellant continued from the date of its construction to control and keep it in repair fit for public use its entire length, until 1878, when that portion lying within the boundary of Versailles was abandoned, and by reason of the neglect and inattention of appellant became greatly out of repair and unfit for public use; that during the years 1879, 1880, 1881, and 1882 the appellee caused work to be done upon it to the value of \$1,471.43, and instituted this action to recover that sum; but the lower court found that more work was done and materials furnished than necessary to put the road in the condition required by the charter of the company, for the use it was intended, the surplus expenditure having been made to put it in the condition required for a street, and rendered judgment for only the sum of \$847.50, the estimated value of the work required and done for a turnpike road.

It was by the charter made the duty and condition of the right of the Versailles & Nicholasville Turnpike Company to exact toll to keep its road in proper repair, and fit for public use, from one terminal point to the other; and, as the toll it was authorized to collect was in the first instance fixed in the ratio of the length of the road, it necessarily follows that, as long as the full amount of toll authorized by the charter is collected, the duty devolved upon it to keep in repair and fit for the use designed the whole and every part of the road. While, therefore, the duty is imposed upon the town of Versailles to keep its streets in a condition fit for public use, and the power is given to levy and collect necessary taxes for the purpose, including the street upon which appellant's road now is, the turnpike company is not released from its obligation, nor can it claim exemption from its original undertaking to keep in proper repair that part of its road within the town limits, until it clearly appears it has ratably diminished its tolls. It cannot claim and enjoy the benefit of the full amount of tolls on its road, and at the same time shift the burden of keeping it, or any part of it, in repair, to the town of Versailles.

It is not a material inquiry whether the company had or had not the right originally to construct and control a turnpike within the corporate limits of the town; for having actually done so without question, and enjoyed the benefits of that part of its road since 1848, it is now estopped to deny its obligation to perform the condition upon which it has without hinderance exercised that right. As the duty was imposed upon the town to keep the street in repair upon which the road of appellant is situated, and the town authorities were liable to indictment for failing to perform that duty, and they were thus constrained to do what in part it was the duty of appellant to do, but failed and refused to do, and what was to that extent of value to it, in our opinion there can be no question of the right of the appellee to recover the amount adjudged by the lower court.

Judgment affirmed.

THOMAS' ADM'R v. THOMAS' ADM'X *et al.*FLUTY *et ux.* v. BUTLER *et ux.*¹

(Court of Appeals of Kentucky. June 14, 1888.)

1. EXECUTION—SALE—MISTAKE AS TO AMOUNT—WAIVER BY DEBTOR.
A mistake of a sheriff by which he sells land for more than the execution debt, interest, and costs, is waived by the execution debtor refusing to receive the excess, and directing its repayment to the purchaser.
2. SAME—DEED BY SHERIFF'S SUCCESSOR—CERTIFICATE.
The successor of a sheriff who has sold land under execution can convey to the purchaser without a certificate from his predecessor that the purchase money has been paid, as Rev. St. Ky. c. 36, art. 18, § 10, unlike act Ky. Feb. 11, 1809, does not require such certificate.
3. SAME—DEED AFTER DEBTOR'S DEATH.
Land sold at sheriff's sale, in the debtor's life-time, may be conveyed after his death; the statutory time for redemption having expired.
4. SAME—PURCHASE BY DEBTOR'S WIDOW—RIGHTS OF HEIRS.
Where land is, after the time for redemption expires, sold by the purchaser to the widow and administratrix of the debtor, who has died since the sale, in the absence of evidence that the purchase was made for the debtor's benefit, or that the administratrix had funds of the estate with which to redeem, her purchase will not redound to the benefit of the debtor's heirs and creditors.

Appeal from circuit court, Estill county; JOHN S. MAHON, Special Judge. Suit by H. H. Thomas' administrator *d. b. n.*, against the heirs, devisees, and creditors of said decedent, and against the administratrix and heirs of H. C. Thomas, deceased, and the administratrix and heirs of M. L. Thomas, deceased, (said H. C. and M. L. Thomas having been executors of the will of H. H. Thomas,) to obtain a settlement of the estate of said H. H. Thomas. Also suit by R. Fluty and wife, who was the widow and administratrix of M. L. Thomas, deceased, against David Butler and wife, who was the widow and administratrix of H. C. Thomas, deceased, to recover a tract of land which was involved in the first suit. The suits were heard together. It was alleged that H. C. Thomas was largely indebted to the estate of H. H. Thomas, and that a tract of land devised to him, on which his widow (since Mrs. Butler) resided, was liable for the payment of debts of testator. Mrs. Butler claimed the land under a sheriff's sale to one Cochrell, and a sale by the latter to her; the land being conveyed by the sheriff to her directly. Fluty and wife claimed under another execution sale. The court found that Mrs. Butler's title to the land was paramount, and rendered judgment in her favor. From this judgment the administrator of H. H. Thomas, Fluty and wife, and the heirs and creditors of H. C. Thomas appeal.

Robert Riddell, H. C. Lilly & Son, and Thomas Turner, for appellants.
I. N. Cardwell and B. J. Peters, for appellees.

BENNETT, J. The controlling question to be determined in these cases is whether the land in controversy belongs to the appellee Mrs. Butler. The sheriff of Estill county, having an execution in his hands in favor of T. M. Barnes against H. C. Thomas, sold the land in controversy to satisfy said execution on the third Monday in February, 1867. The sale was made at the court-house door on a county court day. H. C. Thomas surrendered said land in writing to the sheriff, for the purpose of levy and sale. At the sale, Harrison Cochrell purchased the land at the price of \$280, which was less than two-thirds of its appraised value. H. C. Thomas died in the fall of 1867, without having redeemed said land. In 1873, no person having redeemed said land, Mrs. Butler, who was the wife of H. C. Thomas, at the time of his death, and subsequently married David Butler, purchased said land from Cochrell at the

¹ Publication delayed through inaccessibility of copy.

price that he paid for it, and interest thereon. The sheriff that sold said land never conveyed the same to Cochrell. Said sheriff's successor in office, by written directions of Cochrell, made Mrs. Butler a deed to the land on the 14th day of October, 1873. The fact that the sale was regular is not denied.

It is contended here that Cochrell purchased the land for the benefit of H. C. Thomas, and that the latter furnished the money with which to pay off the purchase price of the land. The record discloses no fact or circumstance of the kind. On the contrary, it is alleged in the appellee's answer and cross-petition that Cochrell purchased the land for himself and paid the purchase price, and that she purchased the same from him at the price he paid for it and the interest thereon. These allegations are not denied. Besides, Cochrell, whose deposition was taken by the appellants, swears substantially to the same facts, and there is no evidence in the record tending to show a different state of case.

It is also contended that, inasmuch as the sheriff sold said land for \$23 more than the execution debt, interest, and cost amounted to, the sale was void. Conceding that this excess would ordinarily render the sale void, yet it will not be controverted that the execution defendant could not waive the error. The record shows that the sheriff informed H. C. Thomas, shortly after the sale, of the mistake, and tendered him the \$23, but he directed the sheriff to return the \$23 to Cochrell, and to let the sale stand. By this act H. C. Thomas waived the right to take advantage of the error; and, as he elected to waive the error, the appellants have shown no right to take advantage of it.

It is contended by the appellants that the successor of the sheriff making the sale had no right to convey the land, unless a certificate of said sheriff was produced showing that the purchase money had been paid. There are old decisions of this court holding that the production of such certificate was prerequisite to the successor's right to make a conveyance; but these decisions were based upon the statute of this state, approved February 11, 1809, which authorized the sheriff in office to convey land that had been sold under execution by his predecessor in office upon the production by the purchaser of the certificate or receipt of his predecessor, showing "the actual purchase" and the payment of the purchase money. There was no such requirement in the law under which the sale in this case was made. At the time the sale, transfer, and conveyance were made, the Revised Statutes were in force; and section 10, art. 13, c. 36, provided: "The sheriff who sells land under execution, or his deputy, or the successor of the former, must convey the title sold to the purchaser or his assignee, or his heirs or devisee, if the same is not redeemed." Under this section the prerequisite of producing a certificate or receipt of the former sheriff showing the purchase and the payment of the purchase money was dispensed with. This section makes it the duty of the successor in office to make the conveyance to the purchaser or his assignee, etc., if the land has not been redeemed. A similar provision is contained in the General Statutes.

It is contended that the sheriff had no right to make the conveyance after the death of H. C. Thomas. It has been held time and again that in a chancery proceeding for the purpose of conveying the title to land, if the owner dies between the time of the decree for the sale and the sale and confirmation, or between the time of the confirmation and the making of the deed, (the latter is changed by the Civil Code of Practice,) it is the duty of the court to have his heirs brought before it before proceeding to make the conveyance. The bringing of the heirs before the court is a jurisdictional necessity, for the reason that the conveyance must be made in their names. But as the sheriff seizes and sells the title of the execution defendant by virtue of his authority as a ministerial officer, and as he conveys the title in his own name, and not in the name of the execution defendant, the reason of the chancery rule does not apply to him; therefore, after the time allowed the defendant, or his heirs,

in case of his death, to redeem the land has expired, the sheriff may make the conveyance to the purchaser or his assignee.

The record fails to disclose that the appellee, as the administratrix of H. C. Thomas, had any means belonging to his estate with which to redeem said land. After the time of the right of redemption had expired, the land belonged absolutely to Cochrell, and he sold it to the appellee, and she bought it for herself, and paid for it, as the record shows, with her own means. We therefore cannot decide, in view of the further fact that there was no fraud or collusion in the transaction, that her purchase redounded to the benefit of H. C. Thomas' heirs and creditors.

Mrs. Fluty claims the land by virtue of an execution sale in favor of Maj. Turner against H. C. Thomas' administrator and heirs. Said execution was issued, and the land sold under it, long after Cochrell's purchase; therefore Mrs. Fluty acquired no title to the land as against said purchase.

After a careful review of the entire record we find no reversible error.

The judgment is affirmed.

STATE v. FISK UNIVERSITY.

(*Supreme Court of Tennessee. January 22, 1889.*)

COLLEGES AND UNIVERSITIES—TAXATION—CONSTITUTIONAL LAW.

A tract of six acres of land, part of a larger body purchased by a university, and divided from the residue, on which the main buildings are erected, by streets only, on which two small buildings are erected and used by the primary departments, the residue of which tract is cultivated by the students, who receive pay for their labor in board and tuition, the products being consumed at the university, and on which it is intended, when funds are procured, to erect another large building, is not taxable under Const. Tenn. art. 2, § 28, and Acts Tenn. 1883, c. 105, §§ 1, 2, exempting from taxation all property belonging to educational institutions, and actually used for educational purposes. SNODGRASS, J., dissenting.

Appeal from chancery court, Davidson county; ANDREW ALLISON, Chancellor.

Bill by the state of Tennessee against the Fisk University, to recover taxes on land. Bill dismissed, and plaintiff appeals.

G. W. Pickle, Atty. Gen., and J. B. Dante, for the State. John Kuhm, for appellee.

FOLKES, J. This is a bill filed by the state and county to collect taxes assessed for the year 1884 upon a lot containing six or eight acres. The cause was heard upon an agreed statement of facts, and the bill dismissed by the chancellor, and is now before us on appeal by the complainants. The statement of facts is as follows:

"(1) The Fisk University is an educational institution chartered under the laws of Tennessee. It is a college for colored people of both sexes. Connected with the college is a dormitory, where from 250 to 300 boarding pupils are entertained. But this dormitory is not located on the land sought to be taxed in this case. It is located in Jubilee Hall. In purchasing its permanent site, Fisk University secured three separate blocks of land located in the Thirteenth civil district of Davidson county, each square or block containing six or eight acres, and each separated from the others by streets only.

"(2) The Fisk University building known as 'Jubilee Hall' was several years ago erected on the north square; and in 1881, thereafter, the building known as 'Livingston Hall' was erected on the south square. The remaining or middle square remains vacant, except as hereinafter recited, and was so in 1884; and this is the square assessed for taxes for 1884, and for the collection of which this suit is brought." (The amount of the taxes claimed is then set out, but no question is made on the amount.)

"(3) It is contemplated by the officers of the university now in charge, at some time in the future, not yet determined, when funds are provided for that purpose, and such a fund is being raised, and a small portion has already been accumulated for that purpose, to erect another large building for college purposes, and to erect the same on this vacant lot, and this is the real purpose for which this land was purchased, and has been and is now held. Another purpose of owning this land is to keep any other parties from building on or occupying the same.

"(4) A part of this lot is leveled off, and some trees have been planted thereon. A portion of it is each year cultivated, and was for 1884, and a crop of corn and vegetables raised thereon. Hay is also grown yearly on this lot, and mowed and fed to the cows; stables and barns are located on one corner of this lot, and were in 1884; also one small frame building used for school rooms for the students in the primary department; also another frame building for the intermediate department, built in 1887. Pupils of the college are engaged in attending to the raising, etc., of the corn, hay, and vegetables. Those so engaged receive pay for their work in board and tuition. The corn and hay raised is fed to the cows and horses belonging to and connected with the college. The vegetables are used in the college mess-room, which mess-room is situated in 'Jubilee Hall,' and is used for college purposes merely.

"(5) No taxes have ever been paid by the university on any of this property."

We have given the entire agreed case, as made by the parties, although it is manifest that much of it may be said to be immaterial.

Counsel for complainants have assigned as error that the property in question "was not used exclusively for educational purposes," but that "it was used for farming and gardening purposes;" and that under the state constitution, and the act of 1883, in force at the time of the assessment now involved in this suit, all property must be taxed, save such as is "used exclusively for purposes purely educational;" and that, to obtain benefit of the exemption claimed, it must be "actually so used."

The language of the state constitution of 1870, art. 2, § 28, upon this subject, is as follows: "All property, real, personal, or mixed, shall be taxed, but the legislature may except such as may be held by the state, by counties, cities, or towns, and used exclusively for public or corporation purposes, and such as may be held and used for purposes purely religious, charitable, scientific, literary, or educational."

The act under which the assessment in this case was made is to be found in Acts 1883, c. 105. Section 1 provides for assessment of all property, "except such as is declared exempt in the next section." Section 2 enacts "that the property herein enumerated shall be exempt from taxation, and none other." Subsection 2 exempts "all property belonging to any religious, charitable, scientific, literary, or educational institution, and actually used for the purpose for which such institution was created."

The contention on behalf of the state and county is that, inasmuch as the constitution of 1870 requires all property to be taxed, with the exceptions therein stated, the exception and exemption must be strictly construed, and nothing not within the letter of the exception must be allowed to escape its share of the burdens of government. It is unnecessary to resort to argumentation, or to cite authority for the general principle that exemptions from taxation are generally to be construed with great strictness. Our reported cases state and maintain the rule as contended for, and this court has no purpose or disposition to depart from such construction. But this, like all other rules of construction, is made to rest upon the intention of the legislature, and will not be allowed to defeat the will of the law-making branch of the government. To apply this strict construction to individuals, and to corporations for profit, is but to announce the judgment of the courts upon the

intention of the legislature; while to give to a constitutional or legislative act, granting an exemption in aid of institutions literary and educational, a construction that is within the spirit, policy, and purpose of the act, and not opposed to its letter, is likewise but ascertaining and declaring the intent of the law-making power.

It is not difficult to arrive at the intention of the legislature with reference to the substantial benefits which the exemptions in question are intended to confer upon such institutions. The constitution of 1870, which authorizes the exemption, in another section says: "Knowledge, learning, and virtue, being essential to the preservation of republican institutions, and the diffusion of the opportunities and advantages of education throughout the different portions of the state being highly conducive to the promotion of this end, it shall be the duty of the general assembly, in all future periods of this government, to cherish literature and science;" and, while it is true that this language is found in the section which treats of the common-school fund, it is not confined to it, but is declaratory of the sense of the constitutional convention on the subject of education, and the duty of subsequent legislatures to cherish. To this must be added the fact that our laws make most liberal provision for the maintenance of public schools in counties, towns, and cities, and levy taxes upon polls and property to sustain same.

How can it be contended that it is the policy of the state to encourage education, and to levy direct taxes upon its citizens for the purpose of furnishing education free, and at the same time refuse exemption to the property of educational institutions which conduce to cheapen education, and place the higher branches thereof within reach of those who would otherwise be a direct tax upon the people of the state, if they were to leave such institutions as this of the defendant, and resort to the public schools?

Now, we do not have to resort to any latitude of construction to reach a conclusion that will sustain the decree of the chancellor in the case at bar. Anything like a reasonably fair construction of the act in question will exempt this property from taxation. There is upon the ground a building actually used for the purpose of teaching the primary department, and the bill does not seek to separate the portion of the lot so occupied from the part used for the stables, and for hay, corn, and vegetables, to say nothing about the fact that the students get credit in board and tuition for the work they do upon the ground, in working on said crops. Nor is there anything to repel the idea that the land is "actually used for the purposes for which said institution was created," in the fact that it is separated from the two main buildings by streets. It was purchased at the same time, and the lots have been improved, as far as the means of the institution would permit, in the erection of buildings "for the purposes for which said institution was created." To give the language of the constitution the strict construction contended for by the complainants would lead to excluding every portion of the grounds, and every portion of the property not actually used in education. It would include only school buildings, desks, books, etc., and would exclude ornamental promenade grounds, play-grounds, and gymnasium buildings, and infirmary or hospital buildings for the pupils. The agreed case fails to show that any of this property is used for profit, or for purposes not embraced within the duties of the defendant, as an institution of learning.

There are many adjudged cases from different states, and much in the textbooks, which are not easily to be reconciled, growing out of exemptions somewhat similar to those under consideration here. It is not our aim at this time to discuss these cases, nor to define nor limit what uses may or may not be within the exemptions referred to. We only decide that the intention of the legislature must govern in ascertaining the extent of such exemptions, and that in arriving at such intention the same strictness of construction will not be indulged where the exemption is to religious, scientific, literary, and edu-

cational institutions that will be applied in considering exemptions to corporations created and operating for private gain or profit. In the latter character of cases, entirely different considerations move the legislature, and the exemptions are intended to go no further than they have in terms provided. Nor can it be said that a liberal construction should be given to exemptions heretofore granted railroads, etc., because the constitution says: "A well-regulated system of internal improvement * * * ought to be encouraged by the general assembly." It is manifest that this provision has reference to the multifarious means in which such improvements could be encouraged, without relieving them from taxation. The language is retained in a constitution under which the legislature has no power to exempt improvements from taxation, and this court has uniformly held exemptions from taxation to a strict construction in all such cases. Nor do we mean now to extend exemptions for educational purposes by any free or latitudinous construction to any matters not fairly and reasonably within the intention of the legislature; that intention to be arrived at from the language used, and from the policy of the state with reference to such institutions, and the purpose and scope of the particular act under consideration. This idea is clearly put in the opinion pronounced at this term in the case of *University v. Skidmore*, 9 S. W. Rep. 892. It is true that the identical question there decided turned upon the matter of title instead of use, but the whole subject is incidentally discussed in the opinion, and is instructive as to the policy of this state.

So much has been written in the text-books and reports, expressive of the divergent views on this subject, that it would be unprofitable to review the cases, so that we content ourselves with merely a reference to a few of them. *University v. People*, 80 Ill. 333, where the state court took the view advanced by counsel here for complainants. The cause was carried to the supreme court of the United States, where that learned tribunal reversed the decision of the state court upon lines which we have pursued in the disposition of the case at bar. And the supreme court of Illinois in a later case, under the constitution of 1870, reported in 106 Ill. 898, under the title of *Monticello Seminary v. People*, held that, under an exemption of such property "as may be used exclusively for schools," lands owned and used by the college for the purpose of raising supplies for the college by ordinary farming were entitled to the benefit of such exemption. In *College v. State*, 46 Iowa, 275, the court held that certain houses belonging to the college, and used for boarding the pupils, and for the residence of professors, etc., were exempt under the language, "devoted solely to the appropriate objects of the college." To same effect is *People v. Commissioners*, 6 Hun, 109. See, also, *Academy v. Wilbraham*, 99 Mass. 599; *State v. Ross*, 24 N. J. Law, 497; *People v. Commissioners*, 10 Hun, 246.

We give these cases as illustrative of the idea upon which our disposition of this case depends, and without by any means intending to approve the extent to which some of them have gone; for, as is said by Judge COOLEY, "the question is, in each instance, whether such property, in the manner it has been invested, [used,] can be regarded as within the intent of the exemption."

Upon the whole case, as presented in this record, we are of opinion that the decree of the chancellor dismissing the bill should be affirmed, which is accordingly done.

SNODGRASS, J., dissenting.

BROWN v. SULLIVAN.

(Supreme Court of Texas. October 16, 1888.)

1. MASTER AND SERVANT—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Plaintiff and his wife were keeping a boarding car in connection with a construction train, and just as the car was about to be moved, she was standing with the conductor near the door, to see where it would be placed. The car started with a jerk, and she was thrown out upon the track. *Held* proper to charge that defendant was liable if the injury was caused by the negligence of its servants, although there may have been negligence on the part of plaintiff's wife, unless she could, by the exercise of ordinary care, have avoided the consequence of defendant's negligence.

2. SAME—LIABILITY FOR SERVANT'S NEGLIGENCE.

It was not error to charge that if defendant by its agents could, by ordinary care, have avoided the consequences of her negligence, or if it by direct act of its agents caused the act which produced the injury, defendant is liable.

3. SAME—FELLOW-SERVANTS.

The evidence showing that the wife was working for her husband, who was boarding the company's men, under an agreement that the company should retain their board, and pay it to plaintiff, the wife and the engineer were not fellow-servants.¹

4. NEGLIGENCE—CONTRIBUTORY—QUESTION FOR JURY.

It was not error to refuse to charge that there could be no recovery if plaintiff's wife was standing in the door, and knew the car was about to start, and in consequence of her standing up the jerk of the car threw her out, since the question of negligence was for the jury.²

5. SAME.

The verdict will not be set aside on the ground that it was negligence in plaintiff's wife to be standing near the door, knowing that the car was about to start, where the evidence shows that she was standing three feet from the door.

6. PLEADING—EVIDENCE—VARIANCE.

It is immaterial that it was alleged in the petition that the injury was received at Provencal, La., while the proof showed that it was received at Robeline, the defendant not having been misled thereby.

7. DAMAGES—FOR PERSONAL INJURIES.

Plaintiff is entitled to recover for his wife's mental suffering, her injuries including a broken leg and dislocated arm, without direct proof that mental suffering ensued.

8. SAME—EXCESSIVE.

A verdict will not be set aside as excessive where it appears that the injured woman's arm was dislocated, her leg broken, and her back and shoulder injured, and that her sufferings had been great, though it was so large that the trial court might have set it aside in its discretion, when there is nothing to show that the jury was actuated by passion or prejudice.

9. RECEIVERS—ACTIONS AGAINST—JUDGMENT—LIEN.

It is error to make the judgment in such case a lien on the earnings of the road in the hands of the receiver. Following *Brown v. Brown*, 9 S. W. Rep. 261.

Appeal from district court, Harrison county; J. G. HAZELWOOD, Judge. F. H. Prendergast, for appellant. James Turner, for appellee.

GAINES, J. This action was brought in the court below by Owen Sullivan, the appellee in this court, to recover of John C. Brown, as receiver of the Texas & Pacific Railway Company, damages for injuries to plaintiff's wife, alleged to have been caused by the negligence of the employees running a train which was operated upon a railroad which was in charge of the receiver. It appears from the testimony that the plaintiff and his wife were keeping a

¹As to who are fellow-servants, within the rule exempting the master from liability for injuries to one caused by the negligence of the other, see *Wolcott v. Studebaker*, 84 Fed. Rep. 8, and note; *Anderson v. Bennett*, (Or.) 19 Pac. Rep. 765, and note; *Yates v. Iron Co.*, (Md.) 16 Atl. Rep. 280.

²Respecting the province of the court and of the jury in determining negligence in general, see *Barnes v. Sowden*, (Pa.) 12 Atl. Rep. 804, and note; *Good v. Railroad Co.*, 3 N. Y. Supp. 419; *Railway Co. v. Hill*, (Tex.) 9 S. W. Rep. 351; *Whalen v. Railway Co.*, (Iowa,) 39 N. W. Rep. 894, and note.

boarding car for the receiver in connection with a construction train, and that the boarding car and other cars, having been attached to an engine for the purpose of moving it, and of placing a water car in proximity to it at the station where it was situated, were started with a jerk, thereby throwing Mrs. Sullivan out of the door, and upon the track, dislocating her arm, breaking her leg, and inflicting other injuries. She had just been asked by the conductor and brakeman where she would have the water car placed, and was standing in front of and near the door, when the car started. As to the suddenness and force of the movement in starting the car, the evidence was conflicting. Mrs. Sullivan testified, in effect, that the start was very quick and violent, and that it threw her out of the door. Pauline Scott, a servant in her employ, also testified that she was standing in the car, and was thrown down. It also appeared that the stove in the car, belonging to plaintiff, was broken. The employees of the receiver in charge of the train gave testimony tending to show that the jerk in starting was not unusual. With two exceptions the assignments of error are based upon the charge of the court, and the refusal to give instructions asked by the appellant.

The charge, we think, correctly presented the law of the case. The jury are told, in effect, that the plaintiff could not recover, unless the injury was caused by the negligence of defendant's servants; and are repeatedly instructed that, even in that case, the plaintiff could not recover if the negligence of his wife contributed to the injury. By the repetition of the charge upon the law of contributory negligence the court, it would seem, desired to make that question prominent, and to impress upon the jury the importance of giving it a careful consideration. In one paragraph of the charge the court instructed the jury, in effect, that the defendant would be responsible if the injury was caused by the negligence of its servants, "although there may have been negligence on the part of plaintiff's wife, unless it appears that under the circumstances she could, by the exercise of ordinary care, have avoided the consequence of the defendant's negligence;" and it is urged that this instruction is erroneous, because it places the burden of proof upon the wrong party. This court, following the courts of England, the supreme court of the United States, and the majority of the courts of the several states, holds, as a general rule, that, in actions of this character, a defendant who relies upon contributory negligence as a defense must allege and prove it. *Railway Co. v. Murphy*, 46 Tex. 356; *Railway Co. v. Spicker*, 61 Tex. 427; *Railway Co. v. Cowser* 57 Tex. 298. A seeming modification of the general rule has been recognized in a case where, by the plaintiff's own testimony, a suspicion was created that his own negligence may have contributed to the injury. *Railroad Co. v. Crowder*, 63 Tex. 502. In the present case the situation and acts of the persons who participated in the transaction which led to the injury, and especially the conduct of the injured party herself, were fully disclosed by the evidence; and it was proper to instruct the jury to find for the plaintiff, if the injury was caused by the negligence of the defendant's employees, unless they found that plaintiff's wife was at the same time guilty of ordinary negligence which contributed to the injury.

It is also complained that "the court erred in the sixth paragraph of the charge in charging the jury that if defendant, by its agents, could by ordinary care have avoided the consequences of Mrs. Sullivan's negligence, or by direct act of its agents caused the act which produced the injury, plaintiff can recover. This was error, because there was no evidence that defendant could have avoided the consequences of Mrs. Sullivan's negligence." We are not prepared to say that there was no evidence which authorized this instruction. It does not directly appear that the conductor saw Mrs. Sullivan at the time he signaled the engineer to move the train, but it does appear that but a short while before he had approached the boarding car to ask her where she would have the water car put; and it is not reasonable to infer that he may

have been in a situation to have known of her danger, if in fact she was in any danger, from starting the car, if moved in a careful manner. But in no event is it probable that the jury were misled by the instruction.

It is also complained the court erred in instructing the jury that the plaintiff could recover for his wife's mental suffering, because it is insisted there was no evidence that she suffered pain of mind. It is settled in this state that mental suffering is an element of actual damages, in this class of cases. Where serious bodily injury is inflicted, involving fractures, dislocations, etc., and results in protracted disability and confinement to bed, we know that some degree of physical and mental suffering is the necessary result. Hence, when a serious bodily injury which threatens permanent disability, and continues for a long time, is proved, the jury are authorized to consider the pain both of body and mind in assessing the amount of damages, without direct proof of such sufferings.

In reference to the charges asked by the defendant and refused by the court, it is sufficient to say, as to some of them, that they had been given in the general charge, and should not have been repeated. In special instructions numbered 1 and 2, the court was asked to charge "to the effect that if Mrs. Sullivan knew that the car was about to be moved, when she stood up in the door of the car, and if in consequence of her standing up the jerk of the car threw her out, she cannot recover." It was proved that Mrs. Sullivan was not standing in the door. But, whether this was so or not, the question of negligence was one of fact, to be determined by the jury in the light of the circumstances; and it would have been improper for the court to charge that it was negligence as a matter of law. *Railway Co. v. Murphy*, 46 Tex. 356. The charge was properly refused. We also fail to see that it would have been proper for the court to charge that Mrs. Sullivan, in taking charge of the boarding car, assumed the ordinary risks of the situation. The theory of plaintiff's case was that the injury was not the result of an ordinary accident, but was the consequence of negligence on part of defendant's servants. The jury are pointedly instructed in the general charge that the plaintiff could not recover unless the injury was caused by such negligence. We do not understand danger resulting from negligence to be classed among the ordinary risks of operating dangerous machinery.

The accident is alleged in the petition to have occurred at Provencal, La. The proof showed that it took place at Robeline, in that state. The defendant asked the court to charge the jury that if the injury was inflicted at Robeline, and not at Provencal, as alleged, they should find for the defendant, and this was refused. This is a transitory action. The rule at common law is that in such action the allegation of place is immaterial, and that it need not be proved as alleged. *Hamer v. Raymond*, 5 Taunt. 789; 1 Starkie, Ev. 465; 1 Greenl. Ev. § 61. If the defendant's counsel had been misled by the allegation in the petition, and if, when evidence was introduced showing an injury at Robeline, he had moved the court to permit him to withdraw his announcement and continue the case, it would seem a proper practice for the court to have granted it, provided his motion had been supported by affidavit. Such is the practice in New York, as regulated by statute. But that defendant was not surprised in this case is shown by the fact he had his witnesses present to meet the evidence introduced by the plaintiff.

The evidence bearing upon the relations between Mrs. Sullivan and the defendant was given by herself, and is as follows: "Last May I was on the work train at Robeline, La. I was cooking on the train. Was cooking for my husband. I was boarding from twenty to forty men. The men were working for the Texas & Pacific Railway Company. The company paid my husband for their board, and the money was kept out of their time." The defendant asked the court to charge the jury that Mrs. Sullivan and the engineer were fellow-servants, and that she could not recover for his negligence. We infer

from the testimony which we have quoted that the plaintiff was keeping the company's boarding train, and boarding the men, under an agreement that the company would retain the men's board, and pay it to plaintiff. We hardly think this made him an employee of the company. If the company had merely employed him to keep the boarding car, and to engage and supervise the servants who assisted in the work, the relation would have been different. But the witness says she was working for her husband. Then she was not working for the company, and was in no sense its employee or servant. We are therefore of opinion that the court did not err in refusing the instruction.

It is also assigned that the court erred in not granting a new trial, because the verdict is contrary to the evidence in this: the evidence showed it was Mrs. Sullivan's own fault, in standing in the door when she knew the car was about to be moved, that caused the injury. In support of this assignment, it is contended that the fact that Mrs. Sullivan stood up in the car when she knew it was about to be set in motion is negligence. Her testimony was that she was standing three feet from the door as the car started, and we cannot say, against the verdict of the jury, that this was such negligence as would defeat a recovery. Whether it was negligent or not is a question of fact, and it was strictly within the province of the jury to determine it. Under the rule of decision in our state, an act not in violation of a statutory requirement would have to be palpably reckless to authorize the court to declare it negligence *per se*.

Nor can we say that the damages are so clearly excessive as to require a reversal of the judgment. Mrs. Sullivan's leg was broken and her arm dislocated, her back, shoulder, and side injured. She testified that her sufferings were great, and that she still suffered from her injuries. Nearly 12 months had elapsed, and she had not recovered, and had been able to do no work. The injury occurred in May, and she was unable to walk until September. A witness testified that previous to the injury she was a stout, healthy woman, but that at the time of the trial she was hardly able to dress herself. The verdict is large, and the court below, in the exercise of a sound discretion, might properly have set it aside; but the damages are not so great as to manifest that the jury were actuated by passion or prejudice, and therefore we cannot disturb the verdict because it may seem to us too large.

The judgment in this case, as in that of *Brown v. Brown*, 9 S. W. Rep. 261, decided at a former day of this term, attempts to make the recovery a lien upon the earnings, etc., of the railroad in the hands of the receiver. This, in the case cited, is held to be error.

The judgment in this case will accordingly be reformed in that particular, and affirmed. The appellant will recover the costs of this appeal.

ST. LOUIS, A. & T. RY. CO. v. DUTTON *et al.*

(Supreme Court of Texas. October 30, 1888.)

RAILROAD COMPANIES—CONTRACT TO GRADE ROAD-BED—AUTHORITY OF ENGINEER.

In an action against a railway company for clearing and preparing their right of way for grading, and for changing the location of the grade, defendant denied the authority of its engineers who employed plaintiffs. The citizens had agreed to furnish the right of way graded, and plaintiff contracted with them to grade parts of the line. There was evidence that such a contract did not include clearing the ground. The citizens denied their liability to do the work, and one of the subordinate engineers at first refused to make a contract with plaintiffs on behalf of defendant to do the work until he could consult the chief, who had authority to make such contracts, and, after having an opportunity to consult him, employed plaintiffs to do the work, promising them that defendant would pay them. Whether the chief heard this arrangement made was uncertain, but officials, having authority to make such contracts, knew that plaintiffs were doing the work expecting to be

paid by defendant. Only one of defendant's engineers testified in the case, and his evidence was in conflict with that of plaintiffs. *Held*, that a verdict for plaintiffs was supported by the evidence.

Appeal from district court, Franklin county; W. P. McLEAN, Judge.

Action by Dutton & Burns against the St. Louis, Arkansas & Texas Railway Company, to recover for work done. Judgment for plaintiffs, and defendant appeals.

Todd & Hudgins, for appellant. *Hiram Glass*, for appellees.

STAYTON, C. J. This action was brought by appellees to recover the value of services claimed to have been rendered by them for appellant in clearing the right of way on named sections subsequently used for its road, and to recover the value of services rendered in changing a grade from a place where they had placed it, under directions of an engineer in appellant's employment, under whose directions they were doing grading. That the services were rendered is not controverted, but it is contended that appellees were not employed by the appellant to do the work; and the only question presented is as to the sufficiency of the evidence to show that any person, authorized to contract for the appellant, requested appellees to do the work. The evidence shows that the citizens of Sulphur Springs, or a committee of such citizens, contracted to furnish the right of way, graded without cost to appellant, over the ground on which appellees claim to have performed the services sued for; and the appellant, in consideration of this, obligated itself to accept the roadway thus prepared, and thereon to place the necessary bridges, cross-ties, and rails to complete a standard gauge railway, over which it was to operate and maintain a railway service. The appellant seems to have had a contract with Hargrove, Weaver, Foscue, and Henderson for the entire construction of that part of the road on the roadway on which appellees are shown to have rendered services, and those same persons seem to have been the committee representing the citizens of Sulphur Springs. In some way not clearly shown, but probably by contract with the Sulphur Springs committee, Grigsby & Bro. became interested in the construction of the road, and with them appellees made a contract to do grading on named sections of the roadway, at a fixed price per cubic yard. There was evidence tending to show that a contract to grade did not carry with it the obligation to clear the right of way, and services rendered in doing this constitutes the greater part of the demand made by appellees. It is most likely true that the services rendered by appellees were such as the citizens of Sulphur Springs had contracted to perform, but it is not shown that they or the committee employed the appellees. That the services rendered by appellees were rendered under the direction and at the request of engineers employed by appellant to superintend the work seems not to be denied, but it is denied that they had authority to contract for appellant.

Notwithstanding, as between the appellant and the citizens of Sulphur Springs, it may have been the duty of the latter to cause to be done and pay for the services rendered by the appellees, yet, if they performed the services under an express or implied contract with the appellant, then the latter must make compensation therefor. The record shows that the committee, or some of the committee, for the citizens of Sulphur Springs, denied their obligation to do the work for which compensation is asked, and that the same was not done with the expectation that the citizens or their committee would pay for it. The testimony for appellees shows that the work was done at the request of three engineers in the employment of appellant, and engaged in construction, but there is testimony tending to show that they had no express power to make contracts for such services. It was shown, however, that the appellant's chief engineer had power to make such contracts, and that a subordinate engineer, when consulted about the work, declined to make a contract

until he could consult those in authority above him; and that after he had opportunity to do this he directed the appellees to do the work, and promised that the appellant would pay for it. The circumstances under which this is shown to have been done were such as to justify the jury in believing that he was acting under instructions from the chief engineer, who may be said to have been present at the time, though it is not shown that he heard what passed between one of the appellees and the subordinate engineer. There was also evidence tending to show that some of the engineers who directed appellees to do the work, and promised that the company would pay for it, made other contracts with appellees for similar work, which the appellant paid for in accordance with the contracts made. That officials empowered to contract for the services knew that the work was being done is made clear, and that other officials in the employment of appellant knew that appellees believed that a contract existed, and were doing the work on the faith of it, cannot be doubted, if the witnesses are worthy of credit. But one of the engineers who are shown to have assumed to contract with appellees was introduced as a witness, and his testimony conflicted with that offered for appellees. The court instructed the jury fully and clearly as to the law of the case, and permitted them to consider the evidence to which we have briefly referred, and, though it is not so clear as it would seem might be brought on such a question, we cannot say that it was not sufficient to authorize the verdict. If it was the duty of the citizens of Sulphur Springs to do the grading done by appellees, of which, from the contract before us, there seems no doubt, this was to be done in accordance with instructions and plans to be given and furnished by engineers employed by appellant. When the work was once so done, the contract of the citizens was complied with, and it would seem that any subsequent alterations of embankments, or other work made necessary by mistakes of such engineers, would be a proper charge against appellant.

We do not feel authorized to hold that the verdict is without sufficient evidence to sustain it, and the judgment will be affirmed.

C. B. CARTER LUMBER CO. v. CLAY *et al.*

(*Supreme Court of Texas. November 9, 1888.*)

HOMESTEAD—ABANDONMENT—EVIDENCE.

Testimony that a homestead was rented for a year, on account of the ill health of the wife, that there was no intention to leave the state, but always an intention to return to the homestead at the expiration of the lease,—is sufficient, though contradicted as to intention, to sustain a finding that there was no abandonment.¹

Appeal from district court, Kaufman county; ANSON RAINEY, Judge.

Action to recover real property, brought by the C. B. Carter Lumber Company against John Clay and others. Judgment for defendants, and plaintiff appeals.

T. L. Stanfield and *Allen & Vesey*, for appellant. *Wood & Charlton*, for appellees.

STAYTON, O. J. The property in controversy was the homestead of Antonio de Grazier and family. In December, 1884, the property, consisting of a house and lot in the town of Terrell, was rented to a tenant for one year; and the evidence tends to show that this was done on account of the ill health

¹As to what constitutes an abandonment of a homestead, see *Dennis v. Bank*, (Neb.) 28 N. W. Rep. 512, and note; *Lee v. Moseley*, (N. C.) 7 S. E. Rep. 876; *McDermott v. Kernan*, (Wis.) 39 N. W. Rep. 537, and note; *McDaniell v. Ragsdale*, (Tex.) 8 S. W. Rep. 625, and cases cited.

of Mrs. De Grazier, the husband and wife intending to board for one year. On January 27, 1885, the appellant caused a writ of attachment to be levied on the property, based on a debt due it by De Grazier. The action in which that writ was sued out was prosecuted to final judgment, and under that the property was sold, and purchased by appellant. On January 28, 1885, De Grazier, joined by his wife, conveyed the property to Julia Durham in consideration of \$700 paid. This action was brought by appellant against the tenant of Mrs. Durham, and she became a party defendant. The cause was tried by the court, and judgment rendered for defendants.

The only question presented is as to the correctness of the findings of the court on the evidence. There is some testimony tending to show that De Grazier, after renting the property, declared his intention to leave the state; but such intention is denied by him and his wife, who testified in the case. They both state that their intention was to return to the property at the expiration of the lease, and that this intention continued until they conveyed to Mrs. Durham. The circumstances of their renting the property were shown, and were not such as to induce the belief that the renting was intended to be more than temporary. Under this state of facts it cannot be held that the finding against abandonment was not sustained by the evidence. The court below having found the facts against appellant, on testimony somewhat conflicting, but sufficient, in favor of appellees, if believed, to sustain the judgment, it will be affirmed.

MCALISTER v. MCALISTER.

(Supreme Court of Texas. November 9, 1888.)

DIVORCE—CRUELTY OF WIFE—FALSE CHARGES.

It is not a ground for divorce that the wife has falsely and repeatedly charged the husband with adultery, and that on one occasion she came near involving him in a personal difficulty by making such a charge, thus causing him disgrace and mortification, in the absence of any showing that by reason of the temperament, character, or occupation of the husband, or other circumstances, the effect of the charges was to produce a greater degree of mental suffering than would usually result therefrom, as without some such facts, such charges, when made against the husband, do not amount to cruelty.¹

Appeal from district court, Hunt county; GEORGE S. PERKINS, Special Judge.

Petition for divorce by G. W. McAlister against his wife, M. M. McAlister. Demurrer to petition sustained, and plaintiff appeals.

E. W. Terhune and Sherrill & Austin, for appellant. *B. F. Looney*, for appellee.

WALKER, J. This is an appeal from the judgment of the court below sustaining a demurrer to the petition of appellant in a suit for divorce. The appellant declined to amend, and judgment was rendered for the defendant. The petition alleged excesses, cruel treatment, and outrages on part of the defendant, collated in appellant's brief: "(1) That for six or seven years appellee has repeatedly harrassed him with studied insults, and publicly accused him of adultery with various women. (2) Appellee publicly and falsely accused him of adultery with one [naming her,] his neighbor's wife. That the ac-

¹ It is extreme cruelty, warranting a divorce, under the Kansas statute, for a wife to circulate anonymous letters which falsely charge her husband with adultery, *Carpenter v. Carpenter*, 2 Pac. Rep. 122; or to humiliate and disgrace him by persistently and falsely accusing him in public of having violated his marriage obligations, *Whitmore v. Whitmore*, (Mich.) 13 N. W. Rep. 800. On the general subject of what is extreme cruelty warranting a divorce, see *Sharp v. Sharp*, (Ill.) 16 N. E. Rep. 15, and note; *Haley v. Haley*, (Cal.) 16 Pac. Rep. 248, and cases cited; *Lynch v. Lynch*, (N. J.) 16 Atl. Rep. 176, and cases cited.

cusation caused scandal in the neighborhood, and was calculated to wound appellant's feelings, and in fact came near causing a personal difficulty with the lady's husband. That when threatened with a suit for slander, the appellee voluntarily went before a notary public, and made affidavit that the charge was false, and made with wicked and slanderous intent; and that said affidavit was printed and published to the world, bringing shame and reproach upon appellant, injuring his feelings, and disgracing his little children." And (3) that appellee "publicly and repeatedly declared that appellant was not the father of her children born during their marriage." As to the last specification, it is evident, from the petition, that the charge is regarded as false, from the fact that the husband seeks the custody and guardianship of these children whose paternity is said to be questioned. The first and second may be considered together as but one charge, save that in the first its continuance is stated to have been for several years' duration.

Is it a cause for divorce for the wife to charge the husband with adultery? With the consequences of such charge upon others, and subsequent to it, we have nothing to do. Wisely, or not, our statutes do not make occasional acts of adultery on the part of the husband a cause of divorce, when sought by the wife; otherwise, when the husband asks divorce from the wife taken in adultery. Our courts have held that a single deliberate act of the husband falsely and publicly charging his wife with being a prostitute, or with unchastity, may be cause for granting a divorce. *Jones v. Jones*, 60 Tex. 457; *Bahn v. Bahn*, 62 Tex. 518. Our courts show no like action, upon a similar state of facts, in favor of the husband. The ordinary meaning of "cruelty," in actions for divorce, is that the act endangers or threatens the life, limb, or health of the aggrieved party. To this, in our courts, is added any outrage upon the feelings, inflicting mental pain or anguish. *Wright v. Wright*, 6 Tex. 8; *Nogees v. Nogees*, 7 Tex. 588; *Pinkard v. Pinkard*, 14 Tex. 356; *Shreck v. Shreck*, 82 Tex. 578; *Jones v. Jones*, 60 Tex. 457, *Bahn v. Bahn*, 62 Tex. 518. There are no allegations in the petition showing that from the character, calling, or occupation of the plaintiff, or from his temperament, or from any other subjective cause, the charges would be calculated to and did produce mental suffering or anguish beyond the ordinary effect likely to be produced. Cases might exist, upon such allegations, showing the special effects of the charge of adultery upon the husband, and that the mental suffering was such as to render the living together insupportable, where a divorce should be allowed; but, taking the gravity of the offense charged, when made against the wife, with the comparative levity of it when against the husband, we are of opinion that the mere charge of adultery on part of the husband made by the wife, though the charge be often repeated, and be false, is not, under our laws, a sufficient ground for divorce.

The demurrer was properly sustained. The judgment is affirmed.

WRIGHT v. LASSITER.

(Supreme Court of Texas. November 2, 1888.)

1. DEED—SUFFICIENCY OF DESCRIPTION.

A sheriff's deed, though in itself too indefinite in its description of the land conveyed, but which refers for more specific description to a recorded deed to the same land made by the execution debtor to another person, and to a deed of reconveyance by the latter's executrix to said debtor, when supplemented by the testimony of a surveyor, who has run the lines according to said deeds, and found apparent monuments of the boundaries therein described, is sufficient.

2. BOUNDARIES—RECOGNITION—LICENSE.

A mere license by the owner of one tract of land permitting the owner of an adjacent tract, the boundary line between which and the former tract is disputed, to

fence and occupy over the true line, will not amount to an agreement accepting the line claimed by the licensee as the boundary, though his possession extends up to the line so claimed.

3. **TRESPASS TO TRY TITLE—NOTICE OF ADVERSE CLAIM.**

Possession of part of a tract of land by one holding an unrecorded bond for a deed for the whole, the boundary of which is disputed by a coterminous owner, not extending to any portion of the disputed boundary, is not notice of claim of title to the part in controversy.¹

4. **SAME—UNRECORDED TITLE-BOND.**

In the absence of notice to the plaintiff in execution, or the purchaser at a sale thereunder, that part of the land purchased was covered by such unrecorded title-bond, the levy and sale pass title to the land, the legal title thereto being in the execution defendant.

Error from district court, Red River county; D. H. SCOTT, Judge.

Trespass to try title to land in Red River county by L. W. Lassiter, against H. C. Wright. Verdict and judgment for plaintiff, and defendant brings error.

Sims & Wright, for plaintiff in error. *Chambers & Doak*, for defendant in error.

WALKER, J. This was an action in trespass to try title by Lassiter against Wright. The dispute is as to the locality of the common dividing line between Lassiter on the east and Wright on the west of it. Both claimed under B. H. Epperson, or rather through his independent executors, Russell & Epperson. B. H. Epperson, in his life-time, had subdivided the William Walker survey, and had sold the tract claimed by Wright to one John A. Chambers. He had also sold a subdivision east of and adjoining it to James H. Caton, containing 248 acres. The west half of the Caton tract was subsequently sold to one Thompson, under whom Lassiter deraigns title. Chambers died, and his widow, representing his estate, surrendered the lands to Epperson by quitclaim deed. The tract was sold to one Ward, under whom Wright claims, under an execution issued under a judgment rendered against B. H. Epperson and others, and revived against his executors. The sheriff's deed is somewhat indefinite in describing the land sold, but it is further described in the deed as "being the same land conveyed by B. H. Epperson to J. A. Chambers, November 8, 1872, to which deed reference is made for more specific description, and which was reconveyed by the executrix of said J. A. Chambers to said B. H. Epperson, which deed is recorded in Book X, page 126, record of deeds of Red River county." The locality of this land is testified to by the defendant. The deed by the sheriff to Ward was executed March 3, 1880, and was filed for record April 7, 1880. April 28, 1880, Russell and Culbertson, executors, conveyed to Elmore and Gaines the land claimed by Lassiter. The deed conveys 124 acres, more or less, situated * * *, part of the William Walker survey, and the west half of 248 acres, once sold to James H. Caton and taken back, and adjoining and next to a tract of 360 acres out of the same survey, and sold to John A. Chambers and taken back," and recites: "The intention of this instrument is to convey the same land that was conveyed to the said Elmore and Gaines in a deed dated December 9, 1879, in which errors appear in the field-notes; this deed being made to correct the same, also to convey the same land conveyed to John L. Thompson by B. H. Epperson in a bond bearing date November 30, 1876." This deed referred to field-notes for description, which include the disputed territory. Lassiter held under this conveyance. It appeared that Thompson claimed that this tract extended over the land in dispute, which is 61 varas wide at the south end,

¹Actual possession of part of a tract of land under a patent for the whole is not possession of the whole as against a senior patentee of another portion. *Turner v. Stephenson*, (Mich.) 40 N. W. Rep. 735; *Ivey v. Petty*, (Tex.) 7 S. W. Rep. 798, and cases cited.

95 varas at the north, and 1,400 varas in length. It appears that he never had any improvements upon it. It also appears that parties under Thompson down to the plaintiff claimed the tract. It seems that the deed of April 28th was made to include the land to the extent claimed under Thompson, though his bond called for 124 acres, the west half of the Caton tract. Lassiter's grantor, J. J. Perdue, testified "that, while witness claimed to own the land in dispute with defendant's consent, he commenced at their north line, and run south on a line with where plaintiff claims the west boundary of the line in dispute to be, for several hundred yards, and fenced up the north end of the strip of land in dispute; that afterwards some difficulty took place between witness and the defendant about this fence. While Thompson's bond for title only called for 124 acres, he took possession up to where plaintiff claims."

It is not disputed but that the line between the Caton and the Chambers subdivisions gives the land in dispute to Wright. It is equally clear that it is included in the field-notes attached to and made part of the deed by Russell and Culbertson to Elmore and Gaines. The execution sale and sheriff's deed made under the judgment against B. H. Epperson revived against his independent executors, passed the title from the Epperson estate to Ward to all the land included. The reference to the deed from B. H. Epperson to Chambers, and from Mrs. Chambers back to Epperson, of record, with the further identification of the land in evidence by the witness Howell and the defendant Wright, will sufficiently describe the subdivisions of the Walker survey, intended to be the subject of the sale. *Brown v. Chambers*, 63 Tex. 135; *Steinbeck v. Stone*, 53 Tex. 382. It also passed all title thereto which was in the Epperson estate. *Hart v. McDade*, 61 Tex. 208.

The testimony of the witness Perdue, that "by consent of defendant he had inclosed part of the land in dispute," does not go to the extent that they, (witness and Wright,) had mutually agreed upon the line, as claimed by witness, to be the division line between their adjoining tracts of land. His testimony does not establish an agreed line. A witness (Howell) testifies "that prior to B. H. Epperson's death, and while Thompson was holding the land subsequently conveyed to Elmore and Gaines under a bond for title, which had never been recorded, Thompson sent witness up there to run off the land; that he at that time lived with Thompson, who told witness that Mr. James H. Caton knew where the line was, and would show it to him; that upon seeing Caton he pointed out the west boundary line at about where defendant now claims it to be; that the land spoken of in the sheriff's deed as the 'John A. Chambers land' was the same land now held by the defendant,—that is, the west boundary line of the Thompson subdivision was the east boundary of the Chambers tract." It was also shown that measuring on the north end of the Caton 248-acres tract, of which Thompson's bond was for the west half, at about the distance called for, (within 4 or 5 feet,) is found a *Bois de Arc* post, as if placed for corner, corresponding with the line as claimed by Wright. It would seem that the lines of the subdivisions made by Epperson were well known, or capable of identification. It seems that Thompson exhibited field-notes which were either in or attached to his title-bond from Epperson, from which the description was taken, which was attached to the deed from Russell & Epperson to Elmore & Gaines. While he claimed the strip of land in dispute, he never had any improvements upon it, nor was his bond ever recorded. The levy and execution sale of the 360-acres Chambers tract, the records showing title to be in the Epperson estate, would pass title thereto against Thompson and those claiming under him,—it not appearing that Ward, the purchaser, or the plaintiff in the execution had notice of such claim. The occupation of the undisputed part would convey no notice of the claim. *Grace v. Wade*, 45 Tex. 526; *Simpson v. Chapman*, Id. 564; *Linn v. Le Compté*, 47 Tex. 442; *Lewis v. Johnson*, 68 Tex. 448, 4 S. W. Rep. 644. The subsequent deed by Epperson's executors could not affect Ward's title.

From the testimony it is not clear that Thompson's title-bond included more than the west half of the 248-acres tract which had been sold to Caton, lying between the Scaff and the Chambers tracts; but, if it did, then the claim was concluded by the levy and execution sale before the execution of the deed under which the plaintiff claims. It is here held (1) that the sheriff's deed in referring to other deeds which are shown to be well known, and which described the land, was sufficient to identify the land sold; (2) that a license by one party to the other to occupy a part of the land in dispute is not equivalent to a mutual agreement upon a division line, although such license extended to the occupation up to the line claimed by the party to whom the license was given; (3) that possession under an unrecorded bond for title of a part of the land described in the bond and not in dispute, is not notice of claim to that part in dispute; and (4) that in absence of notice of such claim to the plaintiff in execution, or to the purchaser at execution sale, the levy and sale passed title, the legal title appearing of record in the defendant in execution.

The judgment of the court below should have been for the defendant, and it will be reversed. Reversed and remanded.

EAST LINE & RED RIVER R. CO. v. SCOTT.

(*Supreme Court of Texas. November 9, 1883.*)

1. CONTINUANCE—ABSENT WITNESS—DEPOSITION.

An application for a second continuance on the ground of an absent witness will not be granted, where it appears that the deposition of the witness had been taken, and his presence was desired to explain some portions of it; that no effort had been made to again take his deposition; and that the witness was in the employ of the applicant.

2. MASTER AND SERVANT—INJURY TO SERVANT.

Plaintiff, who was employed as fireman and watchman by a railroad company, was requested by the engineer, who had been taken sick, to run the engine to a place where piles were to be driven. Plaintiff did so, and was injured by the explosion of the boiler of an engine used to operate the pile-driving machine. It appeared that plaintiff was not actually engaged in any work at the time of the accident, and that there was a rule of the company forbidding an engineer from placing his engine in the control of another, but there was testimony that this rule was not intended to be enforced in case of the sickness of the engineer. *Held*, that plaintiff could recover for injuries received.

3. SAME—NEGLIGENCE OF FELLOW-SERVANT.

In an action by a servant for injuries alleged to have been caused by the incompetency of a fellow-servant, where several facts are presented as bearing on the question of competency, it is not error to refuse a charge that plaintiff could not recover by showing a single act of negligence.

Appeal from district court, Marion county; W. P. McLEAN, Judge.
F. H. Prendergast, for appellant. C. A. Culberson, for appellee.

STAYTON, C. J. This action was brought by appellee to recover damages for an injury that he alleged was caused to him, while in the employment of appellant, by the explosion of the boiler of an engine used to operate a pile-driving machine. The action was brought in Marion county when tried, and when the cause was called for trial the appellant made an application for a continuance based on the absence of F. M. Sprague, who resided in Hunt county. The witness had testified by deposition, and the appellant desired his presence in order that he might explain a part of his evidence already given. No effort had been made again to take his deposition, but, being in the employment of appellant, it depended upon having him present on the trial, but in this was disappointed by reason of the fact that one of appellant's officials had given him leave of absence. The bill of exceptions shows that

the application was for the second continuance. No such diligence as the law requires has been used, and the court below did not err in overruling the motion for a continuance. It seems that appellee was in the employment of appellant as a fireman, when he was directed by the proper authority "to go to Carson, and stay with engine 190 and the pile-driver as watchman." This was on February 5, 1886, and in obedience to the order he went. There was some pile-driving to be done about one mile and a half west of Carson, at a bridge, and on the morning of the next day the train, with the pile-driver, having remained during the night at Carson, went to the place where the work was to be done with the regular engineer, F. M. Sprague, in charge of the locomotive. The train, with pile-driver, returned to Carson at noon, and went out again in the afternoon in charge of the fireman, but soon returned to the side track at Carson to let a train pass. After this, Sprague, the engineer, was sick, and he directed the appellee in charge of the locomotive to take the train to the place where the piles were to be driven, which he did. Behind the locomotive were the tender, caboose, and car on which was the pile-driver and engine to operate it. When these arrived at the place where the work was to be done, appellee, and others of the crew, went to the car on which was the pile-driver and its engine, and soon after the boiler of this engine exploded, causing the injuries to appellee of which he complains. Appellee alleges that the explosion was caused by defects in the boiler, and by the want of proper skill in the person who was operating the engine for the pile-driver.

The evidence for appellee shows clearly that the boiler was very defective, and tends to show that the person who had it in charge had but little, if any, experience as an engineer. No evidence was introduced to show that the engineer was competent, or that any inquiry had been made as to his competency; but a witness for appellant, who examined the boiler on the day it was sent out, stated that he thought it then in good order, and that from an examination made after the explosion he thought it was caused by an overpressure of steam. F. M. Sprague, the locomotive engineer, testified that "John S. Scott [the appellee] ran the engine out on the evening of the explosion by my request, as I was sick, and not able to handle the engine. Scott's duty was to watch the engine at night. It was not his duty to take the engine out from Carson that day, but at my request he did it. I requested him to take the engine out, as it was the custom for watchmen and men who were hired as Scott was to assist the engineer in case of sickness, as he was an old fireman, and I thought him a competent man to handle the engine. Scott's time was his own from 7 o'clock A. M. to 6 o'clock P. M. He was requested by me to handle the engine as aforesaid. Scott took the engine at my request. If he had not taken it, my opinion is the result as to him would have been the same. When Scott arrived at the bridge he stopped the engine, and came over on the pile-driver car with the train crew. I don't know what he was doing at the time of the explosion. He was on the third car from the locomotive. I don't know how came him to be there." It is shown that appellee was not actually doing anything at the time of the explosion; that his bedding was in the caboose, where he slept; and there was evidence tending to show that his duties, as watchman only, would not have taken him from Carson, and that he might have spent the day as he pleased, if under no obligation to obey the order of Sprague. The evidence tended to show that a rule of the company forbade an engineer to place his locomotive in the control of another, and that this rule was known to Scott at the time of the trial; but his knowledge in this respect, on the day of the explosion, was not shown.

Appellant asked the following instruction: "It appeared that the plaintiff had no duty to perform at or near the pile-driving engine, and he was there on the car merely to suit his own pleasure. He cannot recover. You will therefore find for defendant,"—which was refused, and this is assigned as error.

The court, in effect, instructed the jury that appellee might recover, if injured as alleged, without negligence on his part, although his duties, as watchman only, did not require him to render the services rendered at request of the engineer, "if under the custom and usage of defendant's road management plaintiff was expected to obey" the orders of the engineer under the circumstances. This charge is also assigned as error.

Appellant contends that it was a violation of the rules of the company for the engineer to place his engine in the hands of appellee, and that for this reason the latter cannot recover. If the appellee had been injured while in the act of performing an act, or through the performance of an act, known to be forbidden by the rules of the company, it is clear that he could not recover. He, however, was not injured in either of these ways. If it be contended that appellee was, wrongfully or not, in course of the service, at the place where the explosion occurred, by reason of the fact that he went there in performance of a duty that under the rules of the company the engineer was forbidden to permit any person other than himself to perform, then, under the evidence, it would be necessary to ascertain what effect should be given to the rule claimed to have existed. The testimony of Sprague shows that the general rule which forbade an engineer to give another charge of his engine was not intended to be enforced, when on account of the sickness of the engineer it became necessary for his duties to be performed by another. The rule, then, had its exception, which was applicable at the time appellee went to the place where the explosion occurred in charge of the locomotive. Paper rules which are usually and customarily violated are presumed to be not intended for enforcement,—not rules at all. If, under the evidence, the appellee had been injured by an explosion of the boiler of the locomotive, caused by such defect as would fix liability on the master for an injury to a servant, we do not see that appellant would not have been liable. It is true that the employer is only liable as master to the servant when the latter is actually in his service, and that at times during the period of an engagement the employe may sustain to the employer no other relation than that of stranger. It does not follow from this, however, that the employe is to be deemed in the employer's service only when he is actually engaged in labor. He is to be deemed in the master's service whenever present to perform his duty under the contract creating the relation of master and servant, and subject to orders, although at a given moment he may not be engaged in the actual performance of any labor.

We are of the opinion that the evidence shows a state of facts which required the appellee, as the servant of appellant, to be with the train at the time he was injured. The fact that he may not have been actually engaged in the performance of labor at the time he was injured, if he was with the train, in discharge of a duty the engineer had power to impose upon him by virtue of his employment, and subject to further orders, would not for the time destroy the relation of master and servant, and make him a stranger to appellant. This being true, there was no error in refusing the charge asked, nor in giving the charge complained of. Had the appellee, when the train stopped, remained with the locomotive, and been there injured by the explosion of the boiler used in operating the pile-driver, he would doubtless have been entitled to recover, if there was a failure of the master to use such care as is required in reference to machinery placed in the hands of employes to be used in the master's service. Whether the act of appellee in leaving the locomotive when the train stopped, and going to the place where the car with the pile-driver was, was contributory negligence that would defeat a recovery, was a question for the jury. No question as to this is raised in this court, nor does it appear that such a question was raised in the court below. The proposition sought to be maintained throughout is that the relation of master and servant did not exist at the time the injury was inflicted, and that for

this reason appellant did not owe to appellee any duty other than such as it owed to every stranger.

The appellant asked a charge to the effect that the incompetency of the engineer in charge of the boiler that exploded could not be proved by one single act of negligence, and this was refused. The court did not err in refusing the charge, for it was not applicable to the facts in proof. The testimony introduced to show the incompetency of the engineer consisted of evidence tending to show his entire want of experience as an engineer, and that his avocation was that of a bridge carpenter. There was evidence, introduced by appellant, tending to show that the explosion occurred on account of the fact that the engineer placed a higher pressure of steam on the boiler than it was capable of sustaining. This tended to show negligence on the part of the engineer, and might have been looked to, in connection with other facts, to ascertain the competency of the engineer; but a charge which presented but one fact, and that the least important fact bearing on an issue, and informed the jury that this would not be sufficient proof of incompetency, would have been calculated to mislead. All the facts tending to show incompetency should be considered together. If the question be whether a master exercised due care to inform himself as to the competency of a servant, evidence showing what inquiry he made, and what knowledge he had or obtained on inquiry, should be considered; and, it would seem, if it be contended that a master knowingly employed an incompetent servant, that ought to be established by evidence tending to show that the master had been in position to know that the servant was incompetent, or the general reputation of the servant should be shown to be such as to induce the belief that his incompetency must have been generally known.

The court correctly instructed the jury as to the burden of proof, and as to facts necessary to be shown in order to fix liability of appellant, if the injuries to appellee resulted from the incompetency of the engineer, and did not err in refusing to give the charge asked by appellant, and numbered 6. The other assignments relate to the refusal of the court below to grant a new trial, and in the main present questions already considered. We deem it proper, however, to say that if there had been no testimony tending to show that the engineer was incompetent, the evidence offered by the appellee was such as to show that the boiler was unfit for use.

There is no error in the judgment, and it will be affirmed.

EQUITABLE MORTGAGE Co. *et al.* v. NORTON *et ux.*

(Supreme Court of Texas. November 9, 1888.)

1. ESTOPPEL—IN PAIS—LOAN ON HOMESTEAD.

Defendants, to procure a loan on the wife's land, on which they were not then residing, made sworn application stating that it was not their homestead, which they claimed in another lot. This latter lot was deeded to them and designated as a homestead the day before the loan was obtained, but on the following day was reconveyed to their grantor. The wife, during the negotiations, was sick of a fever, then in child-bed, then watching her sick infant, until its death, and alleged that the application and mortgages were fraudulently obtained from her, and that she did not know, and was not in condition to know, the purpose of the papers signed by her. An alleged agent of the loan company participated in obtaining and designating the new homestead, but the mortgage trustee testified that he alone was its agent, and knew nothing of that transaction. *Held* error to refuse a charge that the wife was estopped if plaintiffs advanced the money on faith of the statement that the land was not a homestead.

2. TRIAL—ARGUMENTATIVE INSTRUCTIONS.

Argumentative instructions, enumerating parts of the evidence, are properly refused, as giving undue prominence to those portions of the evidence.

8. APPEAL.—REVIEW.—HARMLESS ERROR.

The exclusion of a notarial certificate attached to a designation of homestead is harmless error where the instrument itself is admitted in evidence, and the notary called as a witness.

Appeal from district court, Kaufman county; ANSON RAINERY, Judge.

Lawther & Holloway and *Manion & Huffmaster*, for appellants. *Word & Charlton*, for appellees.

WALKER, J. May 1, 1888, appellants brought suit against B. J. Norton and his wife, Nannie A. Norton, on a promissory note for \$400, and the interest coupons of date September 1, 1886, made by defendants, and payable to the Equitable Mortgage Company, and to enforce a trust deed made to secure same, in which S. M. Finley is named as trustee, upon 50 acres of land near the city of Terrell, the separate property of the wife. Default was made in the payment of interest, and by terms of the contract action arose. The trust deed bore date September 1st, but the acknowledgment thereto bore date October 4, 1886. The defendants pleaded general denial, and alleged that the land described in the trust deed was their homestead at the time it was made, and still is. By amended answer the wife pleaded that the several papers held against her were obtained from her by fraud; that at the time of signing the mortgage she was sick, not competent to know or care what she was doing, setting out in detail a history of her illness, etc. In supplemental petition plaintiff denied the allegations of fraud, and alleged that the money was loaned upon the faith of the representations of the defendants, etc., whereby they were estopped, etc.

The facts in evidence detail transactions from September 1 to October 22, 1886. It was shown that defendant had lived on the 50 acres in controversy from 1883 to January 6, 1886; that they leased the land for a year, and moved to the city of Terrell, and lived in a rented house. The land was a gift from her father to the wife. Norton, the husband, was a house-builder by trade, and moved to get work. He approached J. S. Grinnan, an agent of the Equitable Mortgage Company, on the subject of a loan; spoke of owning a place in the country, wanting to buy a house, being tired of paying rent. Grinnan passed Norton's every day, and knew he was living in a rented house. Norton and Grinnan had many conversations about the loan,—one or two at the door of Norton's, while his wife was present in hearing. The note and interest coupons bore date September 1, 1886, as did the two trust deeds. September 16, 1886, an application was presented to Grinnan for a loan, signed by Norton and wife, containing many representations, and, among others: "My wife has an interest in the property [the 50 acres having been described and offered as security] herein offered as security, which property is her separate property, having been deeded to her by her father, Geo. B. Paschall. This property is not our homestead, nor is it claimed, used, enjoyed, or occupied as such; but we have other property which we occupy and claim only as our homestead, and which is fully paid for, and free and clear of all incumbrances, said homestead consisting of one acre, situated and described as follows: In the town of Terrell, with house." This application was not satisfactory to Grinnan. Norton was so informed; Norton testifying, "The papers had not been executed because he had not gotten his homestead." In the negotiations—at what time not given—"Mrs. Norton said he [the husband] was bargaining for one. She did not speak of the particular place they were bargaining for." This is testified to by Grinnan. Norton finally bargained with G. W. Harrell for a homestead. A deed was prepared from Harrell and wife to Norton and wife for a house and lot in the town of Terrell, bearing date and acknowledged October 20, 1886. On October 21st one Galbraith, a lawyer and notary public, who obtained the signature of Mrs. Norton to the "application," and who took her acknowledgment to the two mortgages on the same

day, at the request of Grinnan and Norton, prepared a designation of the Harrell house and lot as the homestead of Norton and wife. It is signed by them; the witness testifying, "I got it up." This formally, in terms, designated the property as their homestead, under article 1344, Rev. St., for rural homesteads. On same day,—October 21st,—after this designation had been signed, Norton and Harrell went to Grinnan's office, having with them the designation and the deed from Harrell and wife to Norton and wife. This deed was then given to Norton on Grinnan drawing a check in Norton's favor for \$225, the purchase money, and out of the loan, and Norton indorsing it to Harrell. The deed and the check were delivered at same time. Grinnan testifies, "The paper of designation was returned to me, and I then paid him the balance of the money" of the loan, after retaining sufficient to defray expenses and commissions. On the 22d October, 1886, Norton and wife reconveyed to Harrell for \$200; Harrell making \$25 in the transaction. The defendant Mrs. Norton testified that she never abandoned her country homestead; never had any intention to do so. That in September, 1886, she was taken violently sick, bore a child, who lived ten days, and who died two hours after she had been signing papers; that her mind was given to her child; that she did not know the purpose of the papers; that she did not know she was giving a mortgage upon her home. She remembered nothing of the Harrell transaction. She did not know her husband had bought it. She recognized her signature to the several papers shown her. Denied talking with Grinnan, or hearing him and her husband talking about the loan, etc. Galbraith testified to taking Mrs. Norton's privy acknowledgment to the two mortgages and to the application and designation. He was asked by Grinnan as to the application; by Norton to take her acknowledgment. He also testified to complying with the statute in taking her acknowledgment. The plaintiff Finley testified in rebuttal that he had taken the loan in good faith, etc., and that he was the agent of the defendant company, and that Grinnan was not. This was directly denied by Grinnan, who also testified that as agent of the company he had received commissions in this loan. The court submitted to the jury that if they found that defendants had abandoned the land as homestead, to find for the plaintiffs against both defendants; and, if they found that the place had not been abandoned, to find for defendant Mrs. Norton.

Instructions were asked and refused upon the law of estoppel upon the facts in evidence: "*Second*. If you believe from the evidence that defendants made a statement in writing, and the same was sworn to by them, and that they represented therein that the land in controversy had been abandoned by them as a homestead, and that this was presented to plaintiffs or their agent by defendants, and that defendants made a further and additional statement in writing, duly signed by them, to the effect that they had abandoned the land in controversy as a homestead, and that defendants presented the same to plaintiffs or their agent for the purpose of procuring money, and that plaintiffs believed said statements to be true, and acted on the faith of the same, and advanced money to defendants on the strength of said statements, and took a lien on the land in controversy, then you are charged that defendants are estopped from claiming the land in controversy as homestead, and you will find the same subject to plaintiffs' lien." And, *fourth*, "if you believe from the evidence that defendants represented to plaintiffs or their agent at or immediately previous to the delivery of the said deeds of trust that they had purchased a house and lot in Terrell as a homestead, and that plaintiffs believed the said representations to be true, and acted on the faith thereof, and loaned defendants money as mentioned in plaintiffs' petition, then you are charged that defendants are estopped from claiming the land in controversy as homestead."

In the light of the entire evidence, and particularly in view of the testimony of Finley that he was the agent of the defendant company alone, accepted the

security, and upon it had approved the loan, in ignorance of the transactions leading to it, we do not think the court had the legal power to withdraw the issue of estoppel from the jury when it appears that the land was not the actual residence of Norton and wife. It cannot be ignored, however, that the testimony fails to show an active participation in the acts relied on as constituting the alleged estoppel by Mrs. Norton. During much of the time the matter was pending she was sick of a fever; then in child-bed; then watching her sick infant until its death; that watch interrupted by the notary, sent with papers to be signed and acknowledged by her, mortgaging her home, the gift from her father; she unconscious, she says, and careless of what she signed; ignorant of the temporary acquisition of the new homestead from Harrell; and finally appears the getting up of the designation, itself false in its recitations when obtained, and returned to the agent after the ceremony at his office by which the new homestead was obtained, paid for, and designated. It is difficult to attach the term "fraudulent" to her passive submission in the series of acts dictated and required to perfect the loan for the husband by the agent of the company. If Finley alone represented the company it would not be affected by the acts of the others of which he did not have notice, if such acts, in their effect, were fraudulent. The charges above set forth should have been given, perhaps, with an additional clause, limiting the inquiry to the acts of the wife. There was no dispute as to the part taken by the husband. The elements present in an estoppel by conduct are summarized in Bigelow, Estop. 484: "There must have been a false representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it." These rules are practically recognized by our courts in the decisions upon the subject. *Burleson v. Burleson*, 28 Tex. 416; *Scoby v. Sweatt*, Id. 730. As the constitution denounces as invalid all liens upon the homestead save purchase money, or for improvements made thereon, whether created by the husband alone or together with his wife, (article 16, § 50,) the lienholder cannot rely upon such mortgage or trust deed attempting to give a lien. The privy acknowledgment of the wife does not cure the invalidity of a trust deed for a loan upon the homestead. The estoppel, therefore, must be made out by proof of facts outside the instrument itself. It cannot directly or by its recitations bind the homestead.

The third assignment is not well taken. The court submitted no issue upon the regularity of the privy acknowledgment. In effect, the charge assumed that it was legal in making the case turn upon the issue, homestead or not.

The sixth and seventh assignments are not sustained by the record. The instructions are faulty in charging upon the weight of evidence, and in being argumentative. The practice of enumerating parts of the testimony has been condemned as calling attention to that testimony, thereby giving to it undue prominence and weight. The exclusion of the notarial certificate attached to the "designation" was proper. The article in the Revised Statutes under which the document purported to be drawn applied to the owner of a rural homestead upon a tract of land in excess of 200 acres. It provided for the head of the family designating his homestead out of the tract. Besides, the instrument itself was admitted in evidence, and the notary taking the acknowledgment was examined as a witness. No harm could have resulted from its exclusion, had it been competent.

The sufficiency of the testimony will not be here discussed. For the error in refusing the charges asked upon the estoppel pleaded, the judgment will be reversed.

Reversed and remanded.

PENNEGAR *et al.* v. STATE.

(Supreme Court of Tennessee. January 29, 1889.)

MARRIAGE—VALIDITY—CONFLICT OF LAWS.

Under Code Tenn. Mill. & V. § 3332, prohibiting a marriage between the guilty husband or wife after a divorce for adultery, and his or her paramour, during the life of the former consort, such a marriage between parties domiciled in Tennessee, celebrated in Alabama, whither the parties go solely to evade the statute, returning at once to Tennessee, is void in the latter state, though valid in Alabama.¹

Error to circuit court, De Kalb county; M. D. SMALLMAN, Judge.

Indictment against William Pennegar and E. U. Hovey for lewdness. Defendants were convicted, and bring error.

Webb, Corley & Moore, for plaintiffs in error. *G. W. Pickle*, Atty. Gen., for the State.

FOLKES, J. The defendants were indicted for lewdness, tried and convicted, and have appealed in error to this court. The record discloses the following facts: E. U. Hovey was divorced from her husband, John Hovey, by a decree of the circuit court of De Kalb county, upon the petition of the husband, charging her with adultery with William Pennegar. The decree adjudges the charge fully proven, and the divorce was granted the husband solely upon such charge. The divorced wife and the partner in her guilt shortly after the divorce went to Jackson county, state of Alabama, where they were married to each other, and on the next day after their marriage returned to De Kalb county, in this state, the place of their former and present residence, where they have been living and cohabiting openly and publicly, as man and wife, all within 12 months before the indictment found in this case; the divorced husband, John Hovey, still living.

Section 3332, Mill. & V. Code, enacts: "When a marriage is absolutely annulled, the parties shall, severally, be at liberty to marry again; but a defendant who has been guilty of adultery shall not marry the person with whom the crime was committed, during the life of the former husband or wife." The marriage, being prohibited by statute, is void, if solemnized in this state. 1 Bish. Mar. & Div. §§ 46, 223; *Carter v. Montgomery*, 2 Tenn. Ch. 225; *Owen v. Brackett*, 7 Lea, 448. In the last case cited this court held the woman not entitled to homestead where the marriage was had in this state in violation of the statute quoted above. It is admitted that there is nothing in the laws of Alabama prohibiting the guilty divorced party from marrying the paramour. The question, therefore, presented in this record is whether citizens of this state, prohibited by the statute referred to from marrying, can, by crossing over into a sister state, where such marriages are not inhibited, claim the benefit of the marriage there contracted, when they return at once to this state, having left it for the manifest purpose of evading our statute. The question is of first impression in this state, and one not free from difficulty, by reason of certain well-established principles, universally recognized in the law of marriage, which apparently would sustain such marriage, chief of which is that which says: "A marriage, valid where solemnized, is valid everywhere." Adjudged cases are to be found which, under the supposed application of this rule, have sustained marriages identical with the one at bar in all of its essential facts, while others of equal respectability have reached a different result; to some or both of which we will refer later on.

¹The place where the parties are to be domiciled, and not the place of the solemnization of the marriage, is the place of performance of a contract of marriage. *Campbell v. Crampton*, 2 Fed. Rep. 417. A marriage which is void by statute of the state where contracted, by reason of the parties being related within prohibited degrees, is void in another state. *Blaisdell v. Bickum*, (Mass.) 1 N. E. Rep. 281.

Before doing so, let us see what are the general principles controlling in cases of this character. Marriage is an institution recognized and governed to a large degree by international law, prevailing in all countries, and constituting an essential element in all earthly society. The well-being of society, as it concerns the relation of the sexes, the legitimacy of offspring, and the disposition of property, alike demands that one state or nation shall recognize the validity of marriage had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise. It may be said, therefore, to be a rule of universal recognition in all civilized countries that in general a marriage valid where celebrated is valid everywhere. We say "in general," because there are exceptions to the rule as well established as the rule itself. These exceptions or modifications of the general rule may be classified as follows: *First*, marriages which are deemed contrary to the law of nature, as generally recognized in Christian countries; *second*, marriages which the local law-making power has declared shall not be allowed any validity, either in express terms or by necessary implication. To the first class belong those which involve polygamy and incest; and in the sense in which the term "incest" is used, are embraced only such marriages as are incestuous according to the generally accepted opinion of Christendom, which relates only to persons in direct line of consanguinity, and brothers and sisters. The second class, *i. e.*, those prohibited in terms by the statute, presents difficulties that are not always easy of solution, and have led to conflicting decisions. This class may be subdivided into two classes: *First*, where the statutory prohibition relates to form, ceremony, and qualification, it is held that compliance with the law of the place of marriage is sufficient, and its validity will be recognized, not only in other states generally, but in the state of the domicile of the parties, even where they have left their own state to marry elsewhere, for the purpose of avoiding the laws of their domicile. Instead of being called a subdivision of the second class of exceptions, it would be more accurate to say that it is an exception to the exception, and falls within the operation of the general rule first announced, of "valid where performed, valid everywhere." To the second subdivision of the second class of exceptions belong cases which, prohibited by statute, may or may not embody distinctive state policy, as affecting the morals or good order of society.

It is not always easy to determine what is a positive state policy. It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property, in the face of the conclusions of approved text writers, and the concurrence of the adjudications in numerous cases, relating not only to forms or ceremonies and qualifications of the parties, but also to prohibited degrees of relationship, not incestuous in the common opinion of Christian countries, and relating to marriages between persons of different race and color. Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of "valid where solemnized, valid everywhere." The legislature has, beyond all possible question, the power to enact what marriages shall be void in its own state, notwithstanding their validity in the state where celebrated, whether contracted between parties who were in good faith domiciled in the state where the ceremony was performed, or between parties who left the state of domicile for the purpose of avoiding its statutes, when they come or return to the state; and some of the states have in terms legislated on the subject. Where, however, the legislature, as in our own state,

has not deemed it proper or necessary to provide in terms what shall be the fate of a marriage valid where performed, but has in the particular case contented itself with merely prohibiting such marriage, the duty is devolved upon the courts of determining, from such legislation as is before it, whether the marriage in the other state is valid or void when the parties come into this state.

If, as we have seen, the statutory inhibition relates to matters of form or ceremony, and in some respects to qualification of the parties, the courts would hold such marriage valid here; but if the statutory prohibition is expressive of a decided state policy as a matter of morals, the courts must adjudge the marriage void here, as *contra bonos mores*. Thus, in *State v. Bell*, 7 Baxt. 9, this court held that a marriage between a white person and a negro, valid in Mississippi, where celebrated, was void here, in a case where the parties were domiciled in Mississippi at the time of the marriage. This case is distinguishable from the case at bar, not only by reason of the domicile in Mississippi, but also in that we have a highly penal statute on the subject of marriages between whites and blacks, passed in 1870, in amendment of the act which prohibited such marriage theretofore, and by the very pronounced convictions of the people of this state as to the demoralization and debauchery involved in such alliances. The decision in the above case is so manifestly in keeping with sound principles now well established that it need not be here fortified by citation of authority; but we pause to call attention to a case relied on by counsel for defendants, holding not only that such a marriage, solemnized in Rhode Island, (where it was legal,) between persons domiciled there, would be valid in Massachusetts, but that it was valid in the latter state where the parties had left Massachusetts, and gone into Rhode Island, for the express purpose of evading the Massachusetts law prohibiting such marriages, and returned to Massachusetts. *Medway v. Needham*, 16 Mass. 157. This was certainly carrying the doctrine of "valid where performed, valid everywhere," to an extreme limit. The case has been much criticised,—more so, indeed, than it deserves, as it seems to us; for while, to our mind, the result is startling, it is not out of harmony, in its argument, with the principles we have stated. The learned judge delivering the opinion, in speaking of the exception to the general rule, says: "Motives of policy may likewise be admitted into the consideration of the extent to which this exception is to be allowed to operate. If without any restriction, then it might be that incestuous marriages might be contracted between citizens of a state where they were held unlawful and void, in countries where they were not prohibited, and the parties return to live in defiance of the religion and laws of their own country. But it is not to be inferred from a toleration of marriages which are prohibited merely on account of political expediency, that others, which would tend to outrage the principles and feelings of all civilized nations, would be countenanced." So that the difference between this case and *State v. Bell*, 7 Baxt. 9, is a difference in the "motives of policy" and ideas of "political expediency." We do not think, therefore, that the case is open to the criticism passed upon it by the lord chancellor in *Brook v. Brook*, 9 H. L. Cas. 193, which case is itself, with equal propriety, criticised by GRAY, C. J., in *Com. v. Lane*, 113 Mass. 458, which contains a very able and elaborate review of the subject under consideration. Though unable to concur in some of the argument, and especially with the *dictum* that "a marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere, according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages out of the state shall have no validity here." Of course we refer to so much of the above as we have italicised, for it is the purest *dictum*; it being a case where there was no proof of an intent to evade the laws of

Massachusetts, as shown by the judge himself, who concludes his opinion as follows: "Upon the principles and authorities stated in the earlier part of this opinion, it certainly cannot invalidate a subsequent marriage in another state, according to its laws, at least without proof that the parties went into that state, and were married there, with the intent to evade the provisions of the statutes of this commonwealth. No such intent being shown in this case, we need not consider its effect, if proved, nor whether the indictment is in due form." This case being an indictment for polygamy, where a wife, having obtained a divorce on account of the husband's adultery, (in which case he was prohibited from marrying again without leave of the court,) the husband married another woman in another state without proof that the second wife ever resided in Massachusetts prior to the marriage, and without proof of a purposed evasion of Massachusetts law.

Recurring for a moment to *Medway v. Needham*, it may well be that, recognizing and applying the same general principles, the courts in different states may reach different results in the same class of cases, according as the general and fixed sentiment of the public in the respective states may differ in matters of public policy, and, if not, of "political expediency." What might be deemed a mere regulation in one state might be regarded as a matter actually affecting the morals and good order of society in another; so that what is pointed out as a reproach to the law by reason of the conflict in the reported cases from different states and nations is in fact evidence of the universality of the general principles recognized as fundamental by all enlightened courts; the different results reached being due to the statutory enactment of the different states as construed by the courts thereof, who interpret the meaning, intent, and scope of each particular statute on the subject of marriage in the light of the known policy of the state, deviating from the general principles of the international law of marriage only so far as they are constrained to do so by the terms of legislative enactment, or by the manifest and distinctive policy of the state, as understood by the courts. Now, believing, as we do, that the statute in question, which we are called upon to construe in the case at bar, is expressive of a decided state policy not to permit the sensibilities of the innocent and injured husband or wife, who has been driven by the adultery of his or her consort to the necessity of obtaining a divorce, to be wounded, nor the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair, even under the guise of a subsequent marriage performed in another state for the purpose of avoiding our statute, and believing that the moral sense of the community is shocked and outraged by such an exhibition, we will not allow such parties to shield themselves behind a general rule of the law of marriage, the wisdom and perpetuity of which depends as much upon the judicious exceptions thereto, as upon the inherent right of the rule itself.

After what has been already said in the earlier part of this opinion, it is doubtless unnecessary to say that in reaching the conclusion just announced we do not intend in the slightest degree to encroach upon the principle which recognizes as valid marriages had in other states, where the parties have gone to such other states for the purpose of avoiding our own laws in matters of form, ceremony, or qualification merely; but, confining ourselves to the facts of this case, we hold that where citizens of this state withdraw temporarily to another state, and there marry, for the purpose and with the intent of avoiding the salutary statute in question, passed in pursuance of a determined policy of the state, in the interest of public morals, peace, and good order of society, such parties, upon their return to this state, and cohabiting as man and wife, are liable to indictment in the courts of this state for lewdness.

The case of *Dickson v. Dickson*, 1 Yerg. 110, has no concern with the point adjudged in the case at bar. That case merely decides that a person divorced in Kentucky for adultery, and not by the laws of that state permitted to marry

again, might contract a valid marriage in this state prior to the act of 1835, which for the first time prohibited such marriages; and, having come to this state in good faith, married, and continued to reside here up to the time of her husband's death, she was held entitled to dower. The only instruction to be drawn from this case is that, notwithstanding our statute, these parties might have contracted a marriage in Alabama, where there is no similar statute, had they remained there in good faith, which would be valid in that state.

Putnam v. Putnam, 8 Pick. 433, is a case deciding directly contrary to the conclusion we have reached, and the facts in that case were identical with this. It is extremely brief, is unsatisfactory to us from every point of view, and is predicated entirely upon the case of *Medway v. Needham*, 16 Mass. 157, decided 10 years before, which the court said was "binding upon us and the community until the legislature shall see fit to alter it." While speaking of *Medway v. Needham*, the opinion continues: "The court were aware of all the objections to the doctrine maintained in that case, and knew it to be *rezata questio* among civilians; but they adopted the rule of the law of England on this subject, on the same ground it was adopted there, namely, the extreme danger and difficulty of vacating a marriage which, by the laws of the country where it was entered into, was valid." It is manifest that the effort to fortify *Medway v. Needham* by assuming that it is based on the law of England must fail if the house of lords are competent to testify as to the state of the law in England on the subject, for we find that in *Brook v. Brook*, 9 H. L. Cas. 219, the lord chancellor, in speaking of the case of *Medway v. Needham*, as we have already seen, says: "It is entitled to but little weight, and is based upon decisions which relate to form and ceremony of marriage;" and adds: "If a marriage is absolutely prohibited in any country as being contrary to public policy, and leading to social evils, I think that the domiciled inhabitants of that country cannot be permitted, by passing the frontier, and entering another state in which this marriage is not prohibited, to celebrate a marriage forbidden by their own state, and, immediately returning to their own state, to insist on their marriage being recognized as lawful." This is, in our opinion, the true doctrine, and we have quoted so much to show that the highest English court does not hold to the principle upon which it is claimed by the Massachusetts court the *Medway Case* is based. But with due deference we must be permitted to say that the decision in the case of *Brook v. Brook* goes further than we think the principle announced requires,—further at least than we would be inclined to go,—when, as was done in that case, it was held that, while both were resident in England, the man marrying his deceased wife's sister in Denmark, where such marriage was legal, and returning to England, the marriage was void there, because a marriage between parties so related was contrary to the laws of England. Such a marriage would, we think, not fall within any of the exceptions to the general rule. It certainly cannot be said to be incestuous in the estimation of Christendom, and it would seem that under the policy of many of the states of this Union such a marriage is not immoral, nor tending to any social evil affecting the welfare of society. But, after all, it must be admitted that it was for that court to determine whether or not the law infringed was indicative of a decided and essential public policy in England; and the courts of that country would doubtless be as slow to approve our estimate of the public policy which condemns the marriage of the divorced adulterer, since the clause prohibiting such marriage was, upon the argument of Lord PALMERSTON, that the guilty party was preserved from ruin by such a marriage, stricken from the divorce bill in the house of commons, as we are to accept their opinion that a marriage between a man and his deceased wife's sister is contrary to good morals.

We return for a moment to *Putnam v. Putnam*, *supra*, to note that the court in this case closes its opinion with this language: that "if it shall be

found *inconvenient* or repugnant to *sound principles* [the italics are ours] it may be expected that the legislature will explicitly enact that marriages contracted within another state, which, if entered into here, would be void, shall have no force within this commonwealth." The legislature did shortly thereafter so enact; whether because the doctrine laid down in the case was inconvenient, or because repugnant to sound principle, does not appear. In our view of the law, both considerations might well have moved the legislature. *Stevenson v. Gray*, 17 B. Mon. 193, is a case holding the doctrine of *Putnam v. Putnam*, and, after what we have said about the latter case, need not be further noticed here.

Van Storch v. Griffn, 71 Pa. St. 240, does not sustain the contention of counsel on the point decided, as there is nothing in the case to show that the parties went from one state to the other for the purpose of evading the laws of the one. It merely holds that the decree of divorce in New York, which forbade the respondent from marrying again during the life of the libellant, had no extraterritorial effect; so that what is said in the opinion about going from one state to the other for the purpose of evading the law of the state granting the divorce is *dictum*, pure and simple.

In full accord with the conclusion we have reached in the case at bar is *Kinney v. Com.*, 30 Grat. 858, where it was held that a marriage between a negro and a white person, had in the District of Columbia, for the purpose of evading the law of Virginia, was void upon their return. To the same effect, see *State v. Kennedy*, 76 N. C. 251; *Scott v. State*, 39 Ga. 321; *Dupre v. Boulard*, 10 La. Ann. 411. The intention to evade the law by going into another state was made the test of its validity in North Carolina, as will be seen by reference to the two cases of *State v. Kennedy*, 76 N. C. 251, above cited, and *State v. Ross*, *Id.* 242,—both marriages between a white person and a negro. In *Kennedy's Case*, such intention being shown, the marriage was held void; while in *Ross' Case*, it being shown that there was no intent to return to North Carolina, though the parties afterwards did so, the defendant was held not guilty of fornication. This was, however, by a divided court, and is contrary to our own case of *State v. Bell*, 7 Baxt. 9.

We conclude this opinion, already too long, by a reference to *Williams v. Oates*, 5 Ired. 535, where Chief Justice RUFFIN, in delivering the opinion of the court in a case very similar to our own, says: "Now, if the law of South Carolina allow of such a marriage, and although it be true that generally marriages are to be judged by the *lex loci contractus*, yet every country must so far respect its own laws and their operation on its own citizens as not to allow them to be evaded by acts in another country, purposely to defraud them." See, also, Whart. Conf. Laws, §§ 135, 181, 182.

Let the judgment of the circuit court be affirmed.

STATE *ex rel.* WHITSON, Dist. Atty., v. ALGOOD, Dist. Atty.

(Supreme Court of Tennessee. December 31, 1888.)

1. CONSTITUTIONAL LAW—TITLE OF ACT—AMENDMENT.

Under Const. Tenn. art. 2, § 17, providing that no act shall embrace more than one subject, which shall be expressed in the title, the title of an amendatory act need only recite the title of the act amended, if the amendment is germane to, and embraced within, the title of the original act.

2. STATUTES—ENACTMENT—PRESUMPTIONS.

The senate journal showed that a bill was rejected, and that a motion to reconsider was made, but did not show what disposition was made of the motion. It showed, however, that subsequently the speaker of the senate announced, in open session, as required by the constitution on the signing of every bill, that he had signed the bill, and it was approved by the governor, and published with the other

acts of the legislature. *Held*, that it would be presumed that the motion to reconsider was disposed of, and the bill passed, and that the silence of the journal in this regard was due to a clerical omission.

8. SAME—ACTS OF GENERAL CHARACTER—JUDICIAL DISTRICTS.

Const. Tenn. art. 2, § 21, provides that the yeas and noes shall be taken in each house upon the final passage of every bill of a general character. *Held*, that act March 19, 1887, changing two counties from the Sixth to the Fifth judicial circuit, and fixing the terms of court in one or two others, is not a law of a "general character."

Appeal from chancery court, White county; T. W. WADE, Special Chancellor.

Snodgrass & Smiths, for appellant. *Murray & Spurlock* and *F. M. Smith*, for respondent.

LURTON, J. The relator was elected district attorney for the Sixth judicial circuit at the general election of August, 1886. White county, which at the date of his election was one of the counties composing his circuit, has by act of March 19, 1887, been taken out of the Sixth, and placed in the Fifth, circuit, of which defendant, A. Algood, is the district attorney. This bill is filed for the purpose of determining the validity of the act by which this change has been made. The defendant, Algood, demurred to the bill. The demurrer was overruled, and defendant, by permission of the chancellor, has appealed from the decree overruling the demurrer.

The first objection made by the bill to the validity of the act changing White from the one circuit to the other is that the title of the act does not indicate the character of the amendment of the existing law, and that it is therefore void under section 17, art. 2, of the state constitution, which declares that "no bill shall become a law which embraces more than one subject, that subject to be expressed in the title." The title to the act in question is as follows: "An act to amend an act of the extraordinary session of 1885, passed June 11, and approved June 12, 1885, entitled 'An act to divide the state of Tennessee into judicial circuits and chancery divisions, and provide for the administration of justice and equity in the circuit and chancery and other inferior courts of this state, and to fix the time for holding the terms of said chancery, circuit, and other courts.'"

The criticism is, that the title does not indicate the character of the proposed amendment. This is not necessary, if in fact the amendment is germane to the original act, and embraced within the title of the original or amended act. In such case, the title of the original act being made a part of the title of the amendatory act, the particulars of the amendment need not be embraced by the title. In the case of *Hyman v. State*, 9 S. W. Rep. 372, (decided at Knoxville, September term, 1888,) we, upon full consideration, held "that it is not important that the title of an amendatory act shall do more than recite the title or substance of the act amended, provided the amendment is germane to the subject of the original act, and is embraced within the title of such amended act." The amendment is undoubtedly germane to the subject of the original act, as indicated by its title. There is nothing in this objection. The title of the amendatory act is sufficient.

It is next urged that this act was never in fact passed by the general assembly in the manner prescribed by the constitution. It appears from the journal of the senate that the bill as originally introduced was a senate bill, and that it passed the senate on three several readings, and was then transmitted to the house. The house journal shows it to have passed its first and second reading as senate bill No. 262, and that it was then referred to a committee, who reported it back, and that, "by unanimous consent, senate bill No. 262, to fix the time of holding the court in the fourth chancery division, was taken up. The amendment offered by Mr. Hill was adopted, and the bill passed third reading without call of the roll." The amended bill was re-

turned to the senate, and the senate journal shows that the amendment was non-concurred in on a call of the ayes and noes by a vote of 11 ayes and 11 noes, and that on the same day a motion to reconsider this vote was entered. It further appears that on a subsequent day a second motion to reconsider this adverse vote was entered. The journal is silent as to the ultimate disposition of these motions to reconsider. But the journal does recite that upon a day subsequent to both of these motions the speaker of the senate, in open session, announced that he had signed this bill. Subsequently the act was approved by the governor, and it is found among the published official acts of the legislature. The complainant insists that from the journal of the senate, as above recited, it is affirmatively shown that this senate bill No. 262 never did pass the senate after it had been amended by the house, and that therefore the act is void. In the case of *Brewer v. Huntingdon*, 2 Pickle, 737, 9 S. W. Rep. 166, we held that where it affirmatively appeared from the journals of the legislature that an act had not been passed in the manner required by the constitution, that the presumption arising from the fact that the journals showed that the bill had been signed by the speaker in open session would not overcome the affirmative proof from the journal that in fact the bill had been defeated.

The case under consideration differs from the case just cited, in this: that the same journal which records the defeat of the amended bill shows a motion to reconsider this adverse vote. Before the bill could be finally disposed of, it became necessary to dispose of this motion to reconsider. The journal does not, therefore, show affirmatively that this bill was defeated, because it is silent as to the ultimate disposition of the motions to reconsider. Shall we presume that the motion to reconsider was never called up, or shall we, in favor of the validity of the law, presume that there was a reconsideration, and that the bill ultimately received the vote necessary to its passage? We see from the journal that subsequently the speaker of the senate, in open session, announced that he had signed this bill, and this solemn official act is noted upon the journal, as required by the constitution. What presumption arises from this evidence of the passage of the bill? We think the rule well settled that where the journal does not affirmatively show the defeat of the bill, that every reasonable presumption and inference will be indulged in favor of the regularity of the passage of the act subsequently signed in open session by the speaker. This is the rule as announced by this court in the case of *State v. McConnell*, 3 Lea, 333, and as followed by us in the case of *Hayes v. State*,¹ (decided at Nashville in 1887,) which case is referred to by Judge SNODGRASS in announcing the opinion of the court in the case of *Brewer v. Huntingdon*. The journal does not show affirmatively that the bill did not pass. The motion to reconsider, being duly entered, postponed the final fate of the bill. We know, as a matter of history and common political experience, that it is not unusual for a bill to be defeated, and the adverse vote subsequently reconsidered, and the bill finally passed. The constitution requires that, after a bill has passed three readings in each house, "it shall be signed by the respective speakers in open session, the fact of such signing to be entered on the journal." The fact that, after an adverse vote, a motion to reconsider was entered, and that the journal does not show any disposition of this motion, and that subsequently this bill was signed in open session by the speaker of the senate, as shown by the journal, authorizes us to presume that the failure of the journal to show the final passage of this bill is due to a clerical omission. This is, under the law applicable, the legitimate construction to be placed upon the whole record.

The next and last objection made to the validity of this act is that the journal of the house shows affirmatively that this bill passed its third reading

¹No written opinion filed.

in the house without a call of the ayes and noes. This objection is rested upon article 2, § 21, of the constitution, which prescribes that "the ayes and noes shall be taken in each house upon the final passage of every bill of a general character, and bills making appropriations of public moneys, and the ayes and noes of the members on any question shall, at the request of any five of them, be entered on the journal." Is this such a bill as requires the ayes and noes to be taken? This depends upon whether it is a bill making an appropriation of public money, or a bill "of a general character," within the meaning of the constitution. It clearly is not an appropriation bill. The very able counsel who have argued this cause for complainant insist that every law which is a public law is a bill of a general character. Any number of authorities have been cited to show that bills chartering banks and municipal corporations are public laws, and not private acts. This is conceded; but this is not the question. The legislature is, by another provision of the constitution, prohibited from passing any private or special acts. All laws must be general in the sense that they must apply to all alike. But if the framers of the constitution used the phrase, "laws of a general character," in contradistinction to private or special laws, then why was it necessary to add, "and laws making appropriations of public money?" The greater would have included the less. Appropriation bills are not private or special laws. We think the phrase, "laws of a general character," is used to distinguish general legislation, in which the whole body of the people have or may have an interest, from legislation of a purely local character. Laws may be public in their objects, and either general or local in their application. Thus a law creating a new county, or changing a county line, or moving a county-site, or creating a municipal corporation, would be public laws, and yet they would be local, and not general, in their application. They would be laws of a public character, but laws of local application. The act in question changed two counties from one to another circuit, and fixed the terms for the court of one or two others. Such a law is not a law of a general character, but a law limited and local in its application.

It follows that the act of 1887, changing White county from the Sixth to the Fifth circuit, was constitutionally enacted, and that defendant Algood is the lawful district attorney for that county. The decree of the chancellor will be reversed, the demurrer sustained, and the bill dismissed, at cost of the relator, Whitson.

ALVIS *et al.* v. OGLESBY'S EX'RS.

(Supreme Court of Tennessee. January 2, 1899.)

1. LIMITATION OF ACTIONS—SURCHARGING ADMINISTRATORS' ACCOUNTS—EQUITY.

Code Tenn. § 2776, which provides that actions against executors and administrators on their bonds, "and all other cases not expressly provided for," shall be barred if not brought within 10 years, applies to a bill in equity by distributees to surcharge and falsify an administrator's account, and to recover distributive shares; the statute of limitations under the Code being made to operate on the cause, and not on the form, of the action. SNODGRASS, J., dissents.

2. SAME—WHEN ACTION ACCRUED.

The right of action as to the distributees accrued, as to the assets in his hands then, at the time the administrator was by law required to make distribution.

3. EXECUTORS AND ADMINISTRATORS—ACCOUNTING—DEFENSES.

It is no defense to such an action, by one who has just attained majority, that an action by his guardian is barred.

4. SAME—EFFECT OF PARTIAL SETTLEMENT.

The administrator having made a partial settlement, it was error, in the reference to the master, to direct him to take as the basis of the accounting the inventory and account of sales, and to credit the account by such claims as were shown not to have been lost by neglect, and by such disbursements as were properly made, as the partial settlement was *prima facie* evidence in favor of the administrator.

5. SAME—PAYMENTS OF DEBTS BARRED BY STATUTE.

It was also error to direct the master to disallow credits for debts paid after they had become barred by limitations, which were allowed the administrator in the partial settlement, there being no evidence of the circumstances causing the delay.

Appeal from chancery court, Macon county; H. W. WADE, Chancellor. *S. F. Wilson, J. J. Turner, and J. L. Roark*, for appellants. *Head & Wooten* and *John S. McMurray*, for appellees.

LURTON, J. The complainants are the distributees of Elisha Kirby, who died intestate in 1859. They charge that Elisha Oglesby qualified as administrator upon the estate in July, 1859, and that he filed an inventory of the effects of the decedent, and a report of sales of personalty during the year following, and that in 1869 he made a partial settlement in the county court, but that subsequently he died, without completing the administration by a final settlement. This bill is filed for the purpose of surcharging and falsifying the settlement made, and to recover their several distributive shares. The defendants, who are executors of the deceased administrator, deny all charges of waste and *devastavit*, assert payment by their testator of the assets of the estate in due course of administration, set up and plead the settlement of 1869, and plead and rely upon the several statutory limitations, including the 10-year bar contained in section 2776 of the Code. The bill was filed June 5, 1881, 22 years after the administration granted, and 12 years after the county court settlement, which they seek to falsify. After much proof had been taken, the chancellor, upon the pleadings and proof, decreed an account, and settled the principles upon which it should be taken. In this decree he ruled "that Oglesby's estate is not protected in this cause by any statute of limitation, for the reason that Oglesby, as administrator of Kirby, was an express trustee, and the estate had never been settled." This defense of the statute of limitations presents the first and most important question which is presented by the assignment of errors.

As far back as 1817 it was decided by this court that the statute of limitations, as it then existed, did not bar the suit of a distributee. *Pinkerton v. Walker*, 3 Hayw. (Tenn.) 221. In *Cartwright v. Cartwright*, 4 Hayw. (Tenn.) 134, and *McDonald v. McDonald*, 8 Yerg. 145, the same rule was repeated, and applied to the suit of a legatee. These decisions were followed in several other reported cases, including that of *Lafferty v. Turley*, 3 Sneed, 157. The opinions in this line of cases were rested upon the propositions: *First*. That an administrator, by operation of his appointment by the court having jurisdiction, and an executor, by reason of the will under which he was nominated, were express and not implied trustees. *Second*. That the trusts incident to such an office were trusts cognizable alone in courts of equity; there being then no remedy at law by which a distributee could recover a distributive share, or a legatee his legacy. *Third*. That the statutes of limitations, as they then were, applied to the forms of action, and not to the cause of action; and, as bills in equity were not expressly mentioned, that therefore, where a cause of action was a trust cognizable in equity alone, that the statute did not apply to suits concerning such trusts. Upon these premises these decisions were logical, and in accord with the decisions in the courts of Great Britain. It was never held in these cases, or any other made by this court, that the statutes of limitation were not as applicable in equity as in law when there was any remedy at law, even in cases of express trust. Said Chief Justice CATRON: "Courts of equity, equally with courts of law, are bound by statutes of limitation in all the varieties of bailment, loans, pawns, deposits, etc., although express trusts, where there are convenient remedies in case at law, or by bill in equity." *Armstrong v. Campbell*, 3 Yerg. 231. Judge GREEN, that very eminent master of the principles of equity, in delivering the opinion of the court in *Haynie v. Hall's Ex'r*, said: "The statute of limitations

prescribes that certain forms of actions shall be barred within the time limited, and therefore, in its terms, it does not apply to courts of equity; but the courts of chancery, both of Great Britain and this country, have uniformly held that in cases where any remedy exists at law, if a court of chancery gains jurisdiction of a cause, the time fixed in the statute as a bar to the action at law will also be a bar to a bill in chancery." 5 Humph. 291. The sound and well-settled rule in courts of equity is that the statutes of limitation are applied in every case in equity where the trust is not a technical one, of which courts of equity alone take cognizance. The doctrine as stated by Chancellor KENT in *Kane v. Bloodgood*, 7 Johns. Ch. 110, is "that the trusts intended by the courts of equity not to be reached or affected by the statute of limitations are those technical and continuing trusts which are not at all cognizable at law, but fall within the proper, peculiar, and exclusive jurisdiction of this court." See, also, *Peebles v. Green*, 6 Lea, 471, where Judge McFARLAND clearly discusses the question.

Down to the enactment of the Code, in 1858, there was no remedy at law against administrators in behalf of a distributee or legatee, for the recovery of a distributee's share or a legacy. The cases already referred to so expressly decide. The act of 1762, which was the only statutory remedy given a legatee or a distributee, provided that the suit should be brought by petition in the chancery court. Statutes of Caruthers & Nicholson, 251. That there was no remedy in the circuit court was expressly decided in *Dougherty v. Maxwell*, 6 Humph. 446. So continued the law until the Code, when by section 2812 jurisdiction was given the county and circuit courts, concurrently with the chancery court, to entertain the suit of a distributee or legatee "for the payment of his distributive share or legacy." There is, therefore, since the Code, a remedy at law for the recovery of a distributive share or legacy. So, by the Code, the statutes of limitation operate upon the cause of action, and not upon the form.

Another and more important change in the law as it existed at the time of the decisions referred to was made by section 2776, which originated with the Code. This section contains the statute of limitations relied on by the defendants in this cause, and it reads as follows: "Actions against guardians, executors, administrators, sheriffs, clerks, and other public officers on their bonds, actions on judgments and decrees of courts of record of this or any other state or government, and all other cases, not expressly provided for, within ten years after cause of action accrued." By the preceding sections actions against the sureties on such bonds are barred in six years. The bond which he gives as administrator covers every default in his duty as administrator. For failing to account, for a *devastavit*, or for failing to distribute as required by law, he may be sued upon his bond, and such suit will now lie either in law or equity. Complainants' counsel very earnestly insists that this is not a suit against the administrator upon his bond, and that, therefore, it is not such an action as is contemplated by the statute quoted. If it be conceded for the sake of argument that this is not a technical action upon the bond, then would complainants escape the operation of the statute? Since the line of decisions holding such a suit as this not to be within the statutes, the legislature has so changed the statute law of the state, that, as we have seen already, there is now a remedy at law for the recovery of a distributive share. They have also so changed the statutes of limitations that they now operate upon the cause, and not the form, of action. These legislative changes go to the very basis upon which the decisions of this court had been planted. The very ground upon which this court held that the trust of an administration was not within the intent of the statute of limitations, has, by this legislation, been overthrown, and such suits thereby brought distinctly within the rule which makes applicable the statutes of limitation in equity, as in law, where there is a remedy at law concurrent with chancery.

But more significant still is the fact that by the Code an action against the bond of an administrator is expressly barred in 10 years. In view of this legislation, are we authorized to make a distinction between an action on the bond and one against the administrator personally for a *devastavit*, which is at last but a breach of legal duty embraced within the terms of the bond? It would be a most extraordinary thing if the law were as insisted, and that a suit on a bond could be met and defeated by a plea of this statute, while if the litigant were wiser, and sued the administrator personally for a breach of the very duties covered by the bond, he could escape the operation of the statute. This would be to construe the statute as operating upon the form of the action, rather than upon the cause. But the section under consideration is not limited as implied by the insistence of counsel for complainants. It does not stop with barring suits upon the bonds named therein, but to cover all contingencies the pregnant words are added, "and all other cases not expressly provided for, within ten years after the cause of action accrued." These words cannot be stricken from the statute. These words, taken in connection with the opening section of the article in which both are found, that "all civil actions, other than those for causes embraced in the foregoing article, shall be commenced after the cause of action has accrued, within the periods prescribed in this chapter, unless otherwise expressly provided," (Code, § 2769,) indicate a legislative purpose and intent to prescribe a bar for all suits, whether specifically mentioned or not. No reason exists for any strained construction of this statute that such suits may be entertained after such delay. There is no more sanctity about the demand of a distributee than is found in a vast number of the engagements arising from implied trusts, bailments, deposits, contracts, and judgments. What reason, then, that after a delay of 10 years after right of action accrued,—a delay not superinduced by fraud and concealment, or accounted for by legal disability,—that the exceptions should exist in the law in favor of such a claim when many, equally as meritorious, are barred in a much shorter time. This court did not have any exception in favor of such a suit upon any superior merit in such a demand, but alone upon grounds which have since been removed by legislation.

From all of these considerations we are led to the conclusion that the suit of a distributee for an account, or for a *devastavit*, or to recover a distributive share, is barred unless brought within 10 years, and this bar is as applicable in equity as at law, and as applicable to suits against administrators upon the personal trust arising from his office as to a suit technically on his bond. The two cases cited and decided since the Code (*Taylor v. Walker*, 1 Heisk. 740, and *Carr v. Lowe's Ex'r*, 7 Heisk. 98) did not involve the construction of the sections here construed, and this statute was not called to the attention of the court. They are not adjudications sustaining the position of complainants, in that the question here decided was not even considered by the court. The right of action in favor of these complainants accrued as to the assets then in the administrator's hands at the time he was by law required to make distribution. Neither the pleadings nor proof show the receipt of any assets by him within 10 years next before the bringing of this suit.

Some of the complainants sue with their husbands as married women, but the bill is silent as to how long this disability has existed, or when it begun. The proof is equally silent, save as to Sarah, the wife of William Hicks. She was born December, 1853, and was married in 1874. She was under the disability of infancy alone at the time the statute began to run, and the subsequent disability of coverture cannot be added to the original. She attained her majority in 1874, and is therefore barred. The burden is on complainants to show that by reason of disability they are within the saving of the statute, which has otherwise barred their action. *Shropshire v. Shropshire*, 7 Yerg. 165; *McClung v. Sneed*, 3 Head, 219; *Chaney v. Moore*, 1 Cold. 48. The proof shows that complainant R. S. W. Kirby, the youngest child of the decedent,

was born February 11, 1858. He therefore reached his majority February 11, 1879. This suit was commenced in June, 1881. He has therefore filed his bill within the saving of the statute, which is three years after the removal of his disability. The fact that his guardian is barred is no answer to his suit, and the bill, in so far as it seeks to recover his individual share, is in time. *Henley v. Robb*, 2 Pickle, 474, 7 S. W. Rep. 190. The statute is a bar to all the other complainants, none of them having shown such disability as brings them within the saving of the statute.

The next assignment of error is that the chancellor directed the master, in stating the account with the administrator, to take as the basis of the account the inventory and account of sales, and to credit the account by such claims as were shown not to have been lost by neglect, and by such disbursements as were properly made. This was error, in that the settlement made in 1869 in the county court should have been made the basis of the account. This settlement, though not final, was, so far as it went, *prima facie* evidence in favor of the administrator. Code, § 2305. Although the allegations of the bill were sufficient to authorize complainants to surcharge and falsify the account, yet, upon a reference, the burden was upon the complainants to show by proof the incorrectness of the account they sought to surcharge and falsify by their bill. This decree of reference cast the burden upon the administrator to sustain his former settlement. The statute casts it in all such cases upon the attacking party.

The decree of reference was likewise erroneous in directing that the administrator should not be allowed credit for debts paid by him after the lapse of the time within which he could be sued. If the debt was just, and the delay had been at the request of the administrator, then the payment would not be a *devastavit*. While the burden of proof is on the administrator who pays a debt after the bar of the administrator's statute, yet, when it is sought to charge an administrator with a *devastavit* for paying a just debt after such bar, such strict proof will not be required to justify such payment as would be of a creditor in an action when he sought to recover on such a debt. We approve of what was said by this court in *Puckett v. James*, 2 Humph. 568, that "if the executors felt that it was doubtful whether the creditor could recover, and knowing that the debt was a just one, and that they had induced him to delay by their request, it might be very proper for them to pay the debt. They would thus have avoided an expensive litigation, that might have resulted in a recovery of the debt at last, involving the estate in unnecessary cost and themselves in dishonor." The debts thus paid were allowed the administrator in the county court settlement. The record is silent as to the circumstances under which they were delayed in payment, and equally so as to the showing made by the administrator upon which he obtained the credit. Under these circumstances, the settlement after so great a lapse of time ought not to be disturbed. The presumption arising from the settlement stands until overthrown, that the delay was at the request of the administrator.

The decree compounding interest against the administrator is erroneous upon the facts of this case. Nothing but very culpable conduct will justify the compounding of interest, and no such culpability exists as will authorize any such punishment upon the facts as they appear upon this record. The master's report charged interest upon the entire sum with which the administrator was chargeable, but does not allow interest upon credits allowed him. This is gross error. His disbursements should have been credited on the principle of partial payments at the time they were made.

The bill will be dismissed as to all of the complainants save R. S. W. Kirby. All of the costs of this court and one-half the costs of the chancery court will be paid by complainants, including R. S. W. Kirby, and the remainder will be paid by defendants, unless it should turn out that nothing is due the complainant R. S. W. Kirby, in which event he will pay the remainder of the cost.

The case will be remanded for an account to be taken upon proof in the record, to ascertain the amount, if anything, due to the complainant R. S. W. Kirby, upon the principles here determined.

SNODGRASS, J. I do not concur as to the running of the statute of limitations in favor of the administrator as trustee of funds in his hands.

WESTERN UNION TEL. CO. v. MUNFORD.

(*Supreme Court of Tennessee. January 3, 1899.*)

TELEGRAPH COMPANIES—CONNECTING LINES—LIABILITY FOR DELAY.

The blank on which was written a telegram received by defendant, addressed to a point on a connecting line, declared defendant to be the sender's agent, without liability to forward any message over the line of another company. In course of transmission over defendant's line, the address was changed from "Sam T." to "Wm. T." The agent of the connecting line at the place of delivery believed the telegram to be intended for Sam T., and, on being erroneously informed that he was then in another town, mailed it, addressed to him, at the latter place. The transmission to the place of destination having been prompt, *held*, that a delay in delivery was not caused by the change in the address, and that defendant was not liable for delay upon line of the connecting company.

Error to circuit court, Warren county; M. D. SMALLMAN, Judge.

Action by E. W. Munford against the Western Union Telegraph Company for delay in the delivery of a telegram sent by plaintiff. Plaintiff having died, Mary E. Munford, executrix, etc., was substituted. Defendant brings error.

J. W. Bonner, for plaintiff in error. Frank Spurlock, for defendant in error.

LURTON, J. This is an action brought by E. W. Munford, the testator of defendant in error, in his life-time, to recover damages alleged to have been sustained by the delay in the transmission of a telegram. E. W. Munford, on the 11th of April, 1887, delivered to the agent of the plaintiff in error, at its office in McMinnville, Tenn., a telegram for transmission to Tampa, Fla., of which the following is a copy:

"McMINNVILLE, TENN., Apl. 11, 1887.

"Col. Sam Tate, Tampa, Florida: Proposition accepted. Your draft for one thousand will be honored.

[Signed]

"E. W. MUNFORD."

The lines owned and operated by the Western Union Telegraph Company did not extend to Tampa, Fla., but terminated at Jacksonville, in that state. From Jacksonville to Tampa there was a telegraph line, owned and operated by the South Florida Telegraph Company, and the message in question could only be transmitted to its destination by being sent over the line of the Western Union Telegraph Company to Jacksonville, and then transferred to the South Florida Company, by whom it would be sent to Tampa. Of this fact Mr. Munford was advised by the agent, who received his message for transmission. The telegram was promptly forwarded, reaching Tampa early in the afternoon of the same day. In transmission the address of the message was changed from "Col. Sam Tate" to "Col. Wm. Tate." This, it is agreed, occurred on the line of the plaintiff in error before it was transferred to the connecting company. The message was not delivered by the South Florida Company to Col. Tate until the 13th, it having been received at Tampa on the 11th. Plaintiff below alleged that by this delay he sustained damage amounting to \$500.

In the view we take of the case, it is only necessary to consider one of the defenses presented by the pleas of the plaintiff in error; and that, in substance, is that the delay in the delivery of the message was not occasioned by the error in transmitting the address, but resulted alone from the negligence of the agent of the South Florida Company. The facts concerning the delay, as we find them to be from the transcript, are these: The agent of the South Florida Company at Tampa personally knew Col. Sam Tate. He states that he knew no such person as Col. William Tate, and that when he received the message he believed it to be intended for Col. Sam Tate; that he instructed the messenger, whose duty it was to make personal delivery, to inquire and learn if there was a Col. William Tate in Tampa, and, if he could hear of no such person, to take the message to Col. Sam Tate. The messenger thus instructed says he made inquiry, and, hearing of no William Tate, undertook to deliver the message to Col. Sam Tate; that he took it to the office of S. A. Jones, where both he and the agent say they had been requested by Mr. Jones to leave messages for Col. Tate. The messenger states, upon inquiry for Col. Tate, a clerk in the office informed him that Col. Tate was then at Clear Water Harbor. This information being communicated to the agent of the telegraph company, he, on the same day, instead of making further inquiry for Col. Tate, mailed the message addressed to Col. Sam Tate at Clear Water Harbor, Fla.

The fact, as shown by the proof, is that Col. Tate was in Tampa on the 11th, and had been there for some days, and that he had never authorized delivery of messages for him at the office of Mr. Jones, but that, on the contrary, he was accustomed to receive his messages at his usual boarding place, which was known at least to some of the telegraph company's messengers. Two days thereafter Col. Tate called at the telegraph company's office to inquire about another message, when he was handed a copy of the telegram which had been mailed to him at Clear Water Harbor. If the message had been delivered to him on the day it was received and mailed to Clear Water Harbor, it is conceded that the damage alleged to have been sustained would not have occurred. The facts, as above recited, are not disputed, and establish beyond controversy that the delay in the delivery of the message was not in consequence of the error in transmission of the address, but was the result of the subsequent and independent negligence of the South Florida Telegraph Company. The damage alleged to have been sustained was the direct consequence of delay in delivery, for Col. Tate says that he should have had no doubt, upon seeing the messenger, that it was for him alone, and that he should have acted upon it. The damages to be recovered, whether the *gravamen* of the action be regarded as breach of contract or a technical tort, must be limited to such as are the natural and proximate result of the injury or wrong done.

This brings us to the consideration of the question as to whether the plaintiff in error is responsible for damages which resulted alone from the negligent delay in the delivery of the message by the agents of the South Florida Telegraph Company. The message was written upon one of the usual blanks furnished by the Western Union Company. One of the printed conditions contained in this blank reads as follows: "This company is hereby made the agent of the sender, without liability to forward any message over the lines of any other company, when necessary to reach its destination." Is this a valid limitation upon the liability of the company? Telegraph companies are not common carriers, nor are they insurers, either of the accurate transmission, or the sure and prompt delivery, of messages. They are liable, however, for losses consequent upon their negligence. *Marr v. Telegraph Co.*, 1 Pickle, 536, 3 S. W. Rep. 496. Even common carriers are not responsible for losses occurring upon a connecting line, unless there was a contract upon their part to be so responsible. That they may by contract limit their liability to defaults occurring upon their own lines is well settled.

So the fact that two lines are connected, and for their mutual convenience collect freight for each other upon goods delivered for transmission over their lines, will not make the one responsible for losses occurring beyond its own line, unless it has contracted so to be. *Railroad Co. v. Brumley*, 5 Lea, 401. These principles applicable to common carriers seem to us to be alike applicable to telegraph companies. Mr. Gray, in his very valuable monograph upon Communication by Telegraph, in discussing the limitations found in the contract of the Western Union Telegraph Company, and quoted above, says: "Two entirely distinct provisions are embodied in this regulation. One provision is that the telegraph company, in consideration of receiving full prepayment for the delivery of a message at a place upon the line of another company, agrees to deliver the message to a connecting company, and, as the agent of the sender, to contract with that company for the further transmission of the message. This is an offer of special terms of contract. A telegraph company is, it seems, under an obligation, by its ordinary contract, only upon receipt of its own charges, to deliver the message to a connecting company. It is under no obligation by that contract to contract, as the agent of its employer, with the connecting company for the further transmission of the message, or to receive and account for the payment for such transmission. This provision in the regulation is unquestionably reasonable, and, with the assent of the employer of the company, constitutes a valid and mutually beneficial contract. * * * The other provision embodied in this regulation is that the telegraph company limits its liability to losses occurring on its own lines. This has usually been treated as an offer of special terms. As such, it constitutes, with the assent of the employer of the company, a valid contract. This provision is clearly just and reasonable. In the absence of a partnership relation between them, one telegraph company has no more authority over another company than an individual has. A telegraph company should be entitled, therefore, to contract specially, with one who wishes to employ it, that it shall not be liable for loss occasioned by the act of a connecting company; that that person shall seek relief, in case of a loss, directly of the company which causes, and is, under any circumstances, finally liable for the loss." Gray, Tel. § 88. That the Western Union and South Florida Telegraph Companies were entirely distinct and independent corporations, and that no partnership relation existed between them, are admitted in the agreed statement of facts contained in the record.

The case was tried by the circuit judge without the intervention of a jury, who, being of opinion that the error in transmission of address was the proximate cause of the damage sustained, gave judgment in favor of the plaintiff below. This judgment is not supported by any material facts, and must be reversed, and judgment rendered here in favor of the Western Union Telegraph Company.

WOOLFOLK *et al.* v. RICHARDSON *et al.*

(Court of Appeals of Kentucky. January 10, 1889.)

EJECTMENT—TITLE TO SUPPORT—EVIDENCE.

In an action by the children of R.'s first wife, to recover from the children of his second wife certain land, which they alleged R. held as tenant by the curtesy in the right of his first wife, it appeared that R. entered on the land under a title-bond from said wife's father, who had no title, purchased the elder grant, and took a conveyance to himself; that the land, when he entered, was worth little, and that he paid as much or more than that little to acquire title; that R. conveyed the land to defendants as an advancement, having already made advancements to plaintiffs. *Held*, that a judgment for defendants was proper.

Appeal from circuit court, Meade county; T. R. McBEATH, Judge.

Ejectment by James T. Woolfolk and others against Gus. W. Richardson and others. Judgment for defendants. Plaintiffs appeal.

H. T. Kendall and *E. Butler*, for appellants. *Lewis & Farleigh*, for appellees.

PRYOR, J. O. C. Richardson was twice married, and died in the year 1882, leaving children surviving him, the offspring of each marriage. His first wife was the daughter of Daniel Fulton, and her children are suing the children of the second wife to recover a tract of land in the possession of the appellees, alleging that it belonged to their mother, and, their father being tenant by her curtesy only, the land passed to them at his death. O. C. Richardson, the father of these litigants, had been in the continued possession of the land for nearly half a century, and then sold and conveyed it to the children of the second marriage in the year 1875, and they have been in possession since that time. This possession, however, was not adverse to the claim of the appellants, (the children of the first wife,) if their father entered upon the land in right of his wife under a gift to her from her father, Daniel Fulton. Holding under the title of his wife, these appellants could not sue until the termination of their father's life-estate, and he lived until the year 1882.

There is some testimony of a slight character conducing to show that the father went upon this land under the title of his wife's father, Daniel Fulton, and that it was a gift from Fulton to his daughter; but, on the other hand, it is made manifest that Fulton had no title to this land, and that O. C. Richardson, after he took possession, purchased the title of the elder grant, and obtained a conveyance from the commissioner; and, while such a purchase might be held to inure to the benefit of his wife, the testimony further shows that O. C. Richardson held the bond of Daniel Fulton for title, and that this was the inducement for him to settle on this land. When he entered upon it, the land was of but little value, and he evidently paid more, or as much, for the land, in order to acquire the title from hostile claims, than it was worth when he entered. So with no title in Daniel Fulton, or, if with a title, the ancestor of these litigants having entered under a bond from Fulton to make him the deed, and Richardson having in fact obtained the title by purchasing these conflicting claims, the chancellor very properly refused to permit a recovery by these appellants upon testimony, by no means satisfactory, that their father entered on this land in right of his wife, (their mother.) Besides, Richardson, the father, made to these appellees, children by the last wife, a general warranty deed for the land in controversy; the consideration being love and affection, and as an advancement to them of so much of his estate. He had made advancements to these appellants, and was endeavoring to make such a disposition of his estate between his children as he deemed just and equitable; and under the facts of the record we perceive no reason for holding that the father was so unjust to the children of his first wife as to deprive them of their patrimony, that he might enrich the children by his last wife.

Judgment affirmed.

BROWN v. WYATT *et al.*

(*Supreme Court of Texas. November 20, 1888.*)

ATTACHMENT—SUBSISTING INDEBTEDNESS.

On the dissolution of a firm, the partner who was to continue the business took the assets, and assumed all indebtedness of the firm, and gave his notes to the retiring partner to secure him against the firm creditors. Payments made by the former on the debts were to be credited on the notes, which were unconditional upon their face. *Held*, that the notes were evidence of such a subsisting indebtedness as would authorize a writ of attachment.

Appeal from district court, Ellis county; ANSON RAINES, Judge.

M. B. Templeton, for appellant. *G. C. Groce* and *F. P. Powell*, for appellee.

GAINES, J. This suit was brought by appellee, H. L. Wyatt, against W. C. Jones, to recover an alleged indebtedness, evidenced by five promissory notes. An attachment was sued out at the time the suit was instituted, and was levied upon a stock of goods, which were subsequently sold, and the proceeds were thereafter paid into court. There is no statement of facts in the record, but the facts appear in the findings of the court, which are adopted by appellant as a statement of the case. The findings are as follows:

(1) In February, 1886, H. L. Wyatt and W. C. Jones (plaintiff and defendant) formed a partnership to carry on a grocery business under the firm name of Wyatt & Jones. H. L. Wyatt put in the business \$1,000 capital, and Jones nothing. They were equal partners.

(2) On the 23d day of July, 1886, said firm, by mutual consent, was dissolved, H. L. Wyatt retiring; and W. C. Jones continued the business under the style of W. C. Jones & Co.

(3) At the time of the dissolution said firm of Wyatt & Jones owed about \$3,000 outstanding indebtedness. There was due said firm accounts to the amount of about \$1,750.

(4) The consideration of the first two notes mentioned in plaintiff's petition, to-wit, \$300 and \$360, was for money loaned W. C. Jones by H. L. Wyatt. The consideration for the other notes sued upon is as follows: Wyatt & Jones agreed that Jones should take the stock of goods, and all notes and accounts due the firm of Wyatt & Jones, and assume all outstanding indebtedness of the firm, and to secure Wyatt against the creditors whose debts were assumed by Jones, as well as to evidence the consideration for Wyatt's interest in the stock of goods and accounts due the firm, the notes were given. It was agreed that, if Jones paid the indebtedness of the firm, to the amount so paid he should be entitled to a credit on said notes.

(5) At the time of the institution of this suit neither Jones nor Wyatt had paid any of the indebtedness of Wyatt & Jones; but during the months of October and November, 1886, Wyatt paid off said indebtedness to the amount of \$4,412.

(6) That plaintiff, H. L. Wyatt, on the 28th day of September, 1886, levied his writ of attachment on the stock of goods of W. C. Jones for the full amount of said notes, to-wit, \$4,307.50; that on the 30th day of September, 1886, intervenor Joseph H. Brown levied a second attachment on said goods for the sum of \$650.86.

(7) That said goods were sold on the 16th October, 1886, by order of court obtained by H. L. Wyatt, and brought the sum of \$3,051.50; which said sum of money, less the costs of sale, was duly returned into court.

(8) That by agreement of all parties, at the March term of the court, H. L. Wyatt drew out all said money, except the sum of \$750, which remained in court to await the result of the suit.

(9) That in the district court of Ellis county Joseph H. Brown, on the 12th day of March, 1887, in his attachment suit against W. C. Jones, obtained a judgment for \$650.09 and costs, amounting to \$6.05, with 8 per cent. interest thereon, with foreclosure of attachment lien, etc., subject to this suit.

(10) That in the justice's court of Ellis county Joseph H. Brown, on the 31st day of July, 1887, obtained a judgment against Wyatt & Jones for \$77.91, with interest at 8 per cent.

(11) That in the county court of Galveston county intervenors Focke, Wilkins & Lange, on the 21st October, 1887, recovered a judgment against Wyatt & Jones for the sum of \$594.50, with interest at 10 per cent. thereon.

(12) That in the county court of Ellis county intervenors Greely Bernheim Grocery Co., on the 20th day of January, 1888, recovered a judgment against Wyatt & Jones for the sum of \$237.55, with interest at 8 per cent. thereon.

(13) That plaintiff and defendant admitted that intervenors, as creditors of Wyatt & Jones, were entitled to the proceeds of sale of goods attached.

Upon the facts so found the court gave judgment that appellant take nothing by his plea of intervention, and distributed the money in court among the other parties. Brown alone appeals. It is not here claimed that there was any fraud in the case. But it is contended on behalf of appellant that the three notes given by Jones to Wyatt at the time he sold the goods were not at the time the attachment was sued out such a subsisting indebtedness as would authorize the writ. In order to procure an attachment in this state, the plaintiff must in every case make oath that the defendant is justly indebted to him in the sum claimed in the writ; and therefore it must be conceded that if the result of the transaction between Wyatt and Jones, at the time of the sale, was such as to create only a contingent liability upon the three notes then executed, the attachment, so far as these were concerned, was without authority of law. In other words, if Wyatt did not have a cause of action against Jones until he discharged the partnership debts, against the payment of which the notes were intended to secure him, then, at the time the attachment was sued out, Jones owed him nothing upon them, and the writ should as to them be held invalid. But upon what ground are they to be held to create only a contingent liability? Their object was doubtless merely to secure the payment by Jones of the partnership debts he had assumed to discharge, and to protect Wyatt against their payment. But they are upon their face unconditional promises, and with the other evidence show the fact that the method agreed upon by the parties for securing Wyatt was Jones' obligation to pay him the amount of the partnership indebtedness. The fact that any payment made by Jones upon the firm debts was to be credited upon the notes did not make them any less legal and subsisting obligations, payable absolutely, until paid either directly to Jones, or indirectly to the creditors of the partnership upon their claims against it. The consideration of the notes is the sale of Wyatt's interest in the assets of the partnership, and, Jones not having paid the debts, the result is the same as if in the transaction Wyatt had assumed the debts of the firm, and Jones had executed the notes in consideration of that undertaking as well as of the transfer by Wyatt of his interest in the firm assets. Indeed, it may be doubted if such is not the legal effect of the transaction. We see no sufficient reason for doubting that all these notes were "debts" in the sense that that word is used in our attachment laws, and therefore the judgment will be affirmed.

WESTERN UNION TEL. CO. v. BROWN.

(Supreme Court of Texas. November 13, 1888.)

TELEGRAPH COMPANIES—FAILURE TO DELIVER MESSAGE—NOTICE.

In an action by the addressee for delay in delivering the following message: "Willie died yesterday evening at six o'clock; will be buried at M., Sunday evening,"—damages cannot be recovered for injury to fraternal feelings from failure to hear of his brother's death in time to attend the funeral and condole with his sister, as the message contains nothing to put defendant on notice that the deceased was plaintiff's brother.¹

Appeal from district court, Hopkins county; B. W. FOSTER, Special Judge. *Stemmons & Field*, for appellant. *Leach & Templeton*, for appellee.

WALKER, J. This is an appeal from a judgment for \$275 in favor of the appellee against appellant. The suit was brought the 15th day of March, 1887, by Brown, to recover of the appellant, the Western Union Telegraph Company, \$10,000 damages for delay in transmitting and delivering to him a telegram sent to him from Hallville, Tex., on the 11th day of December, 1886, by one Wilson Livingston, in following language:

¹ Respecting mental suffering as an element of damage in actions for negligent delay in the transmission of telegraph messages, see *Telegraph Co. v. Cooper*, (Tex.) 9 S. W. Rep. 596, and cases cited.

"HALLVILLE, TEXAS, Dec. 11th. 1886.

"*J. M. Brown, Sulphur Springs*: Willie died yesterday evening at six o'clock; will be buried at Marshall, Sunday evening.

[Signed]

"WILSON LIVINGSTON."

Plaintiff alleged that Livingston acted as his agent in sending the message, and that by "Willie," named in said message, was meant Willie Brown, a brother of appellee, and that the price paid for sending said message was paid by appellee, in the following manner: That the sum of 45 cents paid to the defendant for transmitting and delivering the said telegram was money belonging to the estate of said Willie Brown, one-third of which plaintiff owned as an heir, and the other two-thirds by payment to the other two heirs, there being no administration, nor need of any. The plaintiff alleged that the dispatch was not delivered until noon of the 12th December, 1886, and by reason of said delay, caused by the willful neglect and failure of defendant to transmit and deliver said message, he was prevented from being present at the burial of his brother, whom he had raised and cared for from childhood, and from receiving the consolation and condolences of his sister in his grief; whereby he suffered great disappointment, grief, and mental anguish, etc. Defendant answered by general demurrer, special demurrer, and general denial. The demurrers were overruled, to which defendant excepted.

The exceptions were: "(1) Because the petition on its face failed to state any cause of action, in this, that plaintiff sues for an injury to his feelings in tort, he being the addressee of the message, and no party to the contract under which said message was accepted and transmitted, and fails to state facts necessary to recover in tort. (2) There is nothing in the alleged message to put the defendant upon notice that there was any relationship between the addressee and the said Willie Brown, or that anything except the mere announcement of the death of said Willie Brown was contemplated by the defendant and the sender of said message at the time the message was delivered to and accepted by this defendant for transmission and delivery."

There is no allegation in the petition that the nature and importance of the telegram were made known to the telegraph operator to whom the message was delivered otherwise than as conveyed by the terms of the message. The words of the dispatch were sufficient to notify the operator, as agent of the defendant, that a human being had died at Hallville, Tex., at 6 o'clock of the evening of 10th December, 1886; that the funeral of the deceased was to take place at Marshall on the evening of Sunday, December 12th; that the deceased was known to the person sending and the person to whom the dispatch was sent; that intimate and familiar relations existed between them and the deceased, from the use of the name "Willie;" and even, perhaps, it may be understood that the message was an invitation to the funeral. These suggestions intimated from the face of the message were sufficient notice of its importance to require corresponding care and diligence in transmitting it to its destination. Whatever damages might naturally result under such conditions from a failure to receive the message will be considered as being in contemplation of the parties to the contract; that is, between the plaintiff, having the right to the message, and the telegraph company. *Daniel v. Telegraph Co.*, 61 Tex. 456. But the message gave nothing to indicate that "Willie" was the brother of the plaintiff. The damages alleged are from the fraternal feelings outraged by the failure to hear of his brother's death in time to attend the funeral, and condole with his sister. Giving the most liberal meaning to the words of the message, they cannot be construed into a notice of the special matter of complaint in the petition.

The special exceptions should have been sustained, for which error the judgment is reversed. Reversed and remanded.

MISSOURI PAC. R. CO. v. JOHNSON.

*(Supreme Court of Texas. November 28, 1883.)***1. CARRIERS OF PASSENGERS—INJURIES TO PASSENGER—HARMLESS ERROR.**

In an action for personal injuries occasioned by the overturning of a car, plaintiff's evidence being very strong to show that the condition of the track was bad, the rails being badly worn and ends of sleepers rotten, and that its condition had not materially changed for several months, and defendant's witnesses virtually admitting that the condition of the track was bad, but endeavoring to account for it by the prevalence of bad weather, the admission, for the purpose of showing knowledge on the part of the company, of evidence of the reputation as to condition of the track in the community along the line, and of a letter written to a local treasurer, for the production of which no notice was given, is harmless error.

2. SAME—ACCIDENT CAUSED BY WEATHER.

An instruction that defendant is not liable if the accident was directly caused by unprecedentedly bad weather, as sudden freezes and thaws, and this weather could not have been guarded against by human foresight, skill, and judgment, is sufficiently favorable to defendant.

3. DAMAGES—EXEMPLARY—GROSS NEGLIGENCE.

An instruction that defendant is liable to exemplary damages if it knew of the defects, and operated the road indifferent to the passengers thereof, is erroneous, in not limiting the recovery of exemplary damages to acts of gross negligence contributing to the accident.

4. TRIAL—PHYSICAL EXAMINATION OF PLAINTIFF.

It is not error to refuse to compel plaintiff to submit to physical examination by a physician to whom he objects, though not on the ground of competency or integrity.

Appeal from district court, Upshur county; FELIX J. McCORD, Judge.

J. R. Burnett, for appellant. *N. W. Finley* and *H. Chilton*, for appellee.

GAINES, J In December, 1887, certain coaches of a passenger train operated by the appellant company were derailed near the town of Troupe, in Smith county. The appellee was a passenger upon the train at the time of the accident, and the car upon which he was being conveyed was overturned, and he was injured. He brought this suit to recover damages, both actual and exemplary, for the injury. During the trial the plaintiff, having introduced evidence tending to show gross neglect on part of the defendant in failing for a long time to keep in repair the road it was operating, was permitted to prove, over the objection of the defendant, that it was the general reputation in the community along the line of the road that the track was in bad order. It is to be presumed that the evidence was admitted for the purpose of showing that the company had knowledge of the defective condition of the road. The evidence may have been admissible for this purpose, though it seems to us it was unnecessary. The condition of the track, as is shown by all the evidence, had not materially changed for several months prior to the accident; and if that condition was such as plaintiff claimed it to be,—unsafe by reason of old and worn-out rails, ties rotten at the ends, so that they afforded no protection to the rails, etc.,—the want of repair was visible and manifest, and the company must be held to have known of it. Not to know it would be greater negligence than to know it and not repair; and, as a matter of fact, it would be absurd to presume that for this long period of time the company's officers did not have actual knowledge of the defective condition of the track.

It not appearing that the agents of the company charged with the duty of keeping the road-bed in repair lived in, or were brought directly into communication with, the community in which the reputation was sought to be proved, it may be doubted whether, under all the circumstances, evidence of general reputation should have been admitted. But was the appellant prejudiced by the introduction of the evidence? It will appear further on in this opinion the verdict for exemplary damages cannot be permitted to stand, and hence it is unnecessary to discuss the effect of the evidence upon the verdict of the jury in

that particular. Its effect upon the finding for actual damages will be disposed of in connection with the question of the correctness of the ruling of the court in the admission of the evidence of Col. T. R. Bonner, which is raised in the second assignment. That witness was permitted to state, over objection of defendant, that he wrote a letter to the local treasurer of the company in St. Louis, informing him of the condition of the road. The testimony was objected to, on the grounds that the original letter should have been produced or its absence accounted for, and that notice to the local treasurer was not notice to the company. Admitting that the treasurer was the agent of the company in regard to this matter, notice should first have been given to defendant to produce the letter. If it should be held that the letter did not pass into defendant's custody, then it should have been shown that the plaintiff could not produce it. The evidence was clearly inadmissible. But as to its effect upon the verdict for exemplary damages the admission becomes immaterial.

But did the admission of this evidence, and that of the general reputation as to the condition of the road, operate to the prejudice of appellant upon the main issue? It was clearly the purpose of the testimony, not to prove the main fact,—the negligence of the defendant,—but to show knowledge. But it is held that, when evidence is introduced for a special purpose that is not competent upon the main issue, it is the duty of the court in the charge to confine its consideration to the particular issue upon which it is relevant. In such a case a charge of that character is proper. But the rule in this court is not to reverse for a mere failure to give an appropriate instruction, unless a special charge has been asked, sufficient at least to call the attention of the court to the necessity of giving some instruction upon the point. It frequently occurs that evidence not admissible upon the main issue is admitted for a special purpose, and that the object of its admission is so obvious that the jury cannot be misled. It seems to us, therefore, that the reason of the rule which requires a special request for an instruction applies in such case with undiminished force. Moreover, we are of opinion that the jury could not have been misled in this particular case. The evidence was but cumulative, and tended but slightly to establish a fact upon which the other testimony was overwhelming on behalf of the plaintiff. A cloud of witnesses, some of whom had walked over the track, testified to facts which showed beyond controversy its defective condition. Even the testimony of defendant's witnesses tended to establish the same conclusion. The testimony of its road-master showed that the iron was 14 or 15 years old, and that some of the ties were rotten, and that the bed was in bad condition on account of rain and snow. He stated that track-walkers had to be kept upon the road to flag the trains in case of danger, and, from his testimony, it is to be inferred that this was an extraordinary precaution taken on account of the condition of the road. His testimony that 92,002 ties, out of 116,160 necessary to tie the road, had been put down in 1884, and subsequent to that time, does not weigh against the testimony of the witnesses who swore that many of the ties were rotten at the end, so as not to support the rails, and that in some places two or more of such ties were to be found in succession. All defendant's witnesses virtually admitted that the condition of the road was bad, but claimed that it was due to bad weather. Under this state of case, it is unreasonable to suppose that the evidence had any effect upon the minds of the jury, so far as the main issue was concerned, and its admission, therefore, was harmless error.

It is also assigned that the court erred in refusing to compel the plaintiff to submit to a physical examination by physicians, in order to determine the extent of his injuries. The facts relating to this matter, as shown by the bill of exceptions, are that the court did make the order; that the defendant presented Dr. Hicks and Dr. Daniels to make the examination, and that the

plaintiff declined to be examined by Dr. Hicks, assigning no other reason except his personal aversion to that gentleman. He expressed his willingness to be examined by any other respectable physician. Dr. Daniels declined to make the examination alone. These facts being reported to the court, it refused to compel the plaintiff to submit to the examination by Dr. Hicks. In this we think there was no error. There is authority for holding that, when the ends of justice demand it, such an examination may be compelled. *Schroeder v. Railway Co.*, 47 Iowa, 375; *Railway Co. v. Thul*, 29 Kan. 466; *Turnpike Co. v. Baily*, 37 Ohio St. 104. The supreme court of Iowa find a precedent for the practice in that of the ecclesiastical courts of England in cases of divorce, where the question of impotency is involved. This question was before this court in the case of *Railway Co. v. Underwood*, 64 Tex. 463. The court, without deciding positively that an examination can be compelled, say that it should not be ordered unless the application therefor showed that it was necessary to attain the ends of justice; and intimate that in no case would the judgment be reversed if the plaintiff had shown himself willing to be examined by competent persons. We only decide here that the court did not err in refusing to compel plaintiff to be examined by the one physician to whom he expressed an objection, although this objection did not go to the competency or integrity of the physician proposed. If this power should be exercised at all, it should be by the appointment by the court of one or more disinterested experts, either of its own selection, or such as may be agreed upon by both parties.

The court, in the sixth paragraph of the charge, instructed the jury as follows: "The defendant company would not be liable in this case, and you will find for defendant, if the proof shows that the accident was directly caused by an unprecedented spell of bad weather, as sudden freezes and thaws, and that this spell of weather could not have been guarded against by human foresight, skill, and judgment. If, however, the road had been out of repair before the bad weather set in, and proper judgment was not used beforehand to put the road-bed in good condition, and the injury resulted from a bad condition of the road, and imperfect and bad track and road, and the same could have been avoided by proper skill and judgment, then the company cannot defeat a recovery by proof that the accident was caused by an unprecedented bad spell of weather." This charge is assigned as error, and in support of the assignment the proposition is submitted, that "they made appellant liable for the consequences of unprecedented bad weather, whether appellant could or should have anticipated such bad weather or not, and whether the alleged prior negligence caused or contributed to the accident or not; and the charges were too onerous and misleading." We do not assent to the proposition that a mere continued spell of wet weather, with a fall of snow, is such an unexpected and unforeseen contingency as will release a railroad company from liability to a passenger for injuries resulting to him from the failure to keep the track in repair.

In *Railroad Co. v. Halloren*, 53 Tex. 47, the accident resulted from a washout, caused, as witnesses testified, by "the hardest rain at and about the locality of the accident which any of the witnesses had ever seen in that part of the country." The section-boss had passed over the track but a short time before the accident, and found it in safe condition. The accident occurred at night. The court held that under this state of facts the court should have charged the jury that the company was not responsible unless those in charge of the train knew of the washout.

In *Railroad Co. v. Pomeroy*, 67 Tex. 498, 3 S. W. Rep. 722, it was held that the company could not defend itself against a claim for damages resulting from insufficient water-ways, by showing that the flood which caused the injury had been of very infrequent occurrence; but that, in order to excuse itself, it must show that it was such extraordinary flood as had not occurred in

that locality within the memory of persons there living. We think in this climate railroad companies must provide against the dangers resulting from continuous rains and melting snow. If the break in the rail caused the injury, and was a sudden fracture, brought about by cold weather, which the company did not have time to discover, and if defects in the track did not contribute to it, then the company was not liable, provided the rail before the accident was such as a person of competent skill might reasonably presume, upon inspection, to be free from liability to such fracture. The portion of the charge under consideration might well have been confined to this view. In so far as it was not so restricted, it was liberal to the defendant. In so far as it charges that the company was liable if the accident was caused by defects in the road caused by bad weather, if such defects could have been provided against, the charge was certainly correct. We think the charge not subject to the criticism made upon it.

We are, however, cited to the case of *Railway Co. v. Weams*, 80 Ky. 420, which holds that an instruction that a carrier "was bound, as far as human foresight and care would enable it," to carry a passenger in safety, was erroneous; from which it is to be inferred that it is claimed that the words "human foresight, skill, and judgment," in the instruction in question, was "too onerous and misleading," though this is not distinctly submitted in appellant's proposition.

In *Hutchinson on Carriers* it is said: "In *Christie v. Griggs*, 2 Camp. 79, Sir JAMES MANSFIELD, C. J., stated the law upon this subject to be that, while a carrier did not warrant the safety of the passenger as the common carrier did that of the goods, he was nevertheless bound to provide for his safe conveyance, 'as far as human care and foresight will go,' and this or equivalent language has been employed almost universally in subsequent cases in which the obligation of the passenger has been defined." See section 500, and numerous cases cited; also *Dougherty v. Railway Co.*, (Mo.) 8 S. W. Rep. 900, and cases cited. See, also, *Railway Co. v. Ritter's Adm'r*, 3 S. W. Rep. 591.

It is also complained that the verdict for actual damages is excessive. The plaintiff's sufferings were not great, his expenses and loss of time inconsiderable. But he received an injury near the small of his back, from which, as he testified, he had not recovered. He dragged his right leg in walking. He could not lie upon his side or back. He suffered continuously from head-ache, to which he had not been previously subject, and had lost 25 pounds in weight. Dr. Walker, who was sworn in his behalf, testified that his symptoms indicated that he had received a spinal injury which affected his nervous system; that he had examined the plaintiff, and found that in his leg there was loss both of motion and of sensation; that when such injuries were slight they resulted in a speedy recovery; and the fact that some six months had passed without material improvement indicated that his injuries were serious and permanent. He also testified that in such a case the disease was liable at any time to result in paralysis. His opinion was that plaintiff's injuries were permanent, and would probably so result. The physicians who were sworn for defendant testified that they attended the plaintiff a short time after the accident, and thought his injuries were slight, and that he would soon recover. They were not examined upon an hypothetical case, based upon the evidence, and their testimony is not necessarily in conflict with that of Dr. Walker. We must presume that the jury believed that the plaintiff testified the truth in regard to his symptoms, and that Dr. Walker's opinion, based upon the facts so testified to, as well as his own observation and examination of the plaintiff, was correct, and, if so, we cannot say the verdict is so excessive as to authorize us to set it aside.

The assignment that the charge upon exemplary damages is erroneous we think well taken. The charge is as follows: "Exemplary damages are recoverable where there is willful misconduct, or such an entire want of care which

would raise the presumption of conscious indifference to the consequences, as where the injury was done willfully, or was the result of that reckless indifference to the rights of others which is equivalent to an intentional violation of them; or if defendant company knew of the defects, and operated the road indifferent to the passengers thereof, they would be liable in exemplary damages; but if the injury resulted from causes such as are described in defendant's answer, which could not have been avoided by the exercise of skill and judgment, as before explained, it would not only defeat actual, but exemplary, damages." The vice in the foregoing charge is that it fails distinctly to tell the jury that the acts of gross negligence, upon which the recovery of exemplary damages is predicated, must have contributed to the accident. The trial judge probably meant this, but the idea is not distinctly conveyed. The jury may well have considered themselves authorized by this instruction to give exemplary damages on account of the general bad condition of the road, although the ties, road-bed, and iron, except as to the fracture which caused the derailment, were in perfect condition at the place of the accident. This was an important issue upon the question of the recovery of exemplary damages, and should have been clearly presented. It is not a mere omission to charge, but it is a misleading instruction, and is therefore fatal to the verdict for exemplary damages. The appellee will be afforded the opportunity to remit the recovery for exemplary damages, and, if this be done, the judgment will be affirmed. Otherwise it will be reversed, and the cause remanded.

WALKER v. TERRY.

(Supreme Court of Texas. November 2, 1888.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the evidence is conflicting, the findings of the trial court will not be disturbed, although the preponderance of the evidence may seem to the appellate court to be the other way.

Appeal from district court, Marion county; W. P. McLEAN, Judge.

Action by W. A. Walker against R. S. Terry, involving title to land. Judgment for defendant, and plaintiff appeals.

H. McKay, for appellant. *Hiram Glass*, for appellee.

STAYTON, C. J. There is no reason to believe that any question was made in the court below as to the sufficiency of the evidence to show that the persons through whom appellee claims were the heirs of Wm. Bonner, to whom the land in controversy was patented. The deed from Henry Max and wife, through whom the appellant claims, recognizes the vendors of the appellee as the heirs of the patentee, and that deed is shown to have been made in settlement of a controversy between the executor of Bonner's will and Max and wife. The executor of the will of the patentee recognized the same persons to be the heirs. By that deed in settlement of the claim made by the executor in behalf of the estate of which he was the representative, and for the benefit of those entitled to the estate, Max and wife conveyed all that part of the land covered by the patent, and situated east of a designated line, to the persons through whom the appellee claims, reserving to themselves that part of the land west of that line. The appellant claims under Max and wife land which he avers is west of that line. Under this state of facts, it seems to us, if the land really in controversy in this action is east of the line named, in the deed from Max and wife to the vendors of appellee, as the western line of the land conveyed to the latter, that Max and wife may properly be deemed common source of title. If, however, this be not so, we are not prepared to hold that the evidence, taken all together, is not sufficient to show that the

vendors of the appellee are the heirs of William Bonner, to whom the land was patented. The real controversy is as to the true line named in the deed from Max and wife to the vendors of appellee, as the western line of the land conveyed to them, and named in the deed from the executor of the patentee's will to Mrs. Max as the eastern line of the land reserved by and conveyed to Mrs. Max. The deed from the executor to Mrs. Max describes the land conveyed to her as follows: "Beginning at a stake on the bank of the bayou at the north-west corner of the John Caldwell survey; thence easterly, 348 varas, to the N. W. corner of the J. C. Shumaker survey; thence in a northerly direction, to a stake on the bank of the bayou, from which a sweet gum on the bank of the bayou bears east N. E. 23 feet, marked 'X,' and a small pine tree bears N. W. 23 feet, marked 'X;' thence, with the meanders of Cypress, west to the place of beginning,—containing 25 acres of land, more or less." The reservation made by Max and wife in the deed made by them is described by the same field-notes, except that the call from the third corner fixed by the gum and pine bearing trees is as follows: "Thence, with meanders of Big Cypress bayou, west 95 varas; thence, in a south-westerly direction, to the place of beginning." The north-east corner of the Caldwell survey and the north-west corner of the Shumaker survey are at the same point, and there is no controversy as to its true locality on the ground. The controversy is as to the true locality of the line run from that point to the bayou.

The appellant testified that at the time the settlement between the executor of the patentee's will and Max and wife was made, that line was actually run and marked, and that it terminated on the bayou at a place where a sweet gum and a pine tree, marked as called for in the field-notes, are now found. He further testifies that the deeds were made with reference to the line thus established, and that Max was present when the line was run. Max testified that the sweet gum and pine bearing trees called for at the termination of that line were on the bayou, but west of those claimed by appellee to be the bearings. He further stated that the sweet gum tree bearing the mark was still standing, and that it was near a slough. Another witness testified to the existence of the trees claimed by the respective parties as bearings on the bayou, but stated that the pine had fallen which the appellee claimed to be the true one. The distance between the places at which the corner would be fixed on the bayou by the bearings claimed by the different parties would be about 200 varas. If the line be that from the admitted corner to the point fixed by the bearings claimed to be the true ones by appellant, then the land conveyed by the executor of the will of the patentee would embrace about 47 acres. The land claimed by appellant is not all of that conveyed to Mrs. Max, but only the land embraced in the triangle formed by the bayou front and lines run from the admitted corner to about the points claimed by the respective parties to be the true corners on the bayou. These lines embrace about 17 acres. There was other evidence tending to establish the corner on the bayou at the place claimed by each party, and it may be that the preponderance of that was in favor of the claim of the appellant. The course of the line from the admitted corner to the bayou not being fixed by the deeds, and there being bearings at two places on the bayou which would substantially answer the call in the deeds, it becomes important to ascertain where the line was actually established, when the settlement between the executor and Max and wife was made, and the respective deeds executed. The appellant proposed to know that fact, and stated that Max had the same information. One of these witnesses places the corner then established on the bayou at one place where bearings are found, and the other at another. In this state of the evidence we cannot say that the finding of the court below was not authorized, even though, as it seems to us, the preponderance of the evidence was in favor of the claim asserted by appellant. The trial court had to pass upon the credibility of the witnesses, and, if he believed one rather than the other, we

have no means of determining that his conclusion was wrong. The appellant was about to fence the land in controversy at the time this suit was brought, and to prevent this appellee sued out a writ of injunction, which, on motion, was dissolved. We think no sufficient ground for an injunction was shown, and that the court properly dissolved it. This being so, appellant was entitled to all the costs growing out of the suing out and service of the writ of injunction and the judgment. The court, however, adjudged against each party the cost by him incurred, and this gives to appellant all the costs to which he was entitled. The title to the land having been adjudged against appellant, his plea in reconvention, based on injuries resulting from his being prevented from using the land while the writ of injunction was in force, necessarily fails.

There is no error in the judgment, and it will be affirmed.

BOYDSTON v. MORRIS.

(*Supreme Court of Texas. November 9, 1888.*)

1. EVIDENCE—BEST AND SECONDARY—RECORDED CHATTEL MORTGAGE.

2 Sayles, Rev. St. Tex. art. 3190b, § 3, provides that a copy of a chattel mortgage, duly filed for registration, "shall be received in evidence of the fact that such instrument * * * was received and filed according to the indorsement of the clerk thereon, but of no other fact." *Held*, that a copy was not admissible to show the execution of a chattel mortgage, where the absence of the original instrument was not accounted for.

2. CHATTEL MORTGAGE—LIEN—FORECLOSURE—PARTIES.

Where one holds a chattel mortgage on property which is wrongfully appropriated by defendant, he does not lose his lien by proceeding to judgment on his debt, and to foreclose the mortgage against the mortgagor, without making the defendant a party.

3. TROVER AND CONVERSION—MORTGAGED PROPERTY—PARTIES.

In an action by a chattel mortgagee against one who has wrongfully appropriated a portion of the mortgaged property, and put it out of existence, the mortgagor need not be made a party.

Appeal from district court, Rockwall county; ANSON RAINEY, Judge.
W. B. Wade, for appellant.

GAINES, J. Appellee brought this suit to recover of appellant the value of certain corn appropriated by the latter, upon which appellee claimed a lien. One Steger executed to appellee a chattel mortgage upon his growing crop, which was duly registered. After the registration appellant bought of Steger 84 bushels of corn, which he mingled with his own, and subsequently fed to cattle. During the progress of the trial the plaintiff offered in evidence a copy of the mortgage, which was admitted by the court over the objections of the defendant. The objection was upon the ground, among others, that the original instrument had not been accounted for. The admission of the copy was error. In the absence of proof of the loss or destruction of the original, secondary evidence of its contents was not admissible. The statute provides that a copy of a chattel mortgage, duly filed for registration, certified to by the clerk in whose office it has been filed, "shall be received in evidence of the fact that such instrument * * * was received and filed according to the indorsement of the clerk thereon, but of no other fact." 2 Sayles, Rev. St. art. 3190b, § 3. In order to establish the mortgage, its execution should be proved, and the original produced, or its absence accounted for by showing its loss or destruction. For the error of the court in admitting the copy in evidence the judgment must be reversed.

There are other assignments of error, but none of them are well taken. We will dispose of them in a brief manner: *First*. We are of the opinion

that the plaintiff did not lose his lien by proceeding to judgment in the justice's court on his debt, and to foreclose his mortgage against the mortgagor, without making appellant a party. The judgment did not affect appellee's rights, but it left the lien intact. The judgment was evidence that Steger still owed the debt. *Second.* It was not necessary to make Steger a party to the present suit. This was not an action to foreclose the mortgage. Appellant had disposed of property upon which appellee had a lien. The lien could not be foreclosed upon it, because it was no longer in existence. By the wrong of appellant, appellee was deprived of the right of having the corn sold for the payment of his debt, and is entitled to compensation. The amount of his unsatisfied debt being greater than the value of the corn, the latter is the measure of his damages. Upon this theory the case was tried below, and, if the original mortgage had been proved and introduced in evidence, there would have been no ground for a reversal.

The judgment is reversed, and the cause remanded.

MISSOURI PAC. RY. CO. v. JAMES.

(Supreme Court of Texas. November 9, 1888.)

1. TRIAL—INSTRUCTIONS—CHARGE ON THE FACTS.

In an action against a railroad company for injuries to an employe alleged to have been caused by a defect in a hand car and in a rail, a charge that the promise of the section-master to repair the rail some days before, and the fact that he had sent the car to the shop for repairs, and had again put it in use, might be considered on the question of contributory negligence, is not a charge upon the weight of evidence, where the uncontradicted evidence shows the facts recited in it.

2. MASTER AND SERVANT—INJURY TO SERVANT—NEGLECT OF EMPLOYE.

A charge that, if the employe was ignorant of the defects causing the accident after having used such care as one in his position ought to use, the company could not relieve itself from liability because an employe had neglected a duty imposed by the company to see that its car and track were in good order, is not erroneous.

3. SAME—ABSENCE OF VICE-PRINCIPAL.

It was proper to charge that the temporary absence of the section-master would not relieve the company from liability for an injury occurring in executing instructions to employes, where the evidence showed that the employe was working under the instructions of the section-master in his absence, until ordered by the road-master to do the work which he was on his way to do when the accident occurred.

4. APPEAL—REVIEW—PRESUMPTIONS.

In construing a charge, the jury will be presumed to have considered other parts of the charge referred to in it.

5. SAME—ASSIGNMENT OF ERROR.

An assignment of error that the court erred in refusing to give the special instructions numbered 1, 2, 3, and 4, asked by defendant, is too general to be considered.

6. SAME—MATTERS NOT APPARENT OF RECORD.

The action of the court in entering judgment *nunc pro tunc*, at a term subsequent to that at which it was rendered, after hearing evidence, will not be reviewed where the evidence is not brought up.

Appeal from district court, Hopkins county; J. A. B. PUTNAM, Judge.

Action by James M. James against the Missouri Pacific Railway Company for personal injuries. Defendant appeals.

Todd & Hudgins, for appellant.

STAYTON, C. J. Appellee, while an employe of the appellant, was injured by the derailment of a hand car on which he was. The accident was alleged to have occurred on account of a defect in a rail and defect in the car. The uncontroverted evidence showed that the car had been out of repair, but that it had been sent to the shop to be repaired and returned, as the appellee supposed, in good order. It had also been known that there was a defect in a rail at a place but a short distance from where the accident occurred, which

the appellee and others had started to repair under orders of the section-master, who stopped them, and stated that he would make the necessary repairs in person, and thereupon started in the direction of the place where the repairs were needed. This occurred a few days before the accident, and appellee had not been over the road afterwards. The defect in the rail which is shown to have caused the accident was not that known to appellee, but one a few feet beyond it, of which he had no knowledge, so far as the record shows. The court, in effect, informed the jury that, in determining whether appellee was guilty of contributory negligence in operating the car and using the track, the promise of the section-master to repair the track, and the fact that he had sent the car to the shop for repairs, and again put it in use, might be considered. It is objected that this was a charge upon the weight of evidence, in that it assumed that the section-master had promised to repair the track and car. The uncontradicted evidence showed his promise to repair the track, and his acts in reference to the repair of the car, and under such state of facts the charge was not subject to the objection urged against it.

The court instructed the jury that if the appellee was ignorant of the defects from which the accident resulted, after having used such care as one employed as he was ought to use, then the appellant could not relieve itself from liability on the ground that an employe, whose duty it was made by appellant to see that its car and track were in good order, had neglected that duty. This was the substance of the charge, and we understand the law to be as therein stated.

The fourth assignment of error relates to a similar charge, which, in view of the facts of the case, was substantially correct. It was evidently assumed by appellant on the trial, as it is here, that appellee at the time he was injured was acting as section-master, but there was no evidence tending to show that this was true. It was shown that the section-master was absent that day, but that appellee and other hands were working under his instructions, until they were ordered by the road-master to do the particular work which they were on their way to do when the accident occurred.

The court instructed the jury that the temporary absence of the section-master would not relieve the company from liability for an injury occurring in his absence, in carrying out instructions given to employes. There was no error in this.

The charge complained of in the fifth assignment may not have been abstractly correct, but, as the evidence was not sufficient to show that the appellee had any knowledge of the defects from which the injuries occurred, the charge was harmless.

The charge complained of in the sixth assignment did not inform the jury that appellee was entitled to recover in any event, unless it appeared that he was guilty of contributory negligence. The charge makes reference to preceding parts of the charge, by which the jury were informed as to the facts that would authorize a verdict for appellee; and if the jury looked to these, as they are to be presumed to have done, they could not have understood the charge complained of as appellant now insists it should be understood.

The seventh assignment of error is not, as to the fact on which it is based, sustained by the record.

The ninth assignment of error, which is that "the court erred in refusing to give the special instructions numbered 1, 2, 3, and 4, asked by defendant," is too general to require consideration. The verdict of the jury was not unsupported by evidence, and the court did not err in overruling the motion for a new trial.

This cause was tried at the September term of the court, and a verdict was then returned, and a motion for new trial filed and overruled, but the judgment was not actually entered of record. At the next term a motion was made to enter the judgment *nunc pro tunc*, on which, after notice to and

appearance by appellant, the judgment was entered. The judgment on the motion recites that evidence and argument of counsel were heard, "and it appearing to the court from an inspection of the record in this cause, together with other evidence, that at the regular September term, 1887, of this court, on the 2d day of November, 1887, this cause came on for trial." It then recites that the facts transpired necessary to a trial, and that the verdict made the basis of the judgment was returned into court; and then declares "that thereupon the court rendered the proper judgment on said verdict, which said judgment, through oversight, was never entered in the minutes of the court." There is no statement of the facts, by bill of exception or otherwise, on which the court below acted in entering the judgment; and in the absence of this it must be presumed that the evidence offered was such as authorized the action of the court. If appellant desired to have the action of the court reviewed upon the question of the sufficiency of the evidence to authorize the entry of the judgment at a term subsequent to that at which it was rendered, it should have brought the evidence before us.

There is no error in the judgment, and it will be affirmed.

HARVEY *et al.* v. CARROLL *et al.*

(*Supreme Court of Texas.* November 20, 1888.)

1. PUBLIC LANDS—HEAD-RIGHT CERTIFICATES—ADVERSE POSSESSION.

Adverse possession by the wife, after the death of her husband, of an unlocated head-right land certificate issued to him, will not pass title to the land located or to be located under it, as against the heirs of the husband and of a former wife, to whom he was married when the certificate issued.

2. GIFT—UNEXECUTED GIFT BY INFANT.

A parol gift, by an infant heir, of his interest in such a certificate, is invalid.

3. ERROR, WRIT OF—BY MARRIED WOMAN—TIME OF TAKING.

A writ of error is not barred by the lapse of more than two years since the rendition of the judgment, when one of the plaintiffs in error is a married woman, with whom her husband is joined as a party.

Error from district court, Navarro county; L. D. BRADLEY, Judge.

Action by Sallie J. Harvey and ——— Harvey, her husband, and A. J. Jennings against B. F. Carroll and others, to recover land in Navarro county. Judgment for defendants, and plaintiffs bring error.

James B. Goff, for plaintiffs in error. *Simpkins & Neblett*, for defendants in error.

WALKER, J. The substituted bill of exceptions cannot be considered. It was supplied without notice to the adverse party or their attorney. The third, fourth, fifth, and sixth assignments of error, however, can be entertained, and they require the court to pass upon the matters raised by them. The facts out of which the litigation arises are here given: In 1838, Edward Patterson and his wife, Nancy, were married in Alabama. They lived there together until 1835, when Edward Patterson emigrated to Texas, reaching his destination December, 1835. February 1, 1838, a certificate for a league and labor of land was issued to him as head of a family. The same year—1838—he returned to Alabama, and remained there several months. Patterson and his wife, Nancy, had one son, William F. Patterson, who died unmarried in 1847. On September 30, 1840, Nancy Patterson intermarried with one McClosky, in Alabama. A few weeks later, in November, 1840, Edward Patterson married Alethia Patterson, at Houston, Tex. No trace is given in the testimony of the land certificate after its issuance, until long after both husband and wife had other marital relations than with each other. Divorce can probably be inferred from the second marriage of both parties at so nearly the same

time. Edward Patterson died at Houston, Tex., October, 1841, leaving no child by the second marriage. Nancy Patterson McClosky had a son, A. J. Jennings, born in 1825, by a former marriage. She and McClosky left an only child, the plaintiff, Sallie J. Harvey, born November, 1848, and married to Harvey, November 26, 1867. Dying in 1853, Nancy McClosky left as heirs her son, A. J. Jennings, and her daughter, Sallie J. McClosky, the plaintiffs in this suit. By her son's death, in 1847, she had inherited his entire estate; he dying at about 13 years of age. Presuming that the separation of Edward and Nancy Patterson was lawful, and that a divorce was granted one or the other, we may also infer, in absence of testimony tending otherwise, that the head-right certificate, their community property, remained unchanged,—their property as tenants in common. Upon the death of Edward Patterson, in Texas, in 1841, under the law then existing, (act Jan. 20, 1840, § 4,) the half interest in the land certificate, which he had at his second marriage, passed one-half to his widow, Alethia, and one-half to his son, William F. Patterson. The ownership of the certificate, then, was one-half in Nancy McClosky, one-fourth in his son, and one-fourth in his widow. The widow, in 1849, married A. M. Brooks. Upon the death of the son in 1847, his mother's interest became three-fourths in the certificate.

We cannot give to the testimony of Mrs. Brooks in this case the effect of passing title from the son, William F., to her of his interest. She testifies: "I knew that Edward Patterson left a son. This son relinquished all his right to me, saying he wanted me to have all that his father had in Texas." Patterson's son died at the age of about 13 years. The witness had never obtained the certificate until three or four years after the son's death. There is nothing to show that the son knew his rights. An unexecuted gift by a minor cannot be enforced. Besides, in the deed to Barziza, by herself and husband, they covenanted that "she is the sole heir of the said Edward Patterson, deceased," as his widow. The sale by Brooks and wife of the Edward Patterson land certificate to Barziza could only pass the interest owned by Mrs. Alethia Brooks. She was not the apparent owner of the certificate. This court has repeatedly held that the adverse possession of an unlocated land certificate cannot by limitation pass, with such possession, the title to the land located or to be located under it. *Barker v. Swenson*, 66 Tex. 407, 1 S. W. Rep. 117; *Harvey v. Cummings*, 68 Tex. 605, 5 S. W. Rep. 513. This last case involves the identical transaction here under consideration.

The court below erred in its conclusion of law, finding that the title to the land was barred by the two years' adverse possession of the certificate. It also erred in the finding of fact that the testimony showed a transfer by the minor son of Edward Patterson to Mrs. Alethia Brooks, the testimony being insufficient. The plaintiffs showed title to three-fourths interest in the certificate, and as consequence a like interest in the land. The findings of fact by the court are not sufficiently definite to enable this court to render judgment here. The definite parts held by those proving improvements are not shown. It would seem that the entire Carroll purchase is barred by limitation, but the court held otherwise, and the record does not affirmatively show the finding erroneous. This writ of error is prosecuted after the expiration of two years from the rendition of the judgment, and by Jennings as well as Mrs. Harvey, joined by her husband. Her rights are protected by her coverture, and the writ of error is not barred. For the errors above noted the judgment below is reversed. Reversed and remanded.

CHISHOLM *et al.* v. ADAMS.

(Supreme Court of Texas. November 9, 1888.)

1. TAXATION—LIEN OF TAXES—ENJOINING ASSESSMENT.

Where, before taxes assessed can become a lien on land, the tax-list must be presented to the board of equalization for approval and for correction of any errors in the listing of property, under Gen. Laws Tex. 44, an injunction will not be granted before such approval to restrain an assessor of a county from assessing lands claimed to be in another county.

2. SAME—ALLEGATIONS OF PETITION—LAND IN ANOTHER COUNTY.

Gen. Laws Tex. 1879, pp. 24, 28, provide that assessors shall be furnished with a correct abstract of the surveys in their several counties; and that any lands which have been assessed in any county according to the abstract of land titles, and the taxes paid thereon, shall not be afterwards subject to the payment of taxes for the same period in a different county, although a subsequent survey shall show the said land to be in the latter county. *Held*, where one claiming his lands to be in a certain county sought to restrain the assessor of another county from listing them, on the ground that they would thereby be subject to double taxation, that the petition was insufficient which did not aver that the abstract showed the land to be in the former county.

3. INJUNCTION—THREATENED PROSECUTION.

A threatened prosecution for a violation of a law defining and prescribing the punishment for a crime furnishes no ground for the granting of an injunction.

Appeal from district court, Kaufman county; ANSON RAINEX, Judge.
Brown, Watts & Hall, for appellants. *Manion & Huffmaster and Word & Charlton*, for appellees.

STAYTON, C. J. The general nature and result of this suit are sufficiently stated in the brief of counsel for appellant as follows:

"This is a suit brought by plaintiffs, citizens of Rockwall county, in the district court of Kaufman county, on April 10, 1888. It was sought to enjoin the defendant, S. N. Adams, the tax assessor of Kaufman county, from assessing the property of plaintiff, and otherwise performing his functions as assessor within the territory of Rockwall, and upon the citizens of said county. The petition alleged, substantially, that the boundary line between Rockwall and Kaufman counties was clearly defined, marked, and established according to law, at the time that Rockwall county was created, and could be easily traced and identified from that time to the present; that all of the citizens north of that line so established were always regarded as citizens of Rockwall county; that they voted, did jury service, and were assessed and paid their taxes in Rockwall county; that, notwithstanding these things, Kaufman county claims that the true boundary line between the two counties lies still further north, and includes a strip of land in the territory of Rockwall about 2,500 varas wide and about 12 miles long, and on which plaintiff and about 200 citizens of Rockwall county now reside, and own land and personal property; that S. N. Adams is the duly qualified and acting assessor of Kaufman county, and is attempting to assess and list for taxes the property of petitioners so situated in Rockwall county, and is threatening to assess and list the same for state and county taxes of Kaufman county, if petitioners refuse to render their said property to him for taxation; and that, unless restrained, said Adams will list and assess their property, and thereby impose upon them double taxation, becloud the title to their land, and sacrifice their personal property; and that said Adams is also threatening to report petitioners to the commissioners' court of Kaufman county, and also threatens and declares his purpose to prosecute petitioners in the courts of Kaufman county, under art. 113 of the Penal Code of the state of Texas, for refusing to render to him, as assessor of Kaufman county, their property as aforesaid, whereby petitioners would be annoyed and harassed by a multiplicity of suits, and become involved in vexatious, hazardous, and costly prosecutions. To which, on

June 5, 1888, the appellee answered by general demurrer, and also assigned grounds of special exceptions as follows: (1) Because the petition fails to show that appellants had rendered their property in either Rockwall or Kaufman county; (2) that it appears from the petition that appellants have an adequate legal remedy for the threatened injury; (3) petition fails to show illegality of threatened assessment; (4) petition failed to show that appellants' lands had been abstracted as in Rockwall county. Appellee also answered by general denial and specially. The cause came on to be heard in the district court of Kaufman county on the 26th day of June, 1888, upon the general and special exceptions of defendant, which exceptions, both general and special, were sustained by the court, to which petitioners excepted, gave notice of appeal, and present to this court the rulings of the court below sustaining defendant's exceptions for revision and reversal."

If the lands and other property within the territory claimed by the assessor to be in Kaufman county are in fact in Rockwall county, there is no doubt they ought not to be assessed and taxes thereon paid in Kaufman county; for the constitution requires the assessments and payments of taxes on property to be made in the county in which the property is situated. Const. art. 8, § 11. It does not follow from this, however, that appellants are entitled to injunction, even if their lands be situated in Rockwall county. This is so for several reasons.

1. An injunction will not be granted when the person seeking it has a clear and adequate remedy at law. If the lands of the appellants be put on the assessor's list, either on a rendition made by them or by the assessor, without this, that fact alone would neither make the appellants liable to pay the taxes on nor give lien on their property. Before a list made by an assessor can be looked to in any way to fix liability on the tax-payer or his property, the list must be approved by the county commissioners' court, sitting as a board of equalization. Rev. St. arts. 4717-4719, 4728; Gen. Laws, 1879, p. 44. That tribunal has power to correct any error in lists furnished by assessors, whether consisting of error in valuation or in property listed. Gen. Laws 1879, p. 44. It is not to be presumed that that tribunal would violate its duty, and retain on the approved list property situated in another county, simply because the assessor had placed it on the list furnished for the examination and approval of that body. If the facts stated in the petition be true, the presumption is that appellants could have had the relief which they seek through injunction by a presentation of the facts to the tribunal by law given power to give relief; and, the petition not showing that relief could be given only through a court of equity, the demurrer was properly sustained.

2. Injunction will never be granted unless it appears from the petition that injury will otherwise result to the applicant. The ground on which injunction is sought in this case is that if the property of appellants situated in Rockwall county be taxed in Kaufman county, appellants will be subjected to double taxation. In disposing of this case we throw out of consideration personal property owned by appellants and situated on the controverted strip, as to which, against an illegal assessment, their remedy is too clear. To enable assessors properly to assess lands situated in the several counties, the law requires the commissioner of the general land-office to furnish them with a correct abstract of the surveys in their several counties, which must show, if a survey be partly in one county and partly in another, how many acres are in each county; but if this abstract omit lands then it is made the duty of the assessor to assess them as though they appeared on the abstract books. Gen. Laws, 1879, pp. 24, 28. The act of April 23, 1879, provides that "any lands which may have been assessed in any county according to the abstract of land titles, and the taxes paid thereon according to law, shall not be afterwards subject to the payment of taxes for the same period in a different county, although a subsequent survey and determination of the county boundaries may

show said lands to be in a different county from that in which they are originally assessed; and any sales of such lands, for alleged delinquency shall be illegal and void." Gen. Laws, 1879, p. 153. The section of that act preceding that above quoted provides against double taxation of lands lying in county boundaries not accurately and legally surveyed, determined, or fixed. The presumption is that the commissioner of the general land-office correctly discharged the duty required of him by the statute, and, in the absence of an averment that the abstract showed the land to be in Rockwall county and not Kaufman county, the petition is insufficient to show that, had the assessment been legally perfected and taxes collected under it, the appellants would be liable to pay taxes on the same property in Rockwall county.

3. As before said, if the assessor had performed every act which this suit was brought to restrain him from doing, his acts would not, of themselves, have created liens had the property been situated in Kaufman county; hence, under no state of facts could he alone have clouded the title to lands belonging to appellants or others. This being true, the ground on which courts of equity have so often granted injunctions to prevent the casting of cloud upon title fails.

4. The petition not showing that the acts which the appellants sought to restrain the appellee from doing, if done, would have made it necessary for any one or all of them to resort to any court or other tribunal for the protection of any legal right, or avoidance of threatened injury, it is unnecessary to consider under what circumstances a court of equity will grant injunction in order to avoid a multiplicity of suits. Had appellee listed and valued the property of appellants and returned them to the board of equalization, and had it given to them such final approval as would have authorized the collecting officer to collect taxes on the appellants' property, which could then, and not before, in a legal sense, be said to have been assessed, then such an inquiry, on an application for injunction, would become necessary. There must be a state of facts averred which show that the applicants for injunction are compelled to resort to some tribunal for the enforcement or preservation of a right, whether legal or equitable, or otherwise suffer injury, before such a question can arise. It is too clear that a threatened prosecution for a violation of a law defining and prescribing a punishment for crime of whatever grade furnishes no ground on which a court of equity can grant an injunction.

There is no error in the judgment, and it will be affirmed.

CLIFT *et al.* v. CLIFT *et al.*

(Supreme Court of Texas. November 27, 1888.)

1. PARTITION—IMPROVEMENTS—BY TENANT BY CURTESY.

The children of a second marriage are not, after their father's death, entitled to any reimbursement for permanent improvements made by him on land, the separate estate of his first wife, while he was holding it as tenant by the curtesy.

2. SAME—CHILDREN OF SECOND MARRIAGE—COMMUNITY PROPERTY.

The children of such second marriage can have allotted to them their share of the value of the community property of said marriage used in making the improvement referred to, out of the proceeds of the sale of the property, when found necessary to sell the same for purposes of partition.

3. SAME—VALUE OF IMPROVEMENTS—PRESUMPTIONS.

Where it appears that the improvement, which was a house, was built eight years after the death of the first wife, and seven years after the second marriage, and paid for partly in goods from decedent's store and partly in money, costing nearly as much as the whole value of his property at the death of his first wife, in the absence of proof that any of the property of the first community went into the improvement, it will be presumed that the improvement was made with community property of the second marriage.

Appeal from district court, Ellis county; ANSON RAINNEY, Judge.

Action by Marvin Clift and others against Leonora Clift and others, for partition of land of which Stephen A. Clift died seized, and for the settlement of claims by the plaintiffs for improvements alleged to have been made with community funds of the second marriage of decedent upon the separate property of the first wife and the community property of the first wife. From the judgment rendered the defendants appeal.

A. A. Kemble & Son, for appellants. *Groce & Templeton*, for appellees.

GAINES, J. Stephen A. Clift married in the year 1859. In February, 1871, the wife of that marriage died, leaving three children, who are the appellants in this court. In the latter part of the year 1871 he married a second wife, the appellee Leonora Clift, and died in 1882, leaving four children of the second marriage. At the time of the death of the first wife there were certain lots in the then town of Waxahadrie upon which he resided with his family and did business as a merchant. He continued in the occupation and use of these lots until his death. Some of the lots were of the separate property of the first wife, and others were of the community estate of himself and his second wife. This suit was brought by the second wife and her children against the children of the first marriage, for the purpose of having a partition of the community lots, and for the adjustment of certain equities claimed to have grown out of improvements placed upon the property with the community funds and estate of the second marriage. The main contention of appellants is that the court erred in its decree in reference to a certain lot 4, upon which Clift erected a brick store-house after his second marriage. The lot and store-house front on a square looking west. The lot is 40 feet wide, and the south half, it is conceded, was the separate estate of the first wife. The north half had been sold by Clift and the first wife during their marriage, and a strip thereof 10 feet wide, adjoining the south half, and extending its entire length, was bought back during her life-time. It is also conceded that this strip was community property of the first marriage. The brick store-house is 23 feet wide, and is situated upon the strip of 10 feet, and extends over 13 feet upon the south half. The court below found that the house was paid for by a lot of the value of \$600, which was community property of the first marriage, and by goods and money, which belonged in common to Clift and his second wife, and that the house was worth \$3,000. The ground upon which the house stood on the south half of lot 4 was adjudged to be the property of appellants, and that on the north was decreed to belong, one undivided half to appellants, and the other undivided half to all the parties, as follows: A third interest for life to appellee Leonora Clift, and subject to this life-estate, that half to belong to all the children of S. A. Clift, each holding an equal interest. In other words, the court, in effect, adjudged that, as between the parties to this suit, one undivided half of the strip of land, 10 feet wide, on the north half of lot 4, was to be treated as the separate property of the first Mrs. Clift at the time of her death, and the other half as the separate property of her husband at the time of his death. So far the conclusions were correct. But it also adjudged that appellee Leonora Clift had an interest of \$1,200 in the store house; that her children had an interest of \$857.15, and appellants an interest of \$942.85, in the same. This result was reached by allowing Mrs. Clift one-half the value of the community assets of herself and her deceased husband which went into the building; by awarding to appellants the value of one-half of the assets of the community estate of their father and mother, which was also used in its construction; and allowing all the children of both marriages the value of the other half of all such assets; that is to say, the value of one-half of all the property and money used in erecting the house. The decree appointed commissioners to divide the property in accordance with the respective interests of the parties as settled by the court, and directed them to report at next term.

We think there was error in the decree of the court. The court properly adjudged that the south half of lot 4 was the property of appellants. There is no controversy about this. It was their mother's separate property, and upon the termination of their father's life-estate in an undivided third, they became the absolute owners. It is too plain for argument that a tenant for life of an undivided interest in common with other tenants who are entitled to the remainder can have no higher right in this respect than if he was such tenant of the entire estate; and it must be held, both upon principle and authority, that his legal representatives cannot demand of the remainder-man compensation for improvements which he has put upon the estate. During life he is entitled to the use and enjoyment of the property; but upon his death the remainder-man's right to its enjoyment, free from any incumbrances, immediately attaches. This right the latter would not have if the tenant for life were permitted to place improvements upon the property at will, for which he could be required to pay upon entering into the estate. It is then his privilege to appropriate the property to such use as his business convenience or pleasure may dictate. His interest in remainder would be seriously impaired, if the tenant for life were permitted to improve in his way and for his own purposes, and to make such improvements a charge upon the property. That this cannot be done is laid down by an eminent text writer, (1 Washb. Real Prop. 110,) and is maintained in an able and elaborate opinion by the supreme court of South Carolina in the case of *Corbett v. Laurens*, 5 Rich. Eq. 301. That case, like this, was one in which the father, a tenant for life, made improvements upon a lot to which his children were entitled in remainder. Knowing that after his death the estate is to become the absolute property of those for whom it is his duty to provide, the presumption is strong that the father, in such a case, intends the improvements as a gratuity to his children.

In proceeding to the consideration of the improvements upon that portion of the lot lying north of the dividing line, we note that appellants contend that the evidence did not warrant the finding of the court that the building was paid for in part with the community property and funds of the second marital union. But we think this claim is not based upon sufficient grounds. The facts are meager. But it was shown that when Stephen A. Clift was first married, in 1859, he was doing business as a merchant, having a stock of goods valued by the witness at from \$4,000 to \$6,000. When his first wife died, in 1871, it seems that he had on hand, in goods and money, about \$4,000. There is no proof that at that time he owed any debts, and it must be presumed that he owed none. He continued business until a short time before his death, in 1882, when he became insolvent from losses on cotton. From 1874 to 1876 the business was done in the name of Clift & Fraley, from which it would appear that he then had a partner, though the testimony does not make this clear. The house was built in 1879. The contractor testified that he was paid in a half a lot valued at \$600, which is conceded to have been community of the first marriage, and in goods from the store, and in money. The amount of goods and money was \$2,400, but how much of each was not shown. If it had been shown that the identical goods Clift had on hand at the time of his first wife's death went to the construction, a trust in the property to amount of the value of her community interest therein would have been shown. But it is unreasonable to suppose that this was a fact. After the lapse of eight years from the death of the first wife, we think the presumption must be indulged, in the absence of some other evidence, that the goods were acquired during the second marriage, and were community property of Clift and the second wife. This would be the case as to the money which was paid to the contractor, even if it had been shown, as appellants claim, that the money came from the store. But we do not so construe the testimony. We do not understand the contractor as saying that the money came from the business of the store. His language, as shown by the state-

ment of facts, is: "The remainder, \$2,400, was paid partly in money and partly in goods from Clift's store." Where the money came from there is nothing to show, and hence the presumption is that it was community estate of the then existing marital union. We conclude that the finding of the court was correct upon this matter.

But is the second community entitled, upon partition, to be reimbursed for the money so invested? As to the strip of land now under consideration, Stephen A. Clift, father of appellant, occupies a different position from that held by him as to the remainder of the land upon which the building stands. He was a tenant in common with his wife's children of this strip, holding an undivided half interest by fee-simple title. This property belonged in common to himself and his first wife, and he was the surviving husband. It may be conceded that, as a mere tenant in common, he could claim nothing for his improvement, unless it could be set apart to him by leaving one-half in the value of this land unimproved to his first wife's children. But we may say, as to this small piece of ground, that it did not admit of any partition. The parties, even in the life-time of the father, could only have severed their interests by a sale. A sale, therefore, being necessary to a severance of their interests, no reason is seen why the parties who would have been entitled to the property and funds which paid for the house should not have set apart to them from the proceeds of the sale the amount by which the value of the land has been enhanced by such improvement. Since the equities of the appellees may be secured without depriving appellants of any rights which they would have had if the improvement had not been made, we see no reason why it should not be done. Besides, we are of opinion that, in the adjustment of equities growing out of the conflicting claims which arise under our community laws, we should not be restricted by the rigid rules which apply ordinarily between tenants in common. See *Rice v. Rice*, 21 Tex. 66; *Furrh v. Winston*, 66 Tex. 521, 1 S. W. Rep. 527.

We consider it unnecessary to discuss the question of rents of the old frame store-house on lot 5, or the insurance money collected by the father of appellants when that house was burnt. Nor need we consider the question of improvement and rents upon the farm in the country, the property of the first Mrs. Clift. It is not shown that any money from any of these sources went into the improvement on lot 4, which is the subject of contention here. If Clift received money from these sources which justly belonged to appellants, and for which he did not account, that would make him their debtor to the amount so received, but would not make him a trustee for their benefit of property acquired by him, into which this money is not clearly traced. Following the statutory rule, we think only so much should be allowed for the improvements as the value of the property has been increased thereby. We are of opinion that the court below should have awarded the appellants the recovery of the south half of block 4, free of all claims and incumbrances; that it should have assessed the value of the ground on the north half of that lot, and ordered the same, together with so much of the building as stands thereon, to be sold; that from the proceeds of the sale the value of the ground so assessed should be first taken, and divided as follows: There should be paid to Mrs. Clift a sum equal to one-sixth interest for life in the proceeds of the land proper, the remainder of one-half such proceeds, after deducting Mrs. Clift's interest, to be divided equally among the other parties, and the other half to go to appellants. What remains of the proceeds of the sale, after deducting the value of the land, should be divided as follows: Twelve-thirtieths to Mrs. Clift, one-half to all the other parties, to be equally divided between them, and the remaining one-tenth to appellants, to be equally divided among them.

The judgment will be reformed in accordance with the views expressed in this opinion, and affirmed. But the cause will be remanded to the lower

court, with instructions to assess the value of the land on the north half of lot 4 without regard to the improvements, and to determine what proportion the value of the life-estate in Mrs. Clift bears to the value of the absolute title, and to decree a sale of said strip, and the improvements thereon, and a distribution of the proceeds in accordance with this judgment.

ST. LOUIS, A. & T. RY. Co. v. CROSNOE.

(*Supreme Court of Texas. November 23, 1883.*)

1. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK.

A railroad company is liable for injuries to one crossing the track, occasioned by sending cars in swift motion, with no one at the brakes, upon a switch track where persons commonly pass, without objection from the company, though not a public crossing.¹

2. SAME—CARE REQUIRED.

It cannot be said that persons crossing a switch track at such a point are not entitled to any care for their safety from the employes of the train, unless their danger be seen.

Appeal from district court, Smith county; **FELIX J. McCORD**, Judge.

Action by **H. C. Crosnoe** against the **St. Louis, Arkansas & Texas Railway Company**, to recover damages for personal injuries. Defendant appeals.

N. Webb Finley, for appellant. *John M. Duncan*, for appellee.

WALKER, J. This is an appeal from a judgment in favor of Crosnoe for personal injuries inflicted upon him May 23, 1887, at Corsicana, Tex., by a moving car on the railway track of defendant running upon the plaintiff while he was crossing the track at a public highway. The defendant answered that the "defendant company had a yard upon which was constructed sidings and switches for the exclusive purpose of switching cars from the main track, changing cars, and making up trains; that this yard is located at a point where its sidings and switches do not intersect or cross any street, alley, or public way of travel, and that no person has a legal right to enter upon or cross over defendant's railroad at such point, so exclusively appropriated by it for switching purposes; that it is necessary and proper for the conduct of its business at Corsicana for it to have and maintain such a yard, etc.; that upon one of its sidings or switches in said private yard some flat cars had been placed, and, while an engine was being used to effect a coupling, * * * in the usual and ordinary manner, at usual rate of speed, one of the cars being moved was forced against said flat cars, moving them from their position some four or five feet, thereby passing upon the plaintiff; * * * that plaintiff was a trespasser, having entered upon the track at a point where he had no legal right to do so, and by his own wrong, without fault of the defendant company, brought upon himself the injury," etc. By supplemental petition it is alleged "that there were cars standing upon the side tracks of defendant at or near the scene of the accident, and also a coal chute or bin, constructed between the said side tracks,—all of which tended to and did obstruct plaintiff's view, so that he could not see the moving cars which were run against those which struck plaintiff until they were almost upon him;

¹ One walking on a railroad track without permission, at a place where there is no public crossing, is a trespasser, though the company has allowed the public to walk upon its track at that place without objection. *Blanchard v. Railway Co.*, (Ill.) 18 N. E. Rep. 799. *Contra*, *Troy v. Railroad Co.*, (N. C.) 6 S. E. Rep. 77; *Railway Co. v. White's Adm'r.*, (Va.) 5 S. E. Rep. 573. See, also, note, *Id.* In general, respecting the duty owed by railroad companies to persons walking on their tracks, and the contributory negligence of the latter, see *Blanchard v. Railway Co.*, *supra*, and note; *Railroad Co. v. State*, (Md.) 16 Atl. Rep. 212; *Railroad Co. v. Bell*, (Pa.) 15 Atl. Rep. 561, and note; *Railroad Co. v. Colman's Adm'r.*, (Ky.) 8 S. W. Rep. 875, and note.

that the place where the accident occurred was in the midst of the city of Corsicana, and at a place in defendant's track commonly used by footmen; that same had been for years and is now notoriously used by the public as a crossing for foot-passengers going from East Corsicana to West Corsicana, and returning; that said defendant at all times, as well as its agents and servants, operating trains in Corsicana, well knew of such open, notorious, and constant use of said place as a crossing by the public, and prior to said accident had made no objection thereto."

There is no contest over the fact and the extent of the injury, or as to the manner the same was caused. There was a contest as to the extent and publicity of the use of the place as a way by footmen in passing east and west between the two parts of the city of Corsicana, and some dispute as to the care taken by plaintiff in the act of attempting to cross the track. The counsel for defendant, by carefully prepared instructions requested, but which were refused by the court, sought to have the jury charged that the plaintiff, being in the yard and upon the track, not upon a street or public crossing, was a trespasser, and that under such circumstances he could not recover, unless the employes had seen his danger, and negligently permitted him to be injured, or had neglected to use due efforts for his safety after seeing his danger. The court charged the jury, among other things: "A person who goes upon a railroad track other than at a public street or crossing, or such private way as is commonly used by the public with the knowledge and permission of the company operating the track, is a trespasser, and the railroad company has a right to expect that the person will leave the track, and would not be held liable unless, after seeing the impending danger, they took no precautions to prevent injury; and, if they took precautions after seeing the danger, the railroad company would not be liable. (8) So that * * * if you find from the testimony that plaintiff, Crosnoe, went upon the track of defendant, at a place other than at a public crossing, or private way that was commonly used by the public, and the company's agents knew that fact, and permitted it, he would be a trespasser, and, though the company may have acted negligently, yet the plaintiff cannot recover unless, after seeing his peril, the agents and employes of defendant failed to use precautions to prevent the injury. If they did see his danger, and did not try to prevent the injury, then the plaintiff's negligence would not be the cause of the injuries, and you will find for plaintiff. Yet, though you may find that plaintiff was a trespasser, still, if the proof shows that defendant's agents knew that people were in the habit of crossing the track at the place where Crosnoe was injured, if you further find that the defendant's agents and employes, knowing that people were in the habit of crossing the track at that point, in a reckless and wanton manner propelled the cars in such a way as to show a total indifference to the consequences of such act, and that the plaintiff was injured by such wantonness, then the defendant company would be liable. (9) Plaintiff cannot recover if he did not use his senses to ascertain the approach of a train; and if he went upon the track without acquainting himself of the approaching train, and was injured thereby, he cannot recover, unless, after he got upon the track, the agents of defendant saw him in time to try to use the means to avoid the danger, and failed to do so. If, however, the proof shows that Crosnoe went to a place that was a private way over defendant's road, commonly used by persons on foot, and that this fact was known by defendant's agents and employes in charge of the trains; and if the proof further shows that, before he went upon the track, he used the utmost care to find out if a train was approaching, and by the exercise of this care he did not know of an approaching train, and started across the track; and the defendant's agents and employes, knowing that this was a private way, did not use ordinary care, before explained, to prevent injury, and negligently ran their cars over plaintiff; and the proof further shows that plaintiff used that degree of care required of

him, and was not negligent in going upon the track, and he was injured thereby,—the defendant company would be liable. * * * If the place where plaintiff attempted to cross the track was not a private way, commonly used, the plaintiff, in going upon the track, would be a trespasser, and the defendant company would not be liable if they run over him, unless their agents and employees saw him in time to prevent the injury, and failed to do it. But if it was commonly known to defendant company that people were in the habit of crossing at this point, and though plaintiff had no right to be upon the track, but was not guilty of negligence in trying to cross the track, and defendant's agents and employees propelled their cars forward and over him in such a reckless and wanton manner as to show a disregard to the consequences of their act, and plaintiff was injured thereby, without fault on his part, the company would be liable."

Examining the statement of facts, it is apparent that there was testimony that the plaintiff, before stepping upon the track, both looked and listened, thus using great care; that the attempt to cross was not at a street crossing or other public way; and that it was upon a side track used by the defendant company in its business. The investigation is narrowed down to the inquiry as to the duty of the defendant, under the circumstances attending the act complained of. It is not insisted upon that the employees did see the plaintiff, nor that they could have seen him from the positions they are shown to have occupied at the time; nor is it insisted that the place was at a street crossing or other public highway, nor is such a user of the crossing shown as amounted to the right of way by foot-passengers to cross the track of the company against its orders or obstruction, if it had been interposed; nor is any express license or consent claimed. It is, however, alleged that the place of the attempted crossing was "in the city of Corsicana, and at a place in the track commonly used by footmen in going from the east to west parts of the city, and in returning, and that the use was notorious, and well known by the company, its agents or employees." The testimony shows such use common and continuous; that a foot-path had been worn by the passing at the place; that such use was known to the agents and employees of the defendant company; and that no protest or orders otherwise had been made against such use, nor any efforts to guard the passers-by from the dangers of the passage. It was shown that the work engaged in upon the switch track was part of the ordinary daily task of the employees, and was not dangerous to those engaged therein. It is shown that the bell of the engine was ringing at the time that the engine pushed three cars upon the switch towards the car which ran upon the plaintiff, and when at some distance from it the engine was detached and run back, the three cars by their momentum running to and striking the car next to plaintiff, and pushing it a distance from five to twelve feet, against and upon the plaintiff, inflicting the injury. One man was upon the detached cars, but he was not at a brake, nor in a position to check the cars, had danger been noticed. This hand did not see plaintiff, nor could he have seen him from his position before the collision. It was shown that the employees did not keep an outlook upon the switch track, expecting the way to be clear. The application to this condition of facts in the charge was that "if the agents and employees in a dangerous and reckless manner propelled the cars in such a way as to show a total indifference to the consequences of such act, and that the plaintiff was injured thereby, the defendant company would be liable;" and again, if they did not use ordinary care to prevent injury, and negligently ran their cars over plaintiff, etc., the company would be liable.

Our courts have held that a railroad company owes no duty to one who makes a highway of a railroad track, and is injured by a train upon it. *Railway Co. v. Richards*, 59 Tex. 377. This must, however, be subject to a higher principle, protecting the life and limb even of a vagabond. "A high degree of care is necessary on the part of a railway company in operating its

trains on any part of its road." *Railroad Co. v. Hewitt*, 67 Tex. 479, 3 S. W. Rep. 705; *Hughes v. Railway Co.*, 67 Tex. 598, 4 S. W. Rep. 219; *Shelby v. Railway Co.*, (Ky.) 3 S. W. Rep. 157.

In the case of *Railway Co. v. Boozer*, 8 S. W. Rep. 119, (Austin term, 1888,) it was held that where a boy 10 years of age was killed by a train at the crossing of a foot-path, leading from the thickly populated part of the city of Denison to houses on the opposite side of the railroad track, it was a question for the jury, under the circumstances, to determine whether the railway company used that care which it should have used to guard persons against injury. While the case was an action for the death of a boy not of mature years, which fact entered into the decision, yet the principle is recognized that at such a crossing some outlook was imposed from considerations of safety to those passing upon it. The extent and nature of the use of the way across the track in Corsicana in this suit was part of the basis for the action of the jury in passing upon the care which ought to have been taken by the company and its employees at and before the collision. If the facts were equivalent to an implied consent to the use, a license may have been assumed by the public to exist, from which the act of crossing would not be an invasion of any right of the railway company, and not a trespass, so long, at least, as the work of the employees was not obstructed. As men were commonly passing, or likely to be passing, those operating the cars would know of the danger in turning loose a car or cars without control, at speed sufficient to inflict damage. While the railway company is entitled to the right of a clear track, and ordinarily its employees are not chargeable with the duty of looking out for trespassers, yet, when the facts show from the common use of a private way across the track that it is likely that men may be upon it, such fact cannot be ignored by the employees working upon and using the track, without being guilty of want of proper care for human life and safety, which may amount to recklessness, equivalent to willful injury, if injury should result, and the negligence be gross. The same rule is recognized in *Byrne v. Railroad Co.*, 10 N. E. Rep. 539, by court of appeals of New York. The opinion cites with approval from *Barry v. Railroad Co.*, 92 N. Y. 289: "In that case it was held that, where the public for a series of years had been in the habit of crossing the railroad, the acquiescence of the defendant in the public use amounted to a license or permission to all persons to cross at that point, and imposed the duty upon it as to all persons so crossing to exercise reasonable care in the movement of its trains, so as to protect them from injury." This rule is recognized in *Updike v. Elevator Co.*, 8 S. W. Rep. 779, by the supreme court of Missouri; and in *Nichols' Adm'r v. Railway Co.*, 5 S. E. Rep. 171, by supreme court of Virginia. In *Railway Co. v. Schuster*, 7 S. W. Rep. 875, Justice HOLT, of Kentucky court of appeals said: "The degree of care to be exercised * * * must necessarily depend upon the location, and the circumstances of the case. At places not frequented by the public, either by right or the permission, express or implied, of the company, and in localities where people are not constantly passing about, and where they cannot reasonably be expected to be, those in charge of a train are not required by law to be on the lookout for them. In such cases the company is entitled to the exclusive use of its track, and those upon it are trespassers; and those in charge of a train are only required to avoid injury to them if they can do so upon becoming aware of their peril." Otherwise, where persons are shown to be constantly passing about and across the track, and may reasonably be expected to be. See, also, *Railway Co. v. Phillips*, 112 Ind. 59, 13 N. E. Rep. 132; *Railway Co. v. Hedges*, 105 Ind. 398, 7 N. E. Rep. 801; *Railway Co. v. Snyder*, 18 Ohio St. 399.

Actionable negligence has been defined as consisting, "in the case of persons who are not in a relation of privity, in the exercise of rights in a manner which is not according to the conduct of reasonable and prudent men in

a like situation, and which results in injury to others." Pierce, R. R. 310. Applying this rule to the facts of this case, we cannot hold the verdict to have been wrong in finding that the turning loose of the cars in swift motion upon the switch track, where men were commonly passing or likely to pass, though not a street crossing or public highway, was actionable negligence; nor can we assent to the proposition urged by appellant, that persons crossing the switch track, under the circumstances, were entitled to no care for their safety from the employees in moving the cars, unless the danger should be seen. The following additional authorities have been examined: Pierce, R. R. 330, 332; Patt. Laws, §§ 204, 205; 1 Thomp. Neg. 448, 462; *Hoppe v. Railway Co.*, 19 Amer. & Eng. R. Cas. 81, 21 N. W. Rep. 227; *McAllister v. Railway Co.*, 19 Amer. & Eng. R. Cas. 108, 20 N. W. Rep. 488; *Railroad Co. v. Bracken*, 59 Tex. 74; *Railway Co. v. Richards*, Id. 378; *Railway Co. v. Lotory*, 61 Tex. 149; *Railroad Co. v. Hewitt*, 67 Tex. 479, 8 S. W. Rep. 705; *Hughes v. Railroad Co.*, 67 Tex. 595, 4 S. W. Rep. 219; *Railway Co. v. Ryan*, 7 S. W. Rep. 687; *Railway Co. v. Boozer*, 8 S. W. Rep. 119.

The judgment below is affirmed.

BUFORD v. ASHROFT *et al.*

(Supreme Court of Texas. November 28, 1883.)

1. CONTRACTS—CONSTRUCTION—PERFORMANCE—TENDER.

A. and B. were partners engaged in milling, and, being unable to meet their liabilities, A. agreed to convey the mill property to B. in consideration that the latter would pay on the partnership debts, if necessary to discharge them, a stipulated sum. B. went into possession of the property. Held, that he could not refuse to perform his part of the agreement because the deed of the mill property was not delivered; it appearing that, although a tender was not made until after suit was brought, A. had always been ready to execute the deed, and B. had never demanded it.¹

2. SAME.

In such case, the agreement being that as between the partners the payment of the stipulated sum was to relieve B. from any further obligation on the partnership debts, and that, if such sum was not needed to pay such debts, the balance should be paid to A., B. could not acquire title to the mill property by purchase at a foreclosure sale under a judgment entered at the time of the agreement, unless prior to such purchase he had paid out on the firm debts the amount stipulated.

3. SAME—CREDIT FOR COSTS PAID.

Under the agreement B. was to pay notes without consultation with A., but accounts were not to be paid until the latter had pronounced them correct. Held that, where B. failed to pay certain notes until after judgment by default was entered on them he could not recover costs incurred, but that where he refused to pay an account in good faith, and suit was brought, he was entitled to reimbursement for costs, unless it appeared that he suffered such suit to be brought contrary to the wishes of A.

4. SAME—CREDIT FOR INTEREST.

Such agreement contemplated that the sum which B. stipulated to pay, should be paid at once, and therefore he was not entitled to credit for sums paid as interest maturing after the making of the agreement.

Appeal from district court, Hopkins county; B. W. FOSTER, Special Judge. *E. B. Perkins*, for appellant.

STAYTON, C. J. Appellant and appellees were partners engaged in a mill business on property owned by them. The firm was indebted, and unable to meet its liabilities, when, on November 6, 1883, it was agreed that appellees would convey unto appellant the mill property, in consideration that he would pay on the partnership indebtedness, if necessary to discharge it, the sum of

¹ As to the good faith and diligence required of complainant in an action to specifically enforce a contract, see *Askew v. Carr*, (Ga.) 8 S. E. Rep. 74, and note; *Butler v. Archer*, (Iowa,) 41 N. W. Rep. 309, and note.

\$5,600, and as between themselves this payment was to relieve appellant from obligation to pay any partnership debts unpaid after he had discharged debts equal to the sum named. It was further agreed, if the partnership debts did not amount to \$5,600, that so much of that sum as was not expended should be paid to appellees. Appellant contends that as a part of the agreement appellees obligated themselves to indemnify him by bond against partnership debts in excess of \$5,600, and he alleges that they failed to do this, and that they failed to execute to him a deed for the property. There was a conflict in the evidence as to the contract to give indemnity, and, as the cause was submitted to the jury, to reach a verdict in favor of appellees, they must have found that there was no such agreement. The contract between the parties was oral. The evidence shows that no deed to appellant was executed and tendered to him until this action was brought, but it seems that appellees were ready at all times to execute such a deed, but it does not appear that appellant ever demanded it. The evidence tends strongly to show that immediately after the agreement was made appellant entered into the possession of the mill property, and that he has subsequently held the same. Appellees allege that on the partnership indebtedness appellant only paid \$3,600, and bring this action to recover the difference between that and \$5,600. Appellant, in his answer, alleges that on failure of appellees to execute a deed and bond for indemnity to him, he abandoned the contract of November 6, 1883, but that since that date he has paid on partnership debts a sum in excess of \$5,600, and he asks judgment for three-fourths of the sum so paid against appellees. At the time the agreement of November 6, 1883, was made, there was a judgment against the firm, then amounting to more than \$3,600, which decreed the foreclosure of a mortgage on the mill property. That judgment appellant purchased in the name of his wife, and held at the time the agreement of November 6, 1883, was made. So standing the matter, without any notice to appellees of his desire or intention to abandon the agreement or demand for a deed to the mill property, on August 7, 1884, appellant caused an order of sale to issue on the judgment held in the name of his wife, under which, on the first Tuesday in September following, he bought the property for the sum of \$1,000, and took deed in his own name, and under this he claims. Neither party raises any question by pleadings or otherwise as to the existence of partnership debts unpaid, nor as to equities that might grow out of the existence of such debts, or of partnership assets other than such as was the subject-matter of the agreement of November 6, 1883. Under this state of facts, after the lapse of four years, we feel authorized to dispose of this appeal on the theory that there are no partnership debts outstanding, nor rights to adjust between the parties, other than such as grow out of the agreement of November 6, 1883, and acts done under it. Appellees recovered a judgment for \$370.

Assignments of error question the correctness of the charge of the court bearing on the question of the transmission of title through the oral agreement of November 6, 1883, and acts done under it; but we do not deem it necessary to enter into a discussion in detail of the questions thus raised, but will simply state the conclusions decisive of the rights of the parties.

1. Appellant, having promised to pay a certain sum for the property, and having entered into possession, cannot defeat the right of appellees to enforce his agreement, they tendering a deed, on the ground that the deed which he might have had at any time was not delivered. *Crutchfield v. Donathon*, 49 Tex. 691; *Watson v. Baker*, 9 S. W. Rep. 867, (decided at present term.)

2. Having obligated himself to satisfy the judgment he then held under his control, which seems to have given the pressing necessity for the making of the agreement of November 6, 1883, appellant could not acquire, as against appellees, a title to any property covered by that agreement, or any belonging to the partnership, through a sale made under process issued by virtue of that judgment, unless he had, prior to his purchase, paid out on partnership debts.

a sum equal to that he was bound to pay under the agreement. The deed tendered by appellees makes his title to the property complete.

3. The agreement of November 6, 1883, contemplated that the sum appellant agreed to pay on partnership debts should be paid at once; and, for this reason, appellant would not be entitled to credit for sums paid as interest maturing after that agreement was made. Appellant proved that he paid on partnership debts, after the agreement was made, sums aggregating more than \$5,600, but, so far as we are able to ascertain from the proof, that part of the sum so paid, which consisted of principal and interest due at the time the agreement was made, did not amount to the sum which by the agreement he was bound to pay. Much of it consisted of interest accruing after the date of the agreement. From the evidence we are unable to ascertain when some of the debts paid began to bear interest, and it may be that appellant had paid as much as under the agreement between himself and appellees he was bound to pay. From the estimate we are able to make from the evidence, about which there is no controversy, appellant must have paid, on principal and interest due on partnership debts at the time the agreement was made, at least \$5,550; and there was one small claim paid by him which appellees contended was not a just partnership debt. This we have not considered.

4. Appellant failed to satisfy six claims against the firm until after they were established by suit, and judgments by default were rendered on five of these. Appellant seeks to have allowed him the costs incurred in those suits. Under the agreement he was to pay notes without consulting appellees, but accounts were to be paid when pronounced correct by Ashcroft, who seems to have managed the business prior to the agreement of November 6, 1883, when the firm was dissolved. In so far as judgments were obtained on notes by default, there can be no pretense of the right of appellant to recover costs, for his copartners had directed him to pay them, and judgments by default evidenced the fact that he did not believe there was any valid defense. If the actions on open accounts were suffered to be brought after Ashcroft had refused to approve the claims, then appellant would be entitled to costs paid by him in such suits; but if he permitted suits to be brought on accounts after Ashcroft had approved them and judgment went by default, then he ought not to be permitted to have costs paid in such cases. While the agreement was that, as between the partners, the payment of \$5,600 on firm indebtedness by appellant should relieve him from further obligation to pay firm debts, yet it appears that there was firm property, other than the mill property, which remained the property of all the members of the dissolved firm, and would be subject to firm debts, as would the appellant, so far as creditors were concerned. In view of these facts, we do not see that appellant would not be entitled to costs paid in an action to establish a claim against the firm, if he refused to pay it in good faith, unless it was made to appear that he suffered suit to be brought contrary to the wish of the appellees. If he did the latter, then it would seem that such costs as were incurred in an unsuccessful attempt to defeat a just claim under the agreement ought to be borne by himself. It may be, if the case was fully developed, that appellant is not liable at all to appellees, and the record manifests that the judgment against him is for more than the evidence justified. For this reason it will be reversed, and the cause remanded.

WILLS POINT BANK *v.* BATES *et al.*

(*Supreme Court of Texas*, November 27, 1888.)

1. EVIDENCE—ADMISSIONS—LETTERS BETWEEN PARTNERS.

Testimony as to the contents of a letter written by one member of a firm to another, showing the purpose for which a pretended purchase from a failing debtor was made, is, in a contest between the firm and other creditors as to the validity of

such purchase, competent as an admission, though at the time of giving the testimony the witness, to whom the letter was written, has ceased to be a member of the firm.

2. **SAME—PRIVILEGED COMMUNICATIONS.**

Such letter is not a privileged communication.

3. **SAME—DOCUMENTARY—PASS-BOOK.**

Though the entries against a depositor in his bank "pass-book" may be admissible in a controversy between him and the bank, they are not admissible as against a third person, inasmuch as they are not original entries.

4. **TRIAL—ARGUMENT OF COUNSEL.**

While it is the duty of counsel to present the whole case, as he relies upon it, in his opening argument, it is not ground for reversal that the court permitted him in closing to call its attention to, and request an instruction upon, a feature of the case which he had not before discussed.

5. **NEW TRIAL—AFFIDAVITS OF JURY—UNDERSTANDING OF FACTS.**

Affidavits of jurors are not admissible, on motion for a new trial, to show their understanding of the facts, and the grounds upon which their verdict was rendered.

6. **APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

The court on appeal will not review a verdict which depends upon the weight given by the jury to the testimony of conflicting witnesses.

7. **SAME—HARMLESS ERROR.**

Where there is an excess of only a few cents in the amount of damages awarded, and no effort is made below to have it corrected, the judgment will not be reversed or corrected on appeal.

Appeal from district court, Van Zandt county; F. A. WILLIAMS, Judge.

J. G. Russell, for appellant. C. B. Kilgore and Crawford & Crawford, for appellees.

STAYTON, C. J. On the 19th day of January, 1882, Bates, Reed & Cooley had levied an attachment against Gugenheim & Co. on the property in controversy, and on the 20th day of September, 1883, recovered judgment for their debt against Gugenheim & Co., with a foreclosure of their attachment lien; the judgment directing that the order of sale should be suspended to await the result of this suit. The defendant bank asserts that on the 17th day of January, 1882, two days prior to the levy of the plaintiffs' writ, Gugenheim & Co. were indebted to it in the sum of \$6,300, and that in satisfaction of about \$5,500 of this debt they purchased Gugenheim & Co.'s entire stock, including the property in controversy. H. Fuller, W. A. Williams, J. M. Lybrand, and J. W. Fuller composed the banking firm doing business under the style "Wills Point Bank;" and when the attachment was levied on a part of the goods conveyed by Gugenheim & Co. to them, they made the requisite affidavit, and filed bond to try the right to the property. Appellees, in making up issues, alleged that, if Gugenheim & Co. made a sale of the goods to appellants, this was done with intent to defraud their creditors; that it was made to secure a pretended debt, having no real existence; and that Gugenheim remained in possession after the pretended sale, selling the goods in the ordinary course of trade, as he had theretofore done. The defendants, in tendering issues, alleged that two days before the goods were seized they bought from Gugenheim & Co. their entire stock of goods, including those in controversy, and that in payment they released Gugenheim & Co. from about \$5,535.71 due to them at the time, which was the full value of the goods; and that they at once took possession of the goods, and so were at the time of the seizure. They also denied that the sale was made with intent to hinder, delay, and defraud the creditors of Gugenheim & Co., and alleged that they purchased for the honest purpose of securing the payment of a *bona fide* debt. They also alleged that Gugenheim & Co., at the time they purchased, owed them \$6,337.50, of which the sum released on account of the purchase was a part. The trial resulted in a verdict and judgment for appellees.

It does not appear who made the affidavit claiming the property. Williams, one of the claimants, testified in the case in behalf of appellees, and in the course of his testimony, after stating that he was a member of the firm at the time it is claimed the goods were purchased from Gugenheim & Co., but that he knew nothing personally about it, stated that he was absent from their place of business, and received a letter from a member of the firm in reference to the purchase, which he produced. So much of that letter as has bearing on the questions before us is as follows: "WILLS POINT, TEXAS, Jan'y 17, 1882. *W. A. Williams, Esq., Pilot Point, Texas*—DEAR BILLY: We have purchased Gugenheim & Co. stock goods, but will not make it known for a few days, on account of some goods yet to arrive, at which time will write you all the particulars. Don't mention this to any person." He then stated that between the 20th and 25th of the same month he received another letter giving the details of the transaction in reference to the stock of goods. After accounting for the non-production of that letter, he stated its contents as follows: "In this letter Mr. Lybrand made substantially the following statements, to-wit: That their attorney had told them that a mortgage on a stock of goods would not hold; that the bank would have to buy the stock from Gugenheim & Co. straight out, to pay their debt, which was about \$6,300; that the bank did buy the stock from Gugenheim with the understanding, at the time, that Thompson was to be put in charge of the goods, but that he, Gugenheim, was to stay in the store in connection with the business, they allowing him a living out of it until the debt to the bank was paid, when the goods were to go back to Gugenheim; that the purchase had been made to keep Gugenheim's creditors from attaching the goods." The evidence of Williams in regard to the letter last referred to, was objected to by appellants on three grounds: (1) Because there was no issue under which the evidence was admissible; (2) because the letter was a privileged communication; (3) because the testimony was only the declaration of the witness "as to the *status* of the transaction between Gugenheim & Co. and defendants, made long after the dissolution of the partnership between witness and his other co-defendants." It appears elsewhere in the record that the partnership between Williams and the other defendants was dissolved January 1, 1883. The evidence objected to tended to show that there was not a sale of the goods, but a simulation, under the cover of which the goods should be withdrawn from the reach of other creditors; or that the transaction should be, as between the parties, nothing more than a mortgage under which Gugenheim & Co. should remain in possession and sell in the ordinary course of trade. Either of those conditions would make the transaction invalid as to other creditors of Gugenheim & Co., and it was proper to receive, under the issues made, the evidence offered. The letter was an admission, made by one member of the firm, shown to have been present at the time the transaction with Gugenheim & Co. was consummated, tending to show what its real nature was, and in reference to which either partner could be compelled to testify. Such declarations or admissions, made by one partner to another, have never been recognized as privileged communications. The fact of partnership being shown to have existed at the time the letter was written, and at the time the transaction to which it referred occurred, the writing of the letter and its contents might be proved by any person having knowledge of those facts. The fact that Williams testified after the dissolution of the partnership does not affect the admissibility of the evidence, showing an admission or declaration made by one member of the firm prior to dissolution.

Appellants offered to introduce in evidence a book furnished by them to Gugenheim & Co., in which was contained what purported to be a statement of the debits and credits between them, made up from time to time by the appellants, and embracing a period before and after the transaction through which they claim the goods. The credits to Gugenheim & Co. were shown

to have been entered in his presence, or in the presence of such person as he sent to the bank with money, but the debits to that firm were transcribed by appellants from a book in which they were originally entered. That such entries in a pass-book would be evidence against the bank in a controversy between it and the depositor is true, and under given circumstances such evidence ought to be received against the depositor, but we do not see on what ground the book offered could be received against a third person. The admission of bank-books of original entry is governed by the same rules as the admission of the books of shop-keepers and others, which, however, may be varied by the course of business between the parties. Those of the appellants, as well as *Gugenheim*, showed that the indebtedness of *Gugenheim & Co.* to appellants prior to the transaction about the goods was about as claimed by them, and the testimony of the other partner, *Williams*, did not controvert this. It was stated, however, by *Williams*, that appellants other than himself were partners in a banking business before he became a member of the firm, and that, prior to his so becoming, about \$4,000 of the indebtedness of *Gugenheim & Co.* accrued, and the balance afterwards. Counsel for appellees, in presenting an argument to the court on the law of the case, insisted that only the indebtedness of *Gugenheim & Co.* accruing after *Williams* became a partner should be looked to in determining whether appellants paid an adequate consideration for the goods, and presented a charge embracing that view of the law, which the court refused to give. It is now insisted that it was error to permit such an argument to be made to the court in closing. Whether the question was raised earlier in the argument is not clear from the statement made by the judge in signing the bill of exceptions; but, if raised only in the closing argument, and directed to the court with a view to have a charge on the point, this would not be sufficient ground for reversal. The evidence was voluminous, and it was the right of counsel for each party to comment upon any and every part of it; but if in opening argument any item of evidence was, through inadvertence or otherwise, not commented upon, counsel closing the argument would not thereby be precluded from calling the attention of the court or jury to it. While it is the duty of counsel opening the argument of a cause to present the whole case as he relies upon it, both of law and fact, yet it must not be understood by this that counsel must notice every particle of evidence tending to establish a fact, or otherwise be denied the right to refer to it. Counsel for appellant, in argument, as in the issues and evidence presented, no doubt insisted on the adequacy of the price claimed to have been paid for the goods and upon the real amount of the indebtedness of *Gugenheim & Co.* to the bank, and a reply such as is suggested to have been made would be legitimate.

In support of a motion for new trial appellants proposed to introduce affidavits of jurors to show what their understandings of the facts were, and upon what ground they rendered a verdict in favor of appellees, and these the court refused to hear. That such affidavits cannot be received is well settled. *Mason v. Russell*, 1 Tex. 725; *Campbell v. Skidmore*, Id. 478; *Kilgore v. Jordan*, 17 Tex. 346; *Little v. Birdwell*, 21 Tex. 612; *Thomas v. Zushlag*, 25 Tex. 229; *Johnson v. State*, 27 Tex. 769. If there be any exception to this rule it has not been defined in any case in this state, and no facts were shown by the affidavits offered which are not met by the cases to which we have referred. It is urged that the evidence so clearly showed that appellants bought the goods absolutely, and paid therefor an adequate consideration in the release to *Gugenheim & Co.* for so much of that firm's indebtedness as to have required the motion for new trial to be granted. Three members of the firm appellant, as well as *Gugenheim*, made a case by their evidence that would have entitled them to a verdict; but there was other evidence than that to which we have referred which looked in the other direction. It was shown that *Gugenheim & Co.* were insolvent, and, in addition to his

evidence before referred to, Williams testified as follows: "In the summer or fall of 1882 I went out on a camp hunt with Mr. H. Fuller, one of the defendants, and while returning to Wills Point from our hunt, we had a conversation about the Gugenheim business, in which Mr. Fuller said that the business was to be carried on in the name of the Wills Point Bank until the Gugenheim debt to the bank was paid, when it was to go back to Gugenheim; that Gugenheim was to have charge of and run the business, allowing him a living out of it only during the time; that he (Fuller) did not care anything about what became of the goods, or of Gugenheim either, after they got their money out of it; that he had given Gugenheim to understand that when the debt to the bank was reduced to \$1,000, he (Fuller) would help him." The same witness further stated that "in the month of January, 1883, about one year after the levy of the attachment, the Wills Point Bank rendered a statement to me of the resources and liabilities of the bank, in which there appeared, under the head of resources, a claim against Gugenheim & Co. for about \$2,600, then due the bank. This statement was made about the time of the dissolution of my partnership with the bank. It was in the handwriting of J. W. Fuller, one of the firm, and was transmitted to me in a letter from Mr. Lybrand, with the statement that it was substantially correct." The statement and accompanying letter were produced, and showed that Gugenheim & Co. were indebted to the bank in the sum of \$2,636.64, which was then regarded and stated to be a part of the resources or assets of the bank; that the statement was made was admitted by appellants. These persons stated that Gugenheim & Co. were indebted to the bank only about \$800, after buying his goods, and releasing him for their price, and that this indebtedness was not increased by Gugenheim & Co. afterwards. The explanation given of that statement by one or more of appellants is: "The item marked 'Gugenheim & Co., \$2,636.64,' was intended to show the lossage on the business we had bought from Gugenheim & Co. Gugenheim's transfer of the stock to us lacked something over \$800 of paying his debt to us, and in prosecuting the business we bought from him we lost sufficient to make these two items \$2,636.64." The jury may have had some difficulty in understanding how losses could constitute assets or resources; and may have been unable to understand why Gugenheim & Co. should be charged with losses resulting in the conduct of a business by appellants with goods they had absolutely bought and paid Gugenheim & Co. for. If appellants bought the goods from Gugenheim & Co. the loss on them was their loss; but if the transaction was not what it appeared to be, and the goods remained the property of Gugenheim & Co., then that firm ought to bear the loss of a business conducted for its benefit, even though the receipts from the business by agreement between the two firms were to be applied to the payment of debt due appellants.

The verdict may be wrong. Whether so, depends on the credibility of witnesses, which was for the determination of the jury. It is urged in this court, and not before, that the judgment is excessive, in that damages were given on the value of the property claimed which were in excess of the debt due appellees. If interest on the judgment obtained by appellees against Gugenheim & Co. be computed to date of judgment rendered in this cause, to say nothing of the costs which became by the judgment a part of the debt due appellees, there may be an excess of a few cents in the damages awarded; but, if so, the judgment will not be reversed or corrected in this court, when no effort was made in the court below to have this done, the excess being so trifling. There are some other matters which, without any assignment of errors raising them, appellants attempt to raise in this court, but they are not such as can be considered without proper assignments of error. There is no error in the judgment requiring a reversal, and it will be affirmed.

DEMOVAL *et al.* v. DAVIDSON COUNTY.

(Supreme Court of Tennessee. January 17, 1889.)

1. CONSTITUTIONAL LAW—TAXATION—DRUGGISTS SELLING LIQUORS.

Act Tenn. March 9, 1887, provides that all druggists who have made themselves liable for taxes under the revenue laws of 1881-82, 1883-84, and 1885-86, making them liquor dealers, and who were not in fact using the druggist license as a blind, but were in good faith selling liquors as medicine, are released from all liability for those years. *Held*, that druggists who sell liquors only for medicinal purposes are a distinct class from ordinary liquor dealers, and that therefore the act is not in violation of Const. Tenn. art. 11, § 8, prohibiting the suspension of any general law for the benefit of particular individuals, and prohibiting any law granting to individuals "rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."

2. TAXATION—RELEASE OF FORMER TAXES—POWER OF STATE.

The act of 1887 is simply an exercise of the state's power to compromise or release its claims against debtors, and therefore it is no objection to the act that no provision is made for refunding the tax of such druggists of that class as had already paid.

3. CONSTITUTIONAL LAW—TAXATION—RETROSPECTIVE LEGISLATION.

That the act applies only to past delinquencies, and has no prospective effect, does not make it retrospective within the inhibition of the constitution.

4. SAME—UNWISE LEGISLATION.

That the act may be unwise, presents no reason for declaring it void. The policy of such legislation is not for the courts to determine, so long as it is constitutional.

5. TAXATION—RELEASE OF COUNTY TAXES BY LEGISLATURE.

The legislature has the power to release county taxes; and, the release in the act of 1887 being of all liability, it extends to the liability incurred to counties as well as to the state.

Appeal from chancery court, Davidson county; ANDREW ALLISON, Chancellor.

Bill for injunction, filed by complainant Demoval and others against Davidson county, to compel it to dismiss an action pending against him for the recovery of liquor dealer's tax. There was a decree granting the relief prayed for, and defendant appeals.

Atty. Gen. G. W. Pickle, Thos. J. Freeman, and J. B. Dantels, for appellant. *East & Fogg and Demoss & Malone*, for appellees.

LURTON, J The material question arising upon this appeal involves the constitutionality of an act of the legislature passed March 9, 1887, entitled "An act to relieve druggists of all taxes that have accrued against them as liquor dealers under the revenue laws of 1881-82, 1883-84, and 1885-86." This act is as follows: "Section 1. Be it enacted by the general assembly of the state of Tennessee, that all druggists in this state who have made themselves liable for taxes as liquor dealers under the revenue laws of 1881-82, 1883-84, and 1885-86, making them liquor dealers, and who were not in fact using the druggist license as a blind, but were in good faith only selling the prohibited articles as medicine, be, and they are hereby, relieved from all liability for those years. Sec. 2. Be it further enacted that in all cases falling under the provisions of the foregoing section, where suits have been brought and are now pending in any of the courts, the same shall be dismissed at defendant's cost, and that defendants shall be liable for and pay all attorney's fees due by the state for the institution and prosecution of suits against druggists under the laws of 1881-82, 1883-84, and 1885-86. Sec. 3. Be it further enacted that this act shall take effect from and after its passage; the public welfare requiring it." Acts 1887, p. 179.

The first objection urged is that the act is in violation of article 11, § 8, of the constitution, which reads as follows: "The legislature shall have no

power to suspend any general law for the benefit of any particular individuals; nor to pass any law for the benefit of individuals, inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law." This clause "does not prohibit legislation for the benefit of classes composed of any members of the community who may bring themselves within the class." *Davis v. State*, 3 Lea, 380. But it is argued that all liquor dealers constitute a class, and that this act singles out one portion of the class, to-wit, druggists who have sold for medicinal purposes only, and extends relief alone to them. But druggists are not liquor dealers in any true sense. It is a fact of common knowledge that the sale of liquors for medicinal purposes has until very lately been a recognized part of the ordinary and legitimate business of a druggist, and permissible under the ordinary license of a merchant engaged in the drug business. If a druggist sold liquors as a beverage, he became thereby, in fact, as well as in law, a liquor dealer. The revenue laws of 1881-82 and subsequent years were extended to druggists who sold liquors for any other than sacramental uses. Thus druggists, as a class, *eo nomine*, were required to pay the liquor dealer's privilege tax if they sold even for medical purposes. These acts were construed, and their validity passed upon, in the *Druggist's Tax Cases*, reported in 1 Pickle, 449, 3 S. W. Rep. 490. The act now under consideration extends relief to all this class who have made themselves liable to such tax for the years named therein, who have not, by the character of their sales, made themselves liquor dealers in fact; that is, the relief is extended to all of the class of druggists who have sold for medicinal purposes only, while those who have sold as a beverage, and thereby become members of the "liquor dealer" class, are not relieved.

The class thus described by the act forms a natural, and not an arbitrary, class, and legislation with regard to this class is not for the benefit of individuals within the meaning of the constitution. But it is said that the act makes no provisions for the return of the tax to such as have paid it, and that it is therefore partial. This might be dismissed with the suggestion that it does not appear that there are any such. But would this be an objection to such an act? This liability, after it was incurred, became a debt due the state, and the relation of debtor and creditor existed. Can the state release or compromise with its debtors? Resolutions and acts releasing bail-bond forfeitures, and compromising or releasing sureties upon the bonds of revenue and other officers, are not uncommon, and their validity has been unquestioned. That the power to settle, compromise, and even release a liability due the state ought to exist somewhere, is most obvious. Concerning this power this court, in *McEwen's Case*, reported in 5 Humph. 242, said: "That the legislature of the state, in the absence of constitutional prohibition, is the proper guardian and protector of its funds, no matter for what purpose appropriated, and that as such it is its duty to watch over them, to see that they are properly secured, vested, and applied as the law may direct, is a proposition so palpably in accordance with reason and necessity that it were a waste of time to enter into an argument to prove it. It necessarily follows that if these funds, or any portion of them, be out of the treasury, and in the hands of a citizen, the power to collect, compromise, and arrange the same with the citizen belongs to the legislature, to be exercised according to its best judgment, for the security and prosperity of the state, and upon principles of right and justice to the citizen. This power on the part of the legislature is supreme, and when exercised cannot be revised or called in question by any other power whatever; and it may be exercised by that body in its collective capacity, or it may be delegated to a commission, the decision of which, when made in pursuance of the power delegated, is equally final and conclusive." 5 Humph. 285.

The legislative power of the general assembly of this state extends to every subject, except in so far as it is prohibited, either by the delegated power of the federal government, or by the restrictions of our own constitution. *Davis v. State*, 3 Lea, 376. He who would show the unconstitutionality of an act of the legislature, must be able to put his finger upon the provisions of the constitution violated. That the power of compromising or releasing a liability may be abused, is no answer to its existence. All human power is liable to abuse. The power of public opinion, the responsibility of legislators to their constituents, are likely to prevent any very great abuse of such power, and afford reasonable guaranties for its proper exercise. There is no clause of the constitution which prohibits the legislature from releasing any of its debtors, and, indeed, the learned counsel representing the state do not challenge its existence with regard to individual debtors. But they insist that its exercise must be restrained by the limitations contained in the constitution requiring all legislation to be general. This argument, if sound, might require the state, if it released one debtor, to release all in a similar situation. This is not reasonable; for it is conceded that a state may compromise with or release a single debtor, without extending the same terms to other debtors on the same account. Now, if the state may by resolution or bill compromise with or release one debtor, or the sureties upon a particular bond, why may it not include in the same release any number of debtors? If such an act or resolution would be valid if the debtors relieved were named, why will it not be equally valid if those to whom relief is extended are by the act so described as to constitute a class? We can see none. That the release is conditional upon the existence of certain facts, or upon acceptance of certain terms, such as are named in the second section of this act, where suit has been brought, is not at all objectionable. The second section is operative only upon the collecting officers of the state, and requires them to dismiss suits pending upon acceptance of the terms of the act by the defendants. It contains no mandate to the courts.

The case of *State v. Burnett*, 6 Heisk. 186, is relied upon by the attorney general. The act considered in that case was one refunding to the tax-payers of Roane county the state tax on property paid by them upon the assessment for 1864. The decision in that case was put upon the ground that the act undertook "to donate to certain individuals in Roane county, out of the treasury of the state, the several amounts paid by them into the treasury in 1864, but confers no such benefit on the other individuals in other counties of the state who had made like payments." The result reached in the case was right. The donation of a fund from the state's treasury is a very different proposition from the release of a liability to the state. The appropriation of public money to other than public purposes would be beyond the legislative power, and in a clear case might be restrained by the courts. *Trustees v. George*, 14 W. Va. 411, 35 Amer. Rep. 760. The case is to be distinguished from this in another respect. The tax refunded in that case was a property tax. The tax released in this case is a privilege tax. Article 2, § 28, of the constitution requires that property taxation shall be equal and uniform, while there is no such express requirement as to privileges, which the same section declares may be taxed in such manner as the legislature may from time to time direct. *Kurth v. State*, 2 Pickle, 134, 5 S. W. Rep. 593.

The refunding of a property tax to the people of one county would probably operate as unequal taxation. That case in no aspect is controlling as to the question now under consideration, for if the validity of the act releasing certain tax-payers who have incurred liability for a privilege tax depends upon its applicability to all members of the community in a like situation,—a question which we reserve,—then the requirement is met in this case, for druggists selling liquors for medicinal purposes only, form a natural, and not an arbitrary, class, distinct from liquor dealers in any true or legal sense of the

term. The act is therefore not one for the benefit of individuals within the meaning of the constitution. That the act applies alone to past delinquencies, and has no prospective effect, does not make it retrospective legislation in the sense of the constitution. All release acts or resolutions, settling, compromising, or releasing liabilities due the state, are in one sense retroactive, but there can be no doubt that the state may pass such retroactive laws as only waive her own right without violating the constitution. *Black, Const. Prohib. § 221; Davis v. Dawes, 4 Watts & S. 401; Lewis v. Turner, 40 Ga. 416; Mayers v. Byrne, 19 Ark. 308.* That such a release act may have been unwise, presents no reason for declaring it void. The policy of such legislation may be debatable, but the legislature must settle all such questions under their responsibility to their constituents. The question as to this court is one of legislative power. If this exists, the act must stand. The operation of the act is obviously a release of all who have made themselves liable by sales for medicinal uses. It does not, therefore, matter whether the liability has been reduced to judgment before the passage of the act, or is still the subject of a pending suit. If the party liable chooses to rely upon the release, he may do so by injunction bill as in this case, or by pleading it and offering to comply with the terms of the second section when suit was pending at the passage of the act.

Does the act release the liability of complainant to Davidson county for this privilege tax? We think it does. The liability was incurred to both state and county under the same law, and upon the same state of facts. The act releases the class of citizens described in the act from all liability incurred during certain years. The terms are comprehensive enough to embrace liability to the county as well as the state. The state may release a liability to the county for such a tax as well as it may release liability to itself. The county is but an emanation from the state. It does not exercise any power or franchise under contract between itself and the state. The latter creates, and it may destroy. The state delegates the power of taxation, but it may withdraw such power, and itself assess taxes for municipal purposes. *Luhrman v. Tazewell Dist., 2 Lea, 425.* If the legislature may wholly withdraw the taxing power from a county, it may release a tax assessed by the county. The greater power includes the less. There is no contract that the county shall be permitted to collect such a tax, and no creditor's rights are involved in the case under consideration.

The case of *Nashville v. Herbert, 5 Sneed, 186*, is not in point. The legislature has no authority to authorize a county to levy a tax for any other than a county purpose. Const. art. 2, § 29. Therefore, an act authorizing the application of a county tax, assessed for county purposes, to be paid over to the city of Nashville to be used for city purposes, was void. This is all that was decided in that case. What is said about contract rights or vested rights is *dictum*.

The act relied upon by complainants is valid, and the decrees of the chancellor affirmed, there being no error in his decree.

BRIGHT v. MOORE.

(Supreme Court of Tennessee. January 1, 1889.)

LIMITATION OF ACTIONS—DISABILITIES—SUITS AGAINST PERSONAL REPRESENTATIVES.

A period of two months, elapsing between the death of the maker of a note and the granting of administration on his estate, is to be excluded in computing time under the statute of limitations, under Code Tenn. (Mill. & V.) § 8454, enacting that "the time between the death of a person and the grant of * * * administration on his estate, not exceeding six months, * * * is not to be taken as a part of the time limited for commencing actions which lie against the personal representative."

Appeal from circuit court, Lincoln county; M. D. SMALLMAN, Judge.
John M. Bright, for appellant. *N. P. Carter*, for appellee.

CALDWELL, J. On the 5th of January, 1881, W. C. Bright executed a promissory note to H. L. Moore for \$175, due 12 months after date. Bright died November 20, 1887, leaving the note unpaid. Letters of administration upon his estate were granted to Anna B. Bright, January 24, 1888, and Moore brought this action against her on the 26th of July, 1888, to collect said note. The suit was commenced before a justice of the peace, who rendered judgment for Moore. The administratrix appealed to the circuit court, where the circuit judge tried the case without the intervention of a jury, and pronounced judgment, as did the justice of the peace, in favor of Moore, for the full amount of the note with interest thereon. The administratrix appealed on error to this court.

The only defense interposed in the court below, and the only one relied upon here by the learned counsel of appellant, is the statute of limitations of six years. Was the action barred? From the dates already given it is readily seen that six years, six months, and twenty-one days elapsed between the maturity of the note and the commencement of this action. It is conceded that the six months immediately following the grant of letters of administration, during which suit would not lie against the administratrix, must be excluded in the computation of the time necessary to complete the bar of the statute in her favor; but after the exclusion of that six months there still remains a period of six years and twenty-one days between the date of the maturity of the note and the bringing of this suit. The insistence is that the statute of limitation was running during the whole of the latter period, and that the bar is inevitable. This contention is met by a provision of the law, which makes a further exclusion of two months and four days—the time between the death of Bright on the 20th of November, 1887, and the qualification of his administratrix, on the 24th of January, 1888. Section 8454 of the Code, (Mill. & V.) is in the following language: "The time between the death of a person and the grant of letters testamentary, or of administration on his estate, not exceeding six months, and the six months within which a personal representative is exempt from suit, is not to be taken as a part of the time limited for commencing actions which lie against the personal representative." This statute, in the clearest terms, excludes from the time to be computed under the statute of limitations not only the first six months after the grant of letters testamentary or of administration, but also the time elapsing between the death of the debtor and the grant of such letters, provided only that the latter period excluded shall not exceed six months. In other words, the statute of limitation does not run against the creditor of a dead man's estate from the date of his death until the expiration of six months after the qualification of an executor or administrator on his estate, unless the whole period should exceed twelve months. In no event will the cessation of the statute's operation be for a longer time than one year. It will be for less than one year when the time between the death of the debtor and the qualification of his personal representative is less than six months. The first six months after the qualification of the personal representative is excluded, because no suit can be maintained against him during that time (Code Mill. & V. § 8112;) and the period between the death and the qualification, not to exceed six months, is excluded because there is no one whom the creditor may sue during that time. Applying this construction of section 8454 of the Code to the facts of this case, and making proper exclusions, it is readily demonstrated that the six years statute of limitation had not run its full time, and that the bar was not complete when this suit was brought. Let the judgment be affirmed with cost.

STEFFNER *et al.* v. BURTON.

(Supreme Court of Tennessee. November 12, 1888.)

COSTS—RIGHT OF PLAINTIFF TO COSTS—ACTION FOR DAMAGES.

Under act Tenn. 1829, (Mill. & V. Code, § 3922,) providing that no more costs than damages can be recovered in actions for false imprisonment, etc., unless the recovery exceed five dollars, where a jury is waived in an action for false imprisonment and assault and battery, and the judge finds five dollars damages, the plaintiff must pay all costs in excess of five dollars.

Appeal from circuit court, Sullivan county; ANDREW J. BROWN, Judge.

This was an action by J. P. Burton against J. N. Steffner and others for false imprisonment and assault and battery. Defendants appealed.

C. J. St. John and N. M. Taylor, for appellants. Haynes & Haynes, for appellee.

CALDWELL, J. Burton sued Steffner and others for \$1,000, as damages for false imprisonment and assault and battery. The case was tried by the circuit judge without a jury. He found the issues in favor of the plaintiff, assessed his damages at five dollars, and rendered judgment against the defendant for that sum, and all costs. Steffner and his co-defendants have appealed in error to this court. The only assignment of error is with respect to the adjudication of costs; the contention of appellants being that they cannot lawfully be required to pay more than five dollars costs, because the damages assessed against them do not exceed five dollars. The disposition of court costs has been a fruitful subject of legislative enactment. Since 1794 the rule has been that the successful party in all civil actions is entitled to judgment for full costs, unless otherwise directed by law. Acts 1794, c. 1, § 74, (Car. & Nich. p. 188;) Code, (Mill. & V.) § 3921. Prior thereto, in 1715, it had been enacted that a plaintiff in an action of slander, who recovered damages under five dollars, "could recover only so much costs as damages." Acts 1715, c. 27, § 8, (Car. & Nich. p. 188.) And thereafter, in 1811, it was enacted that, in suits for the recovery of damages occasioned by the overflowing of water by the erection and operation of a grist-mill or other water-works of utility, the plaintiffs shall in no instance recover a greater sum in costs than the damages assessed by the jury, and that the residue of the costs should be adjudged against the plaintiff. Acts 1811, c. 91, §§ 1, 2, (Car. & Nich. p. 189.) In 1829 it was enacted that in all civil actions for assault, assault and battery, malicious prosecution, and false imprisonment, the "plaintiff shall recover no more costs than damages, unless the amount of damages given him shall exceed the sum of five dollars." Acts 1829, c. 1, § 1, (Car. & Nich. p. 190.) Each of the three acts last named made an exception to the general rule that the successful party is entitled to recover full costs, and yet no two of them made the same provision with respect to costs. By the act of 1715, the plaintiff in the given case was deprived of his right to recover full costs only when his recovery of damages was for a less sum than five dollars, in which event he was allowed to recover only so much cost as damages. By the act of 1829 he was denied full costs when his recovery of damages was not for a greater sum than five dollars, and by the act of 1811 he could in no event recover more costs than damages, whether the damages recovered be less or greater than five dollars. This lack of harmony in these statutes must have been in the minds of the legislators when, in 1852, the foregoing provisions of the act of 1811 were repealed; and instead thereof another act was passed providing that, in suits for damages occasioned by the overflowing of water from the same cause mentioned in the act repealed, the successful plaintiff should recover full costs, except when his judgment for damages should not exceed five dollars, in which case he should recover no more costs than damages. Acts

1851-52, c. 146, § 1. This enactment brought the different classes of actions mentioned in the acts of 1811 and of 1829 within the same special rule, or the same exception to the general rule, with respect to costs; but it left the matter of costs, in an action for slanderous words, subject to the other special rule provided by the act of 1715. It would seem that this remaining want of conformity in the law of costs was observed and intended to be overcome by the compilers of our Code, who compressed the several provisions into one section, as follows: "In all civil actions founded upon assaults, assaults and battery, malicious prosecution, false imprisonment, slanderous words, or for the recovery of damages for overflowing of water by the erection of a grist-mill, or other water-works of utility, the plaintiff recovers no more costs than damages, unless the recovery exceed five dollars." Code 1858, § 3198; Code Mill. & V. § 3922.

But as a matter of fact, and notwithstanding actions for slanderous words are expressly included in the section just quoted, the provision for costs in the act of 1715 was compiled separately, and placed under its appropriate head of "Slander and Libel," in a subsequent chapter and section of the Code, in these words: "Where the verdict in slander is under five dollars, the plaintiff shall recover no more costs than damages." Code 1858, § 3402; Code Mill. & V. § 4138. Since the adoption of the Code of 1858, section 3402, and not section 3198, has been held to be the law in an action of slander, and a plaintiff in such an action with a judgment for the sum of five dollars damages has been allowed to recover all costs. *Bates v. Sullivan*, 3 Head, 633, 634.

Nevertheless, as to the other actions therein enumerated, section 3198 is controlling in matters of costs, and by its provisions the present case must be determined; this action being for false imprisonment, and assault and battery, and the damages assessed not exceeding five dollars. It matters not that the damages were assessed by the circuit judge instead of a jury; for, by the statute permitting parties litigant to waive their right of trial by jury, and by the uniform practice of this court, the finding of the facts by the circuit judge, when the trial by jury has been waived, as was done in this case, is treated as the verdict of a jury. The finding of the trial judge that the plaintiff had been damaged to the extent of five dollars by the wrongful acts of the defendant has the same force and virtue as the verdict of a jury assessing his damages at the same amount would have possessed, and the rules of law applicable to the costs of the litigation in the one case are the same as those that would be applied in the other case. We have seen that this case falls within an exception to the general rule that the successful party is entitled to recover all costs from his unsuccessful adversary, and that the statute making this exception will permit the plaintiff in this case to recover only so much costs as damages; the damages not being in excess of five dollars. But it may be said that there is no express provision on the face of the act for the disposition of the balance of the costs. That is true. There is no such express provision; nevertheless we think there can be no serious difficulty in determining what disposition the law-makers intended should be made of the balance of the costs in such a case. All costs must be paid by some party or parties to the litigation, and it is the duty of the court to adjudge all the costs in every case. Hence, when it is enacted that in a certain case and contingency the plaintiff shall recover only a given amount of the costs, it follows, by necessary implication, that the legislators intended that the defendant in such a case and contingency should have a recovery for the residue of the costs. The object of this legislation was to prevent frivolous and vexatious litigation; to keep parties out of court when the injury done was so trivial in its nature and extent that a recovery could not be obtained for more than five dollars damages. The object is praiseworthy; the enactment a wholesome law, which should be cheerfully enforced by the courts. We hold, therefore, that the assignment of error is well made, and that the plaintiff is liable for all costs in excess of five dollars.

In the case of *Gardenhire v. McCombs*, 1 Sneed, 83, a different result was reached, and each party was required to pay his own costs, after allowing the plaintiff a recovery against the defendant for one dollar of costs; that being the amount of damages recovered. That was an action for damages occasioned by the overflowing of water on the plaintiff's land, and the costs were adjudged under the act of 1852, the principal object of which was held to have been the relief of the plaintiff in such a case from the payment of that part of the costs in excess of the sum recovered as damages. That such was the principal object of the act of 1852 was inferred from the fact that it repealed the second section of the act of 1811, which in terms provided that the plaintiff should pay all costs beyond the amount of damages recovered by him. We think that inference was not well drawn from the fact stated, or from anything else appearing in the act of 1852 or elsewhere, and that the decision in that case was unsound, and should not be followed as a precedent. The object of the act of 1852 must have been, as the result was, to bring that class of actions referred to in the act of 1811 within the same special rule, (relating to costs,) which had in the mean time been established with respect to other actions by the act of 1829; and the manifest purpose of all these enactments, that of 1715, 1811, 1829, and 1852, was to discourage frivolous and vexatious litigation.

But if the *Gardenhire Case* were approved upon its own reasoning, it would not control the case at bar, because that reasoning has no application to this case, which in no sense stands upon the act of 1852 or of 1811, but entirely upon the act of 1829, as brought into the Code, without change in meaning.

As to costs, the judgment is reversed, and judgment will be entered here in favor of Burton for five dollars as damages, and for the same amount as costs.

The residue of the costs below, and all the costs of this court, are adjudged in favor of appellants, and against Burton.

BRAKEFIELD v. ANDERSON.

(*Supreme Court of Tennessee. January 12, 1880.*)

SPECIFIC PERFORMANCE—CONTRACT—STATUTE OF FRAUDS.

Although in Tennessee an oral contract for the sale of land is not taken out of the statute by possession and part payment, yet such a contract is not void, but voidable, and where both parties to a bill for specific performance treat the contract as valid, and differ only as to the amount due, it is error to dismiss the bill on the ground that the contract is oral.

Appeal from chancery court, Franklin county; W. S. BEARDEN, Chancellor.

Bill for specific performance, brought by W. W. Brakefield against James Anderson. The bill was dismissed at the hearing, and complainant appeals.

John Simmons and Marks & Gregory, for appellant. *Brannon & Banks*, for appellee.

CALDWELL, J. In August, 1876, W. W. Brakefield bought of James Anderson 37½ acres of land in Franklin county, and went immediately into possession. More than eight years thereafter, in November, 1884, Brakefield filed the original bill in this cause, setting out the contract, and alleging the payment of the purchase money, and the refusal of Anderson to convey him the land; and praying for a specific performance of the contract, if that could be granted by the court, and, if not, that he be allowed a recovery for the purchase money paid, and also for the value of improvements by him placed upon the land. Anderson answered the bill, admitting the contract, but denying that the whole of the price had been paid. In his answer he further says: "The trade was made in good faith by respondent, and he is able, ready, and

willing to make complainant a warranty deed to said 37½ acres of land whenever complainant pays him the balance of the purchase money and the interest now due upon the land." The answer is then filed as a cross-bill, with a prayer that Anderson be allowed a decree against Brakefield for the balance of purchase money due, and that the land be sold for the satisfaction thereof. Brakefield answered the cross-bill, insisting, as in the original bill, that he had paid all the purchase money for the land. Upon these pleadings and proof that the contract had never been reduced to writing, the chancellor, on his own motion, pronounced a decree rescinding the sale, and referring the cause to the master for an account of purchase money paid, improvements, rents, and taxes. In due time a decree was made upon the report of the master and exceptions thereto. Brakefield has appealed.

The decree rescinding the sale is manifestly erroneous, and will be reversed. The learned chancellor must have been of the opinion that the contract of sale was absolutely void for all purposes, because resting in parol; and that a court should not, therefore, in any event, assist in its enforcement. This is a mistaken view of the law. It is true that the statute provides that no action shall be brought upon any contract for the sale of land, unless the contract, or some memorandum thereof, shall be reduced to writing, and signed by the vendor, or some other person by him thereunto lawfully authorized. Code, Mill. & V. § 2423, subsec. 4. And it is likewise true, under the decisions of this court, and contrary to those of the English courts, that part performance of a parol contract for the sale of land, by delivery of possession on the one side and payment of a portion or the whole of the purchase money on the other, will not render the contract binding, or take it out of the operation of the statute. *Patton v. McClure*, Mart. & Y. 335; *Crippen v. Bearden*, 5 Humph. 130; *Sheid v. Stamps*, 2 Sneed, 177; *Jennings v. Bishop*, MS. Op., (Nashville, Dec. 1883.) But the statute is operative to defeat a verbal contract only when interposed by one of the parties. Such a contract may be enforced by the consent and upon the application of both parties. So long as it is recognized, affirmed, and adhered to by vendor and vendee, it cannot be annulled by the voluntary action of the court. The sounder view is that a verbal sale of land is not void *ab initio*, but only voidable at the election of either party, and not enforceable by one against the will of the other, who abandons or repudiates it. The decisions of this court have not been altogether harmonious upon this subject. In several of them such sales have been characterized as void, (*Pepkin v. James*, 1 Humph. 325; *Crippen v. Bearden*, 5 Humph. 130; *Hurst v. Means*, 2 Swan, 598; *Sheid v. Stamps*, 2 Sneed, 175;) and in many others they have been held to be voidable merely, (*Sneed v. Bradley*, 4 Sneed, 304; *Hilton v. Duncan*, 1 Cold. 320; *Roberts v. Francis*, 2 Heisk. 134; *Hamilton v. Gilbert*, Id. 681; *Mason v. Swan*, 6 Heisk. 455.) In some of the cases of the former class, no distinction was taken, or was necessary to be taken, between the terms "void" and "voidable." But the distinction suggested by the words themselves was expressly made in the cases of the latter class, wherein parol sales were held to be voidable only, and not void.

The later case of *Biggs v. Johnson* was an action at law by a vendee in possession, to recover from the vendor purchase money paid under an insufficient written contract for the sale of land. Johnston insisted that the action could not be maintained, because Biggs did not surrender possession of the land before commencing the suit. The majority of the court held that the actual removal from the land by the vendee was not a prerequisite to his right of action, but that notice of his election to abandon the contract was sufficient to authorize his suit. In the decision of that case the learned judge who delivered the majority opinion said that the contract was "void in law, having no element of legal obligation enforceable against either party." *Biggs v. Johnson*, MS. Op., (Jackson, April, 1876.) In the case of a bill by the

vendee to rescind a verbal contract for the sale of land, this court said: "There is no contest as to the question of the right to rescind such a contract by either party, or rather to treat it as void at their option, since the case of *Biggs v. Johnson*." *Wenters v. Elliott*, 1 Lea, 676. To the same effect is the language used and the decision made in the case of *Hays v. Worsham*, 9 Lea, 593. But even these three cases concede, by implication at least, that the contract is binding upon the parties until one of them elects to rescind or abandon it. Whether this is true or not, it is very certain that no one of them undertook to decide, or could properly have decided under the facts therein disclosed, that the courts were authorized to annul such a contract when both parties interested were insisting upon its execution.

Later still is the case of *Jennings v. Bishop*, wherein this court, speaking through Judge COOPER, said: "A parol contract for the sale of land is not absolutely void, for it may be specifically executed as against either party, if he fails or refuses to rely upon the statute; and, if the parties themselves choose to execute the contract, third parties cannot object." MS. Op., (Nashville, Dec. 1883.) We follow this case, not only because it is the most recent utterance of this court upon the subject treated, but also because we think it rests upon sound reason, and will better subserve the ends of justice than a contrary or different holding. Either party may repudiate the contract when ever he may choose to do so, without incurring any liability for its breach; but when one party seeks its enforcement through the courts, the statute, to be made available to the other party, must be by him relied upon as a defense. "The doctrine is now well established that, upon a bill for the specific execution of such a contract, if the contract be fully set forth in the bill, and the defendant admits it in his answer, and submits to waive the statute of frauds, or, what is deemed equivalent to a waiver, does not insist upon the statute as a defense, a specific performance of the contract will be decreed." *Sneed v. Bradley*, 4 Sneed, 304; *Hudson v. King*, 2 Heisk. 573. As we have seen, Judge COOPER puts the same doctrine more briefly in these words: "* * * It [the parol contract] may be specifically executed as against either party if he fails or refuses to rely upon the statute." *Jennings v. Bishop*, *supra*. In the case at bar neither party relies upon the statute. On the contrary, the vendee comes with his bill, and seeks the execution of the contract; and the vendor not only does not interpose the statute as a defense to the vendee's action, but he brings his answer and cross-bill and affirmatively asks the court to enforce the contract in his behalf. Both parties come with appropriate pleading, and say they want their contract carried out. When this is done, the reason of the statute—the prevention of fraud and perjury—ceases, and the chancellor, instead of setting the contract aside, should have decreed its specific execution; the case being one in other respects (as this one is) justifying specific performance by a court of equity.

The proof shows a balance of \$27.50 of the purchase price still unpaid; to this must be added \$18.20 interest; making in all, \$45.70. For this sum Anderson is entitled to a decree under his cross-bill, and unless payment thereof shall be made in 90 days from this date, the land will be sold. If, however, the said sum shall be paid within that time, then Anderson will be required to make Brakefield an absolute deed with the usual covenants. The costs of this court and the court below will be equally divided between them.

DAVIS v. DAVIS.

(Supreme Court of Tennessee. January 8, 1889.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF DECEDENT'S REAL ESTATE—JURISDICTION OF COUNTY COURT.

Under Code Tenn. §§ 3105, 3106, giving the chancery and circuit courts jurisdiction of a bill for the sale of a decedent's real estate in case of a deficiency of personalty, and section 4980, subsec. 6, and sections 5005, 5045, giving the county court jurisdiction to sell property of insolvent estates, and the circuit court concurrent jurisdiction with the chancery and county courts to sell decedent's lands to pay debts where the personal assets are insufficient, and the chancery court concurrent jurisdiction with the circuit and county courts for that purpose, the county court has jurisdiction of a bill for the sale of a decedent's realty for payment of debts when the personal estate is insufficient, though there is no suggestion that the estate is insolvent.

2. LIBEL AND SLANDER—EVIDENCE.

In an action for slander for charging plaintiff with perjury in giving testimony on such a bill, evidence that plaintiff was sworn on such bill and gave testimony, and that defendant charged him with having committed perjury therein, is material, and should be admitted.

Error to circuit court, De Kalb county; M. D. SMALLMAN, Judge.

Action by J. P. Davis against T. J. Davis for slander. Plaintiff appeals in error. Code Tenn. § 4980, subsec. 6, gives the county court "original jurisdiction in * * * the settlement of insolvent estates, and for this purpose to sell real or personal property belonging thereto, * * * where the amount of the estate does not exceed \$3,000." By section 5005 circuit courts "have concurrent jurisdiction with chancery and county courts to * * * sell land to pay debts of decedents where the personal assets are insufficient." Section 5045 declares that the chancery court "has jurisdiction concurrent with the circuit and county courts of proceedings * * * for the sale of land at the instance of the creditors of the decedent if the property is insufficient to satisfy the debts of the estate."

R. C. Nesmith, Alvan Avant, and Webb & Moore, for appellant. B. G. Adcock and John B. Robinson, for appellee.

CALDWELL, J. This is an action for slander, brought in the circuit court of De Kalb county, by J. P. Davis against T. J. Davis. It is averred in the declaration that the defendant falsely and maliciously charged the plaintiff with having committed the crime of perjury, while testifying in his deposition as witness to a certain material matter about which he had been sworn in the cause of T. J. Davis, administrator *et al.*, against Coleman Davis *et al.*, then pending in the county court of De Kalb county. The defendant put in a plea of not guilty. On the issue thus made the parties went to trial before court and jury. Verdict and judgment were for the defendant, and plaintiff appealed in error.

At the trial below the plaintiff examined the clerk of the county court, who testified that he qualified plaintiff to the deposition referred to in the declaration. Then the deposition itself and other portions of the record in the county court cause were introduced as evidence in behalf of the plaintiff. From that record it appeared that T. J. Davis, administrator of Solomon Davis, deceased, and other persons, filed their bill in the county court of De Kalb county to sell land belonging to the estate of said decedent, for the payment of debts against his estate, and for distribution of the residue of the proceeds of the land among his heirs, the complainants and defendants in the bill; that in due time that cause was referred to the clerk for a report as to the amount of personal assets received, disbursed, and still in the hands of the administrator; as to *bona fide* debts against the estate theretofore paid by the administrator, and those yet unpaid; and as to amount and value of real estate, and the necessity of selling same for payment of debts, or for division

of proceeds among the heirs. It further appears from that record that J. P. Davis, the plaintiff in the present action, claimed to be a creditor of that estate to the extent of \$780, due by account for services rendered the decedent; that he filed his claim in that cause, and, pending the reference to the clerk, was sworn by the clerk, and gave his deposition to establish the justice of his said demand; and that his wife and daughter also appeared before the clerk, and gave their depositions for the same purpose.

After the examination of that clerk and the introduction of the county court record as evidence in the present case, as has already been stated, the plaintiff was placed upon the witness stand, and by his counsel asked to state whether or not he was sworn and testified as a witness in the said cause of *Davis et al. v. Davis et al.*, and whether or not the defendant in the present case had charged him with having committed perjury in his testimony, as contained in his deposition in that cause. The defendant objected, and the court refused to permit the plaintiff to answer the question. The ground of the objection, as stated in the bill of exceptions, was "because neither the county court nor its clerk had any power or jurisdiction to hear, try, or determine said matter of account in controversy between J. P. Davis and the administrator, and because it was immaterial, and said clerk could not legally administer said oath to the plaintiff." The plaintiff's wife and daughter were each offered by him to prove that they heard the defendant make the charge against him, (the plaintiff;) but the court refused to let them answer, upon the same objection by defendant. The action by the trial judge in sustaining the objection and refusing to permit the witnesses to answer the questions is now assigned as error by appellant.

If it be true, as assumed in the first part of the objection, that the county court had no jurisdiction of the matter of the account in controversy, it would follow, as assumed in the latter part of the objection, that such matter of account and the deposition were immaterial in that proceeding, and that the clerk was not authorized to administer the oath to the defendant. *Jones v. Marrs*, 11 Humph. 216, *Burkett v. McCarty*, 10 Bush, 758. So that the paramount question in this connection is whether or not the county court had jurisdiction of the matter about which J. P. Davis testified in his deposition. If such jurisdiction existed, the testimony was material, and the clerk had authority to qualify the deponent. This record fails to state in what particular the trial judge deemed the county court wanting in jurisdiction of the claim relative to which the plaintiff deposed. We infer, however, that he was of opinion that the county court had jurisdiction to entertain a bill to sell land of a deceased person for the payment of debts, and to adjudicate disputed claims only in cases of insolvency, and that the jurisdiction failed in that case because the insolvency of the estate of Solomon Davis, deceased, had not been suggested. Such is the position now taken by appellee's counsel, in argument at the bar, to sustain the action of the court below. The conclusion that the insolvency of the estate had not been suggested, is fully justified by the record of the county court proceedings. The bill did not allege such suggestion, but was framed as a bill in chancery to sell land to make assets for the payment of debts, under the act of 1827, which did not require or contemplate a previous suggestion of insolvency. By the plain letter of the act, the chancery and circuit courts have jurisdiction of such a bill, and are authorized and required to adjudicate all claims presented against the estate of a decedent. Code, (Mill. & V.) §§ 8105, 8106. And by construction of that act, in connection with other provisions of the Code, (sections 5006, 5045, 4980, subsec. 6.) it is now well settled that the county court has concurrent jurisdiction with the chancery and circuit courts to sell land for the payment of debts, though the insolvency of the estate has not been formally suggested. *Burgner v. Burgner*, 11 Heisk. 732; *Kindell v. Titus*, 9 Heisk. 727; *Norville v. Coble*, 1 Lea, 467; *Connell v. Walker*, 6 Lea, 712. Then it is certain that

the county court of De Kalb county had full jurisdiction of the matter about which the plaintiff gave his deposition; that the clerk of that court had ample authority to administer the oath to him; and that the testimony was material. If that testimony be false, the witness was guilty of legal perjury; and if true, the alleged charge that it was false is slanderous and actionable.

The action of the court in rejecting the evidence offered by the plaintiff was erroneous. For that error the judgment is reversed, and the case remanded for a new trial. The appellee will pay the costs of the appeal.

RATCLIFF v. BELFONT IRON-WORKS CO.

(Court of Appeals of Kentucky. December 1, 1888.)

1. EJECTMENT—POSSESSION—PREVIOUS ENTRY—INSTRUCTIONS.

In ejectment, neither party proved title from the state, though claiming under a common source. Plaintiff showed possession. Defendant proved no possession prior to that of plaintiff, unless a lease executed by his predecessor included the land in controversy, as to which the evidence was conflicting. At plaintiff's instance, an instruction was given relative to the possessory title necessary to a recovery, which did not define the effect of possession under said lease, if it included the disputed land. Other instructions stated that plaintiff could recover unless defendant, or those under whom he claimed, had held actual possession by entry previous to plaintiff's, and that, if defendant or his privies had held actual possession of a well-defined boundary, including the land in controversy, by such previous entry, they should find for him. *Held*, that all the instructions together were equivalent to a direction to find for defendant if the lease referred to included the land in controversy, and the omission to so charge in the first instruction was harmless.

2. SAME—EVIDENCE—ADVERSE POSSESSION.

Under such circumstances it is not necessary that plaintiff should show adverse possession for 15 years in order to recover.

3. ESTOPPEL—IN PARS.

One who, upon being asked by an intending purchaser of land if he has any claim thereto, replies that he has none, and relying upon that statement the land is purchased, is estopped from afterwards setting up his claim as against the grantee of said purchaser.

4. LANDLORD AND TENANT—ATTORNMEN TO STRANGER.

There being evidence tending to show that one of plaintiff's tenants surrendered possession to defendant, without plaintiff's consent, an instruction that such surrender was void, and did not divest plaintiff of its possession, is warranted by Gen. St. Ky. c. 68, art. 1, § 18, providing that the attornment of a tenant to a stranger shall be void unless with the landlord's consent, or pursuant to the judgment of a court.

Appeal from circuit court, Carter county; GEORGE N. BROWN, Judge.

Ejectment by the Belfont Iron-Works Company, a corporation, against John T. Ratcliff, for land in Carter county. Judgment for plaintiff, and defendant appeals.

Thomas W. Mitchell, J. D. Jones, and W. H. Julian, for appellant. E. F. Dulin, for appellee.

LEWIS, C. J. This is an action of ejectment, upon the trial of which, resulting in favor of the plaintiff, neither party exhibited title to the land in contest, which was deduced from the commonwealth. The plaintiff put in evidence a deed from Dulin, commissioner of the Greenup circuit court, on behalf of the heirs of Richard Graham, for 412 acres, described as part of Graham's 138,320 acres, to Hiram and William Pope, dated in 1873, and also a deed from the Popes, dated in 1874, to it, the plaintiff, for 354 acres. It appears from the testimony that, although the deed was not made by Dulin until 1873, the land was sold, and a survey made of it, in 1866; and in 1867 or 1868 the Popes built a cabin upon it, which was occupied by their tenants three or four years, when the house was burned, and the land was not occupied thereafter by them nor their vendee, the plaintiff, until November, 1881.

when the latter leased it in writing for one year to Coleman, who went upon it as its tenant, another cabin having been built. But a short time thereafter a tenant of the defendant Ratcliff got possession by hiring Coleman to leave, and there is evidence tending to show that was done at the instigation and at the expense of the defendant. The defendant exhibited a deed from the sheriff of Greenup county, dated 1819, to James Ward, for 188,320 acres, which, as recited in the deed, was sold under execution for small amounts against the estate of Henderson and Linton, surviving trustees of Richard Graham, deceased, and also a deed to himself, dated 1872, from Wornack and wife,—the latter a daughter of Ward,—for a tract of land, the boundary of which it is contended covers the land in dispute. There is testimony that in 1853 one Gilbert leased a tract of land within the Graham survey from Ward, and in 1866 leased the same from Wornack and wife; but, though he cleared and cultivated a small portion, does not appear to have lived on it. And one of the questions in this case is whether the land conveyed by Wornack and wife in 1872 is part of that tract. Though both plaintiff and defendant claim under the Graham patent, the evidence is not such as to directly connect the title of either of them with it, and the question is as to the superior possessory right.

The first instruction given by the court is as follows: "That the plaintiff has not made out a title deducible from the commonwealth, but if the jury believe from the evidence that the plaintiff, or those under whom he claims, had purchased the land in controversy, and took a deed for same, and entered upon and took actual possession of said land before the bringing of this suit, then the jury will find for the plaintiff the land in controversy." That instruction is not proper, unless qualified and explained by other instructions, showing all the conditions for such recovery, and also saving the hypothetical rights of the defendant. The plaintiff in ejectment may recover on a bare possession when there has been an actual disseisin or ouster, and even when there has not been such ouster, and the defendant appears to be a trespasser without color of title. *Fowke v. Darnall*, 5 Litt. (Ky.) 316. The second of these conditions does not, however, exist in this case. It is also settled that where the possession of the plaintiff and the entry upon it by the defendant are shown, the right of recovery cannot be resisted by showing that there is or may be an outstanding title in another, but only by showing that the defendant himself either has title or authority to enter under the title. *Sowder v. McMillan*, 4 Dana, 456. For, as said in that case, the plaintiff "can no more be deprived by the defendant's wrongful act of the presumptions and rights attaching to a peaceable possession than the defendant can acquire them." The fact of the plaintiff being in the peaceable possession of the land under the deed from Popes, and claiming to the extent of the boundary defined by that deed, and also marked, is made, in an instruction, a condition of its right of recovery. There was no evidence the defendant himself had ever, previous to the alleged wrongful entry by him, been in the actual possession of any part of the land. On the contrary, the possession, unless the Popes held it, was vacant from 1872, the date of the Wornack deed. But as there was evidence tending to show that Ward, and, after him, Wornack and wife, by their tenants, previous to the entry by Popes, occupied and put improvements upon several distinct parcels of land within the Graham survey, including the one leased to Gilbert, it was a proper and necessary subject of inquiry by the jury whether the Gilbert lease did in fact include the land in controversy, the evidence in regard thereto being conflicting.

The fifth instruction is as follows: "The court instructs the jury that if they believe from the evidence that the defendant and those under whom he claims did not take the actual possession of the land in controversy, that the several entries made by them were limited by them and tenants, or did not include the land in controversy, then the law does not require the possession of

the plaintiff, as directed in the first instruction, to extend the period of fifteen years; and if they so believe, and also believe that the plaintiff had the actual possession thereof under its deed by entry thereon and making improvements, and the defendant or those in his employ entered upon the same before the bringing of the suit, they will find for the plaintiff the land in controversy." As said substantially in that instruction, the plaintiff was entitled to recover, unless the defendant and those under whom he claims had the actual possession by entry previous to that of the plaintiff, which involved the inquiry whether the tract leased to Gilbert included the land in controversy. And as the jury were in another instruction directed to find for the defendant in case they believed he and those under whom he claims had the actual possession, claiming to a well-defined boundary, before the entry of the plaintiff, and such boundary included the land in controversy, they must have understood the fifth instruction as requiring a verdict for the defendant, if it was included in the boundary of the tract leased to Gilbert. The fifth instruction was rather prejudicial to the plaintiff in premitting an inquiry as to the effect of the possession becoming vacant as to the defendant in 1872, and in making a possession by the plaintiff and those it claims under for 15 years a condition, in any case, of its right to recover.

Section 16, art. 1, c. 63, Gen. St., provides that "the attornment of a tenant to a stranger shall be void unless it be with the consent of the landlord, or pursuant to or in consequence of the judgment of a court." It was therefore proper to instruct the jury that if the tenant of the plaintiff "surrendered his possession of the land to the defendant without the consent of the plaintiff, the same was void, and the legal possession was not changed by it, and the plaintiff was not divested of its possession by said surrender to the defendant."

The following instruction was also proper: "If before Popes had obtained their deed from Grahams and Beaty's heirs for the land in contest, and before they had paid for the same, one or both the Popes went to Ratcliff, and asked him if he had any claim on said land, and he told him or them he did not claim any land on the south side of Little Sinking, and they were induced to take the deed and pay for said land by reason of said statement of Ratcliff, then Ratcliff is barred of now setting up claim to said land against their vendee, the plaintiff." It has been often decided by this court that where a person encourages or induces another to buy an estate he is estopped from thereafter setting up any prior claim he may have had. *Springle v. Morrison*, 8 Litt. (Ky.) 55; *Harrison v. Edwards*, Id. 350; *Gerault v. Anderson*, 2 Bibb, 543; *Barclay v. Hendricks*, 8 Dana, 379; *Sale v. Crutchfield*, 8 Bush, 645. And in our opinion the facts upon which that instruction is based, if true, are decisive of this case.

According to the views we have already expressed it was not necessary to a recovery by the plaintiff that it should either show a title to the land in controversy derived from the commonwealth, or an adverse possession for a period of 15 years; and the instruction asked by the defendant, containing such conditions of its right to recover, was properly refused. Nor did the court err in refusing the one relating to champerty; for the question involved was whether or not the tract leased by Gilbert covered the land in dispute, and there was evidence justifying the finding of the jury it did not. Moreover, as before said, the possession as to the defendant was vacant when the plaintiff entered. As the converse of the proposition stated in each of the other instructions asked by the defendant was intelligibly stated in those given, the court did not err in refusing them, and, perceiving no ruling of the court by which the substantial rights of the defendant were prejudiced, the judgment must be affirmed.

FOX et ux. v. MT. STERLING NAT. BANK.*(Court of Appeals of Kentucky. January 10, 1899.)***JUDGEMENT—EQUITABLE RELIEF—EVIDENCE.**

Where, in an action against a husband and wife on a note executed by them, reciting that it was given for necessities furnished the maker's family, judgment is rendered subjecting the land of the wife to the payment of the debt, the wife cannot have the judgment set aside on an allegation made for the first time that the note was obtained by fraud, and its recitals false; the reason assigned for not making such defense in the original action being that she was ignorant of the nature of the proceeding, and of the recitals of the note.

Appeal from circuit court, Montgomery county; JOHN E. COOPER, Judge.

The Mt. Sterling National Bank sued T. H. Fox and wife, H. C. Fox, upon a note executed by them, and obtained a decree ordering a sale of certain land, the property of the wife. The note recited that it was given for necessities furnished the maker's family. Mrs. H. Clay Fox and her husband sued the Mt. Sterling National Bank to set aside so much of the aforesaid decree as ordered a sale of Mrs. Fox's land, upon the ground that the recital contained in the note originally sued on was false and fraudulent, and had been discovered by Mrs. Fox since the decree was obtained. A demurrer to plaintiffs' petition having been sustained, they appeal.

T. H. Hines and V. B. Young, for appellants. *Lewis Opperson*, for appellee.

PRYOR, J. The facts alleged in the petition might have been presented as a defense to the original action, but it is too late after judgment has been rendered, and the land of the wife subjected to the payment of the note, to set up for the first time the alleged fraud on the part of the bank in procuring the note and obtaining the judgment. The note is signed by both husband and wife, and recites on its face that it was given for necessities furnished the family. Suit was instituted on the note, and the land of the wife subjected to its payment. Whether a mortgage was executed by the wife to secure the debt, or the proceeding was simply to subject the wife's estate to the payment of the debt, does not appear; but that her land was subjected in a proceeding to which she was a party is admitted, and in an action on the note that she now alleges was obtained by fraud. There is no reason whatever assigned for her failure to make the defense in the original action, except that she was ignorant of what the note contained, and the nature of the proceeding against her. This affords no ground for attacking the judgment in an independent proceeding. The defense could and should have been made when the bank was attempting to subject her land. The note was the basis of the action. The wife signed it, and an inspection of the record would have shown its contents, and that the property of the wife was sought to be subjected to the payment of the debt.

The judgment dismissing the petition was proper, and is affirmed.

HOLT, J., not sitting.

WEDEKIND et al. v. HALLENBERG et al.*(Court of Appeals of Kentucky. January 12, 1899.)***1. WILLS—CONSTRUCTION—NATURE OF ESTATE CONVEYED.**

Testator directed an annuity of \$500 to be paid to D. until July 1, 1883, and if she should die before that time it should be paid to M., if unmarried, until her marriage. If at that time D. should be living, \$5,000 was to be invested, and the income paid to her during widowhood, but upon her marriage the fund was to be retained by the executors until her death, when \$3,000 of it was to be invested in real estate

for M. for her use for life, without power to sell or incumber it. At her death it was to descend to her heirs. D. and M., as well as the other principal legatees, were relatives of testator, and under the will July 1, 1882, was fixed for the settlement of the estate, which was all disposed of by the will. M. survived testator, and died before July 1, 1882, leaving a husband and one child. D. also survived testator, and died in 1885. *Held*, that the devise to M. vested in her at the death of testator, though its enjoyment was postponed until the death of D.

2. SAME.—WORDS OF INHERITANCE.

There being nothing in the will indicating that the testator used the word "heirs" in any other sense than as technical words of inheritance, which view is confirmed by another clause, in which the word "children" was used, M. took an estate in fee, subject only to a restriction upon her right of alienation for life, and upon her death it passed to her daughter as heir, and not as devisee; such case not falling within Gen. St. Ky. c. 68, art. 1, § 10, providing that a grant or devise to a person for life, and after his death to his heirs, shall pass only an estate for life to him, and remainder to his heirs.

Appeal from Louisville law and equity court; JOHN G. SIMRALL, Judge.

Petition by Gustave Hallenberg and others, executors, etc., of Ernest Wedekind, deceased, against the heirs and devisees of deceased, for a construction of the will. From the decree Frank Wedekind and Minna Wedekind, and the executor, etc., of John B. Komp, deceased, appeal. Gen. St. Ky. c. 68, art. 1, § 10, provide that when an estate shall be given by deed or will to a person for his life, and after his death to his heirs, or the heirs of his body, he shall be vested with a life-estate only, with remainder to his heirs, heirs of his body, or descendants.

L. C. Woolfolk and *C. B. Seymour*, for appellants Frank and Minna Wedekind. *Bacon & Stites*, for appellant Komp's executor. *O. A. Wehle*, for appellees.

HOLT, J. Ernest Wedekind made his will in 1872, and died in August, 1878, unmarried, and without issue. These appeals involve the right to the \$3,000 named in the twelfth clause of his will, and which reads as follows: "I give to my sister, Mrs. Diedrich Wedekind, the sum of five hundred dollars a year, and my executors hereinafter named are to pay the same to her annually until the first of July, 1882. If she dies before said first day of July, 1882, my executors hereinafter named are to pay said sum of five hundred dollars per annum to Mary Wedekind, provided she is unmarried; and if said Mary is married, or does marry, then said annuity is to cease from the time of her marriage. On the first day of July, 1882, if the said Mrs. Diedrich Wedekind is still living, I direct my executors hereinafter named to set apart five thousand dollars, and invest the same in mortgage notes, interest payable semi-annually, and the proceeds thereof to be paid to her as long as she lives. If she marries, the said annuity is not to be paid to her, but the said five thousand dollars is to remain in the hands of my executors until her death. Upon her death my executors hereinafter named are directed to invest three thousand dollars of said sum in real estate for said Mary Wedekind, the title to the same to be made to her, with a restriction that she shall not have power to sell or incumber the same in any way, but may rent, use, or occupy the same, and upon her death to descend to her heirs. The remaining two thousand dollars of said five thousand dollars shall be invested by my executors hereinafter named in real estate for Minna Wedekind, sister of said Mary Wedekind, the title to the same to be made to her, with a restriction that she shall not have power to sell or incumber the same in any way, but may rent, use, and occupy the same, and upon her death to descend to her heirs. Said investments are not to be made in any event until after July 1, 1882, and the annuity therein provided is to cease at that time, unless the said Diedrich Wedekind is living, and has remained unmarried."

She survived the testator, and also the 1st of July, 1882, and the \$5,000 was thereupon invested in notes, as directed by the will, and the interest paid to

her until her death, in April, 1885; she having also received the annuity of \$500 bequeathed to her for the time from the testator's death until July 1, 1882. Her daughter Mary Wedekind married John B. Komp in 1877, and died in 1878. They had one child, Lulie, and she died in July, 1878. The father died in 1881; all of his estate being devised by him to his executor in trust for his children by a former wife. Mary Komp left surviving her a brother and a sister, Frank and Minna Wedekind.

There are three sets of claimants to the fund of \$3,000—*First*. The appellees, Hallenberg and others, who are heirs of Ernest Wedekind, claim that the devise of \$3,000 to Mary was contingent upon her living until July 1, 1882; that it never vested by reason of her death prior to that time, but lapsed, and became undeviseed estate. *Second*. The devisees of John B. Komp assert that the devise took effect at Ernest Wedekind's death, Mary taking a life-estate only in the fund; and that at her death it passed under the will to Lulie in fee, and at her death to her father; and then under his will to his children by the former marriage, who are appellants on one of these appeals. *Third*. The appellants Frank and Minna Wedekind claim that the devise took effect upon the death of the testator, the period of enjoyment merely being postponed until Diedrich Wedekind's death; that the direction in the will for investment was an equitable conversion of the fund into real estate; and upon Mary Komp's death it descended to her child; and upon the latter's death, she being an infant and without issue, passed to her next of kin upon the mother's side.

The *first* question to be determined is whether the devise ever vested in Mary Wedekind; if so, then, *secondly*, did it pass to her child under the will, or by descent?

It is well settled that the law favors that construction which will render estates vested, and not contingent. The law so inclines, because it is nearly always the intention of the testator that his bounty shall be transmitted to the family of the beneficiary. If it be doubtful whether a legacy be vested or contingent, the law treats it as vested. It is, however, a question of intention upon the part of the testator. If this be plain, we need look to no rules of construction. It is only where it does not appear, or is doubtful, that resort is to be had to them. If the testator has annexed futurity to the substance of his bounty, and it is of the essence of the gift, then its vesting is suspended; but if it merely relate to the enjoyment or payment of it, then it vests *in present*, unless this be made to depend upon an event which may never happen. The legacy is to be regarded as vested or contingent according as the time when it is to take effect is annexed to the enjoyment of the gift or the gift itself. If there be no substantive gift, and it is only implied from a direction to pay, then the devise is contingent, unless a contrary intention may be collected from the words or context, or the payment be postponed for the convenience of the property or estate, or to let in some other interest. 2 Williams, Ex'rs, side p. 1069. *Prima facie* it is to be presumed that a testator did not intend any estate disposed of by his will to lapse; and slight circumstances will therefore be regarded as showing that he intended the right to it to vest in the donee, although the possession of it may be postponed. In this instance the testator was interested in some mercantile firms. He also owned real estate jointly with others; and his will, therefore, provided that his estate should not be settled or distributed under it, saving a few small annuities, until July 1, 1882. In fact, the first nine clauses of it relate to the continuance of the mercantile business until that time and the settlement of his estate.

It is contended that where the only legatory words consist in a direction to do something with a sum of money *in futuro* for the legatee's benefit, and the sum is not to be separated from the estate until that time, the legacy does not vest unless the legatee survives that period. If, however, this be done for convenience of the estate, as appears in the case now in hand, and not by reason of any incapacity of the devisee to take, then the rule contended for

does not control, as indeed no rule controls if the testator's intention be plain. *Van Dyke v. Vanderpool*, 14 N. J. Eq. 198. The seventeenth clause of the will disposed of the residuum of the testator's estate, and, after providing in the succeeding clause for the sale by his executors of his real estate, he says: "The money arising from my estate is to be held by my executors hereinafter named, and invested by them in good mortgage notes, bearing interest, the interest payable semi-annually until the first day of July, 1882; and at that time, or as soon thereafter as possible, all the legacies and specific devises above mentioned shall be settled, and my estate wound up as far as practicable." The fund was to be separated from the balance of the estate at a certain time. It was not made to depend upon any uncertain event. The testator knew the 1st of July, 1882, would come, and that Diedrich Wedekind would die; and it is perfectly certain that he directed his estate to be kept intact until the time named, for its benefit and convenience. The testator disposed of his entire estate. This circumstance tends to show that he did not intend the disposition of any of it to be contingent, since this would have defeated his purpose. It was said in the case of *Robert's Ex'rs v. Brinker*, 4 Dana, 570: "*Prima facie* it may be presumed that a testator did not intend that any interest bequeathed in his will should lie dormant or undisposed of after his death, or should ever lapse; therefore a slight circumstance may be sufficient for showing that a legacy is vested, and not contingent." In this instance additional force is given to this fact, because it is evident the will was drawn by one skilled in such matters; and the devise to the testator's sister in Germany under the eleventh clause of the will expressly provides: "In the event of her death at any time, either before or after the first day of July, 1882, said annuity is to cease, and the money herein directed to be set apart shall belong to my estate;" showing that where he intended a devise in a certain event to lapse he expressly said so, and this he did not do as to the one in question. The will abundantly shows that its draughtsman knew how to express contingency in appropriate words. The fifteenth and sixteenth clauses of the will direct that on July 1, 1882, the sum of \$5,000 each be set apart from his estate, and invested in real estate for Louisa and Rosa Buckel, they to have the use thereof, but no power to sell or incumber it. These devises as to contingency are quite similar to the one in question; and it can hardly be supposed that the testator intended the disposition of so much of his estate to be contingent, and especially when he evidently intended to dispose of all of it. He in the main gave his estate to his brothers and sisters and their descendants, and, all of the provisions of the will being considered, it is manifest that he expected and intended, with one exception, where he expressly provided otherwise, that each portion so given was to remain in that particular branch of the family.

Our conclusion is that the gift and enjoyment under the clause of the will in question were not one and the same; that they were not both suspended until 1882; and that the testator did not intend the devise to Mary to be contingent upon her surviving that period, but that it vested upon the testator's death, the enjoyment of it being postponed for the convenience of the estate. When the will was made the conventional interest law allowing 10 per cent. was in force, and it is quite likely that the testator regarded the annuity of \$500 a year given by the clause in question as equivalent to the interest upon the \$500, and, if so, its payment confirms our view that the legacy was not contingent. It having vested in Mary Wedekind, then, as the will provided that the title to the land in which it was to be invested should be made to her, but with the restriction that she should not sell or incumber it, "and upon her death to descend to her heirs," did her daughter, Lulie, take as a purchaser under the will or by descent as the heir of her mother? It is contended that the expression "descend to her heirs" is equivalent to a direction that it should at her death go or pass to them. This must depend upon the sense in which it was used by the testator. It is to be gathered from the entire instrument.

The words are those of inheritance. If the estate passed by devise, and not by descent, then it goes to those who are not of the testator's blood. This fact does not, of course, authorize a court to make a will for the testator, but it may be considered in determining what was intended by the use of the language employed. Certainly the testator did not intend his bounty to pass to strangers; and, as the will was drafted skillfully, why, if the testator intended that at the death of Mary his bounty should go to her children, did he not say so? The tenth clause of the will gave an annuity to one of the brothers of the testator until July 1, 1882, or to his wife, in the event of his death; and directed that at the time named \$5,000 should be invested for their benefit, and "after their death the said five thousand dollars is to be paid to the children of my said brother Henry, share and share alike. If my said brother Henry and his wife both die before the first day of July, 1882, the said five thousand dollars is not to be paid until said first day of July, 1882, at which time, if they both are dead, the said children shall be entitled to the same." The clause last cited tends to show that the expression "descend to her heirs," used in the one in question, was not employed by way of words of purchase, or to express a devise, but merely that the testator expected and intended his bounty would upon Mary's death pass by descent to her heirs. If he did not so intend, why did he use the words, "descend to her heirs?" If he intended the estate should pass by purchase under the will, then the language imports what he did not mean. It seems to us that they were used in a different sense, and as words of inheritance only; that the testator intended to vest the fee in Mary subject to the restriction upon her right of alienation, and that, if he had intended to limit her interest to a life-estate, he would have said so in express terms, as he did in the same clause as to the interest of Dedrich Wedekind in the funds. Our conclusion is that Mary's child took the estate as the heir of her mother, and not as a purchaser under the will. The language employed does not bring the case within the operation of section 10, art. 1, c. 63, Gen. St. This being so, and the direction to invest the fund in real estate being an equitable conversion of it into that character of property, it, upon the death of Lullie, passed by virtue of section 9, c. 31, Gen. St., to the next of kin upon the side of her mother.

The judgment upon the appeal of John B. Komp, executor, etc., is affirmed, but reversed upon that of the appellants Minna and Frank Wedekind, and cause remanded for further proceedings consistent with this opinion.

MITCHELL v. SIMPSON.

(Court of Appeals of Kentucky. January 15, 1889.)

WILLS—CONSTRUCTION—NATURE OF ESTATE DEVISED.

A testator gave to his daughter A., by will, a tract of land in C., and another tract in S. The language of the will then was: "The said land is allotted to her, and valued at * * *. The said land is willed to my daughter and her bodily heirs," except the tract in S., "which she is to have the right to dispose of as she wishes." By another clause of the will lands were devised to another daughter and "her bodily heirs," except certain tracts, which she was to sell, if she wished. *Held*, that the words "bodily heirs" were used in the sense of "children," and that A. took only a life-estate in the tract of land in C.

Appeal from circuit court, Bourbon county; J. R. MOXTON, Judge.

Action by John Simpson, to recover of James Mitchell the last payment due for a tract of land sold by Simpson and his wife to Mitchell. Defendant in his answer alleged that plaintiff was unable to comply with his covenant to convey said land in fee-simple, because by the provisions of Jessie Hall's will, under which Mrs. Simpson derived her title, she (Mrs. Simpson) took only a life-estate in said land. Demurrer by plaintiff was sustained to this answer, and defendant appeals.

Russell Mann, for appellant. *McMillan & Talbott*, for appellees.

BENNETT, J. The sole question in this case is, what is the proper construction of the third clause of Jessie Hall's will? which reads as follows: "I give to my daughter Anna Simpson one hundred and sixty acres of land lying in and around Centreville, Ky. Said land is allotted to her, and valued at fifty dollars per acre. I also will her two hundred acres of land in Scott county, Ky., off of what is known as 'Sheep Farm.' Said land is allotted and valued to her at eighteen dollars and fifty cents per acre. The said land is willed to my daughter and her bodily heirs, except the two hundred acres in Scott county, Ky., which she is to have the right to dispose of as she wishes." The fourth clause of the will contains a devise to his daughter Paulina Henry, in which is this language: "Said lands I will to my daughter Paulina and her bodily heirs, excepting the last two named tracts, which she may sell if she wishes." The estate which he devises to his son James F. Hall is devised to him absolutely.

It is well settled that the words "heirs of the body," "heirs lawfully begotten of the body," and other similar expressions, are appropriate words of limitation, and must be construed as creating an estate tail, which by our statute is converted into a fee-simple, unless from the entire will it reasonably appears that the testator used said words, not in their technical sense, but as synonymous with the word "children." If said words are used in the latter sense, then they are construed as words of purchase, and not in the technical sense as words of limitation, which are construed by our statute as conveying a title in fee to the immediate devisee. In construing the language of the will it appears, at first blush, that the testator was endeavoring to create a life-estate in his daughter Mrs. A. Simpson, with remainder to her children, in the land lying around Centreville, and that he used the words "her bodily heirs" as synonymous with the word "children," as expressive of that intention.

The question in the case of *Righter v. Forrester*, 1 Bush, 278, arose on the construction of a will similar to this in the particulars above mentioned, in which it was held that the words "bodily heirs" were used by the testator in the popular sense of "children," and that they took under the will as purchasers. Said case clearly distinguishes the case at bar from the case of *Johnson v. Johnson*, 2 Metc. (Ky.) 331.

We think that the words "bodily heirs" were used by the testator, Hall, in the sense of "children," and that Mrs. Simpson took a life-estate in the land lying around Centreville, and her children took a remainder interest therein.

The judgment of the lower court sustaining the demurrer to the appellant's answer is reversed, and the case is remanded for further proceedings consistent with this opinion.

GORDON *et al.* v. MORROW *et al.*

(Court of Appeals of Kentucky. January 17, 1889.)

WILLS—MENTAL INCAPACITY—UNDUE INFLUENCE.

Testatrix devised the bulk of her estate to three of her aunts and uncles, excluding others of the same degree of kindred. There was evidence that she disliked one of the devisees and one of the relatives not provided for. Upon trial of the issues of mental capacity and undue influence, the court instructed the jury that, if testatrix had not sufficient mind when she signed the alleged will, or if her mind was not "in a proper state" to dispose of her estate with reason and according to a settled purpose of her own, she was incompetent to make a will. Held that, while evidence of testatrix's prejudices might bear on the question of her mental capacity, the phrase "proper state of mind" might, under the facts of the case, mislead the jury into the belief that a prejudice towards her relatives was in itself sufficient to invalidate the will, and the giving of the instruction was error.

Appeal from circuit court, Logan county; W. L. REEVES, Judge.

B. F. Gordon and others propounded the alleged will of Mattie Gordon, deceased, for probate, in the county court of Logan county. M. A. Morrow and others contested it. Both the county court, and the circuit court on appeal, held that the will was invalid, and denied probate; whereupon proponents appeal. The instruction given by the trial court, and complained of on this appeal, was as follows: "If Mattie Gordon had not at the time she signed the paper in contest sufficient mind, or a mind in a proper state, to dispose of her estate with reason, or according to a fixed judgment or a settled purpose of her own, she was not competent to make a will."

E. W. Hines, for appellants. Ben T. Perkins, Jr., for appellees.

PRYOR, J. While the instructions given by the court below on the question of mental capacity and undue influence are in the main unobjectionable, and the testimony so conflicting as to leave the issue to be determined alone by a jury when properly instructed, there are such peculiar features connected with the execution of the paper in controversy and those who were made the objects of testatrix's bounty as necessitate a reversal of this case. It seems that the testatrix gave the bulk of her estate to two of her aunts and one uncle, excluding others related to her in the same degree. There was proof conducing to show that she disliked Mrs. Crittenden, one of the devisees, and had reasonable grounds to dislike some of those who were not mentioned in the will; that one of them had not visited her while sick, and, although a sister of the father of testatrix, had not attended his funeral. What her frame of mind was in regard to the aunt she had not mentioned, or those she had made the objects of her bounty, is not shown, but such facts were disclosed on the trial as would lead to the conclusion that her mind was not in a proper state, by reason of the supposed neglect of her kindred, to make such a disposition of her estate as she would have made if all had the same claims upon her affections. Her likes and dislikes did not destroy her capacity to make a will, and, while her feelings and prejudices might have gone to the jury upon the question of mental capacity, the fact that she disliked some of her kindred affords no reason for invalidating her will, if the offspring of her own mind, with the mental capacity at the time to know her estate, and those who had claims upon her bounty, and to dispose of that estate according to a fixed purpose of her own. How the jury understood the instruction on this point we cannot determine. In *Tudor v. Tudor*, 17 B. Mon. 394, a like instruction was condemned; this court saying: "If the expression 'proper state of mind' is to be understood as referring to intellectual capacity alone, it is not objectionable; but if it be understood as referring to the state of the testator's mind with regard to his feelings, disposition, or prejudices, it assumes a position that cannot be maintained." We can readily perceive the manner in which the court below intended the instruction to be considered by the jury, but how they did consider it is a question we cannot answer. This is certainly a case where the jury might have been misled by it, and for that reason the judgment is reversed, and the cause remanded, with directions to award a new trial, and for proceedings consistent with this opinion.

WALLACE *et al.* v. MARQUETT.

(Court of Appeals of Kentucky. January 17, 1890.)

ADVERSE POSSESSION—JUDGMENT—RES ADJUDICATA—INNOCENT PURCHASER.

Where, at the time of bringing action against M. for the recovery of land, it had been in the adverse possession of S. for 13 years, and afterwards, and after a sufficient time had elapsed for the title of S. to have ripened into a perfect title, he conveyed to M., who in turn conveyed to the plaintiff pending the action, and it

appeared that neither S. nor the plaintiff was a party to the action, or had any notice of it, and that a continuous possession of the land had been maintained by S., M., and the plaintiff for over 30 years, a judgment rendered against M. 23 years after bringing the said action could not defeat the rights of the plaintiff as a *bona fide* purchaser.

Appeal from circuit court, Pendleton county; W. E. ARTHUR, Judge.

Action by Charles Marquett against Samuel Wallace *et al.*, to enjoin the execution of a writ of possession by a sheriff, in so far as the execution thereof would disturb plaintiff's possession of a certain tract of land. Defendants' demurrer to the petition having been overruled, the injunction was made perpetual, as prayed for, and Wallace *et al.* appeal.

J. W. Menates and L. T. Applegate, for appellants. O'Hara & Bryan, for appellee.

PRYOR, J. In this case the appellants filed a demurrer to the petition of the appellee, and moved to dissolve the injunction. The demurrer was overruled, and the injunction made perpetual, of which the appellants complain. The facts alleged in the petition are, in substance, these: In the year 1858 an action was instituted in the Pendleton circuit court by Samuel Wallace and others against Lewis Myers and others for the recovery of a large tract of land. In August, 1881, a judgment was rendered against Myers and others for the land, and a writ of possession awarded. The appellee, Charles Marquett, in the year 1874, and while this action against Myers was pending, purchased the land in controversy of Myers, it being part of the land that Myers had lost by the recovery; a writ of possession having been placed in the hands of the sheriff, and Marquett, being about to be turned out of possession, filed the present action in equity, enjoining the execution of the writ in so far as it disturbed his possession, relying on the following state of facts: He alleges that two men by the names of Summers and Kidwell were in the adverse possession of this land long before the action was instituted by Wallace against Myers, claiming the land against Wallace and all others, it being defined by a marked boundary, and continued in the adverse possession for more than 15 years, and for so long a period as vested them with a perfect title; that not only holding but being in the actual adverse possession of this land for so long a period, Summers, having acquired Kidwell's title, sold the land to Lewis Myers, the defendant in the suit by Wallace, and Myers, in the year 1874, sold and conveyed the land to the appellee, who has been in possession ever since that time. So the vendors of Myers had, as is alleged, acquired title by an actual adverse possession of more than 15 years before the sale to Myers, and had entered on the land in the year 1845, 13 years before the appellants, Wallace and others, instituted their action, which was in 1858. So there was a continuous possession of the land by Summers, Myers, and the appellee from the year 1845 until this writ of possession issued, in the year 1881, a period of 36 years. It is argued that the appellee cannot hold by reason of this adverse possession in Summers and Myers, because he holds under Myers by the conveyance of 1874, and, as Myers lost the land in the Wallace suit, the appellee, being a purchaser *lis pendens*, is in no better condition than Myers.

It is distinctly alleged that neither Summers, Kidwell, nor the appellee were parties to the action brought by Wallace, and that they, nor either of them, had notice of the bringing or the pendency of that action. Why Myers purchased the interest of Summers does not appear. He may have attempted to take shelter under their title to defeat a recovery by Wallace; but whether so or not, if the purchase from Myers by the appellee makes the latter a *lis pendens* purchaser, then the demurrer should have been overruled.

It must be conceded that if no action had been brought by Wallace against Myers, that the adverse possession for over 15 years, or over 30 years in this

case, would have vested the appellee with a perfect title. The mere fact that he acquired title from Myers does not make the verdict and judgment against Myers conclusive as to the appellee; for, if no party to the action, he is not bound by it, unless he was a *lis pendens* purchaser. If not a *lis pendens* purchaser, it is immaterial when he purchased; if before the judgment, the judgment against Myers cannot affect him. The question, then, is, was he such a purchaser? The fact of his acquiring title from Myers does not preclude him from raising this question, for in such cases the question as to a *lis pendens* often arises.

It is well settled that a purchaser *pendente lite* is bound by the judgment rendered against the person from whom he purchased, and the chancellor will not permit his possession to interfere with his enforcing the judgment. A party by laches may, however, lose his *lis pendens*, and the purchaser from the party whose title is defective, and against whom a recovery is had, will be treated as a stranger to the proceeding. Where there is an unreasonable delay in the prosecution of the action, it is such negligence as will deprive the party of any remedy against *bona fide* purchasers. "To entitle him to enforce it against *bona fide* purchasers, he has been held to reasonable diligence in the prosecution of his suit, and should be guilty of no palpable slips or gross irregularities in the management of the same, by which injury may accrue to the rights of others who are not parties." *Clarkson v. Morgan's Devises*, 6 B. Mon. 449; *Watson v. Wilson*, 2 Dana, 406; *Erhman v. Kendrick*, 1 Metc. (Ky.) 146.

So here was an action pending for 23 years, with parties in possession during the entire period claiming to hold the land as their own, and the appellee purchasing from the defendant in the action who was in possession, and who had derived title from those whose possession before he purchased had ripened into a perfect title. He had no notice of the pendency of the action, and under such circumstances it must be a harsh rule of law or equity that would treat him as a purchaser with notice or a purchaser *pendente lite*. On the contrary, he should be held to be a *bona fide* purchaser, and his rights considered and determined as if no action had ever been instituted by the appellants for the recovery of the land in controversy.

For the reasons indicated the judgment below is affirmed.

HUNTER v. OWEN.

(Court of Appeals of Kentucky. January 19, 1899.)

1. EQUITY—RESCISSON OF CONTRACT—EVIDENCE.

Where the testimony of plaintiff, in an action to rescind a purchase of land, made out a case of fraud, and her testimony was contradicted by that of defendant, plaintiff was sufficiently corroborated by evidence that she was dull, ignorant, and easily influenced, and felt herself under obligation for kindnesses rendered by defendant, who was a shrewd business man, and that defendant represented that the land was worth the price paid, (\$600,) while its actual value did not exceed \$200. Following *Hunter v. Owen*, 9 S. W. Rep. 719.

2. SAME—FRAUD.

The price paid by defendant for the land is admissible to repel the presumption of fraud from his demanding an exorbitant price, but is not evidence of value.

3. SAME—CORROBORATORY EVIDENCE.

Evidence that after the negotiations for the sale were completed, and after arrangements for the payment of the price had been made, defendant, in the presence of a witness who was not present at the negotiations, stated to plaintiff that if she was not satisfied she need not take the land, and that plaintiff expressed her satisfaction, is not necessarily corroborative of defendant's evidence.

On petition for rehearing. For opinion in original hearing, see 9 S. W. Rep. 717.

Hargis & Eastin, M. O. Allen, and J. G. Craddock, for petition. Sandidge & Sandidge and R. F. Spencer, opposed.

BENNETT, J. The counsel, Judge Hargis, in his petition for a rehearing, states that the "opinion does not deal with the evidence of the appellant and that which he offered in the case, but excludes it from consideration;" and as proof of that fact he says: "We point to the fact that not one word is said in the opinion about the proof that this land and improvements cost Dr. Hunter \$337, exclusive of the five acres of bottom which he let her have, valued by Dr. Hunter at \$40 per acre. The opinion omits this conclusive evidence of the value of the land, and takes up the opinion of witnesses as to that fact."

Counsel is gravely mistaken when he intimates that the whole evidence as to the value of the land was not considered by the court. Is it possible that counsel is serious in the contention that the price that Dr. Hunter chose to pay for the land is "conclusive evidence of its value?" If he had paid \$10,000 for the land, instead of \$337, would the payment of such sum be conclusive evidence that it was worth that sum? Or if he had paid but 25 cents for it, would it be conclusive evidence that it was only worth 25 cents? The rule in a case of this sort, by which the value of the land is arrived at, is to resort to the opinion of witnesses acquainted with the land sufficiently well to form an opinion as to its value, from which the court determines whether or not the price paid was adequate, inadequate, or exorbitant. But the price paid in a case like this may be given in evidence, not for the purpose of proving the value of the land, but for the purpose showing that the person paying it believed that the land was worth what he gave for it, in order to repel any presumption of fraud that might arise from asking and receiving an exorbitant price for the land.

As said in the opinion, many witnesses swore that the land and improvements were not worth exceeding \$100, a few fixed its value at from \$100 to \$150, and one or two fixed its value at \$150 or \$200. Now, we assert most positively that no witness, not even Dr. Hunter, contradicts these witnesses as to the value of the land. All that Dr. Hunter swears in reference to the value of the land is his admission that he told Mrs. Owens that the land was worth \$600, and that a part of the land and the improvements cost him \$337, which fact he did not communicate to the appellee. But we assert that he did not swear that the land was worth \$600, nor did he swear that he believed it was worth that much, nor did he swear that he believed the land and improvements were worth as much as he said he paid for them.

But counsel says that Tom Cheatam sustains Dr. Hunter as to the value of said land. Such is not the fact; for, as just said, Dr. Hunter does not swear that it had any value, and Cheatam says that it was worth \$100 or \$150 only.

Counsel also contends that G. W. Warran sustains Dr. Hunter as to the value of said land. On the contrary, it is a fact that Mr. Warran does not express an opinion as to the value of the land. What appears in reference to that matter is that Dr. Hunter said he would take \$500 for a certain portion of the land, and Warran unhesitatingly agreed to give it, provided an adjoining tract could be purchased. It is evident that he formed no opinion of his own in reference to its value but, as Dr. Hunter asked that sum for it, he seems to have taken it for granted that it was worth that sum.

In this connection it is well to notice what counsel says in reference to the statement in the opinion that Warran relied on the opinion of Dr. Hunter as to the value of the land. After quoting the opinion upon that subject, he says: "There is not one thing in the testimony of G. W. Warran that shows that he was willing to purchase that land at a price not fixed according to his own judgment." This is bold language. Let us look into its truth.

G. W. Warran says that on one occasion he was in town, not for the purpose of buying land, and Dr. Hunter, doubtless knowing that he, too, had

drawn a pension, for otherwise he was wholly impecunious, proposed to sell him this land; that he had never seen it, nor did he ever see it again after that day; that they went on horseback to look at it. He was asked: "Did you get off your horse and go over the place?" "No, sir; we sat on our horses up in the big road, opposite a little spring on the left of the road." As just said, this was the only time that he had ever seen the land, which, except a small strip of bottom, is hilly and broken; and, according to the description that he gives of his examination of the land, he did not and could not have formed a reliable opinion as to its value. Nor does he pretend to have formed any opinion as to its value, but relied upon the say so of Dr. Hunter, as his following answers clearly demonstrate: "We did not particularly examine the lines and corners. If he [Dr. Hunter] had have particularly told me where the corners and lines were, I would have trusted to his honor." He is asked: "In a land transaction, would you have left the matter to his word, and trusted to what he said about it?" "Yes, sir." In addition to this, Dr. Hunter was his physician, and had attended on him several months at a time, and had his entire confidence. So we repeat that Warran agreed to give \$500 for the land, not upon his own judgment as to its value, but relying upon the value that Dr. Hunter presumptively placed upon it by the price that he asked for it. So we repeat that the testimony introduced by the appellee as to the value of the land is not contradicted; but the evidence for the appellee as to the value having been taken before Dr. Hunter gave his evidence, and, when he came to give his evidence, his failure to contradict the appellee's witnesses by swearing to the value of the land, is a strong implied admission that the valuation of the land by said witnesses was as favorable to him as his own testimony would have made it.

Counsel has labored hard to convince us that the appellee is a shrewd, strong-minded woman. Well, Dr. Hunter does not agree to that proposition; for, in response to the evidence of the appellee's witnesses that she "is a dull, unlearned, ignorant, easy kind of a woman, and can be easily persuaded into most anything," the doctor says that she was a woman of only mediocre capacity; and, though pressed hard, he would not lift her one jot higher in the scale of intellectuality.

Again, in order that Dr. Hunter might be corroborated all along the line by Prof. Childress, counsel would have us believe that the professor was present on the occasions of the execution of the deed and title-bond. In this counsel is clearly mistaken; for the professor fails to state that he was present on either occasion, and Dr. Hunter says expressly that his recollection is that no one was present on either occasion, except himself and the appellee.

Recurring to the question of value, the counsel, in referring to that part of the opinion which states that no one contradicted the appellee's witnesses as to the value of the land except Dr. Hunter, etc., says that it is not a fair statement of the evidence introduced by Dr. Hunter. As the opinion does say that Dr. Hunter's evidence contradicted the appellee's evidence in reference to the value of the land, we plead guilty to the charge, and now say that the record shows that his evidence does not contradict the evidence for the appellee in reference to the value of the land. Having pleaded guilty, and having spoken correctly from the record, in order to make the *amende honorable*, we are not without hope of receiving clemency from counsel.

Again, counsel in his petition would have us believe that the witnesses for the appellee were "a lot of enemies of Dr. Hunter;" also, in his oral argument, he said that the appellee's witnesses and her counsel were influenced by political prejudice against Dr. Hunter, and that the chancellor had, unintentionally, of course, fallen into line. Now, there is not a *scintilla* of evidence in the record that tends directly, indirectly, or remotely to show that the witnesses were "a lot of enemies of Dr. Hunter;" nor is there an iota of evidence tending to show that the witnesses, or attorney for the appellee,

were influenced by political prejudice; nor that the chancellor, innocently, or otherwise, fell into line; nor is there any evidence in the record tending, in the least degree, to show what the politics of any of the witnesses, attorney, or chancellor were.

We say that if the record developed the fact that the action was instituted through political prejudice; or that it was promoted by evidence influenced by political prejudice; or that the chancellor, in coming to his conclusions, had been influenced in the slightest degree, even to the weight of a mustard seed, by political or other prejudice,—we would, with one stroke of the pen, wipe out his judgment rendered in the case, and give the appellant a rehearing; but, as said, no such thing appears. It has always been a source of pride that Kentuckians, in their social relations with each other, when their sense of honor has been appealed to, when they have been called upon to deal candidly with each other, when they have been called upon to act in the affairs of each other involving questions of right, when they have been called to testify in reference to the affairs of others, are never influenced by political prejudice.

It seems to be conceded by counsel for the appellant that, if the appellee's evidence is to be believed, she made out a case of not only presumptive fraud, but actual fraud. It is certainly true that she, if her evidence is to be believed, made out a strong case of actual fraud on the part of the appellant. The appellant in his testimony flatly contradicted the appellee in nearly all the material points of her evidence indicating fraud on his part. The chancellor, in deciding the case, was forced to give credence to the evidence of the one or the other. There was no way open to him of avoiding this duty. Accordingly he gave credence to the evidence of the appellee. Is her evidence corroborated? We think so. *First.* The decided weight of the evidence is that the land was not worth exceeding \$100,—five-sixths less than what she paid for it in cash; and no witness for the appellee places a greater value upon the land than \$150 or \$200, and the appellant does not swear that the land was of greater value. *Second.* The proof is clear and uncontradicted that the appellee was wholly unacquainted with the values of property, never having owned a piece of property of any consequence in her life, and totally inexperienced in business affairs, "dull, unlearned, ignorant, and easily influenced to do most anything" that one in whom she had confidence might desire her to do; that, as admitted by the appellant, she felt under great obligations to him, on account of kindnesses he had rendered her husband in his life-time. *Third.* The appellant was a shrewd, active business man, and he was evidently looking out to sell said land; for knowing that Warran, who had been for years entirely impecunious, and hardly knew the value of money or property, had received a pension, he proposed to sell the land to him, and the appellee being about to receive a pension, and having been penniless all her life, and dull, ignorant, and wholly inexperienced, he, according to her testimony, proposed to sell the land to her at, according to the uncontradicted proof, an exorbitant price, which price he assured her the land was worth, but when on oath he did not say that he believed it was worth that sum. This assurance of his the appellee evidently believed, and relied on it as true. So it having been proven that the price paid for the land, upon the assurance of the appellant that it was worth that much, was grossly in excess of its true value, and the appellant having failed to sustain the value placed upon it by him, the conclusion of actual fraud is irresistible.

But it is contended that the evidence of Prof. Childress corroborated that of the appellant. On the contrary, it cuts both ways. After the terms of the purchase had been agreed on, and the bond for a title had been drawn up and signed, the appellant, in company with the appellee, took it to the drug-store where the professor was, and in the employment of the appellant's brother-in-law, and requested him to read the bond to the appellee, as she could not

read. Afterwards, after the deed had been drawn up, the professor was invited to the appellant's office, where he and the appellee had just been, to receive his instructions to pay for the land out of the check for the pension money. It was then made convenient for the appellant to say to the appellee that, if she was not satisfied with the trade, she need not take the land, and she in return expressed herself as perfectly satisfied with the trade, notwithstanding the advice of others that she ought not to make it. Of course, she was satisfied. She evidently became satisfied by the representations of the appellant, which fact she complains of here as having been brought about by the fraudulent representations of the appellant. Now, these things occurred after the negotiations had been carried on between the appellee and appellant alone, and after the terms of the agreement had been perfectly understood. Therefore the conclusion is justified that the appellant, knowing that he had driven a shrewd, hard bargain with an ignorant, dull, inexperienced woman, wanted a witness by whom the fact could be established that the transaction was a free, voluntary, and judgmatical act of hers. We are satisfied that the evidence of the appellee was so thoroughly corroborated by the surrounding facts and circumstances of the case that the chancellor's conclusions were in accord with the weight of the evidence.

The petition for a rehearing is overruled.

MOORE'S ADM'RS v. SMITH *et al.*

(Court of Appeals of Kentucky. January 19, 1889.)

1. DEPOSITIONS—IN CIRCUIT COURT—APPEAL FROM PROBATE PROCEEDINGS.

Gen. St. Ky. c. 118, § 81, providing that when a will is offered for probate, and an attesting witness is out of the state or unable to attend, the court may cause a commission to issue annexed to the will, authorizing his deposition to be taken, does not apply to proceedings in the circuit court on appeal from the county court in probate proceedings, and depositions in the circuit court may be taken in such a case as in any other civil proceeding.

2. CONTINUANCE—ABSENT WITNESS.

Where, on the trial of an appeal from the county court in a probate proceeding, an objection for an informality is made, for the first time, to the deposition of an attesting witness whose testimony is vitally important to proponent's case, and it appears that the witness is unable from sickness to be present, and that the deposition had been taken before a former term, at which a mistrial was had, it is error to deny proponent's motion for a continuance.

3. DEPOSITIONS—FORMAL OBJECTIONS—NOTING ON RECORD.

Such an objection, based on the ground that no summons had issued previous to the taking of the deposition pursuant to Gen. St. Ky. c. 118, § 81, should be overruled, under Code Civil Proc. Ky. § 587, which provides that any objection to a deposition other than for the incompetency or irrelevancy of the testimony must be noted on the record during the first term after the deposition is filed.

Appeal from circuit court, Boone county; WARREN MONTFORT, Judge.

Proceedings in the county court of Boone county for the probate of the will of Samuel S. Moore. The will was propounded by Moore's administrators, and contested by Missouri Smith and others. Probate of said will was granted by the county court, whereon the contestants appealed to the circuit court, and, said will having been rejected by the circuit court, the proponents appeal.

O'Hara & Bryan, Wm. Lindsay, D. W. Lindsey, and A. G. Winston, for appellants. *J. F. & C. H. Fisk*, for appellees.

PRYOR, J. The paper in controversy, the alleged will of Samuel S. Moore, was admitted to probate in the Boone county court upon the testimony of B. F. Bristow, one of the subscribing witnesses. The probate was opposed by the next of kin of the deviser, and an appeal taken to the circuit court. There

seems to have been a mistrial of the case at the first term of the circuit court at which the case was called, and on the last trial, in 1886, the court instructed the jury to find that the paper offered was not the will of Moore. B. F. Bristow and C. W. Miller were the attesting witnesses, and their depositions had been taken and were offered to be read on the trial. Miller was dead when this case was tried, and his deposition had been taken in the absence of the original paper that he had attested as the will of Moore. He was, however, presented with a copy attested by the clerk of the Boone county court, and stated that he witnessed a paper similar to that, as he thought, in conjunction with B. F. Bristow, at the instance of the testator, and in his presence. The deposition of Bristow was also offered to be read, and when his deposition was taken the original paper was presented and identified by the witness as the paper attested by him and the witness Miller at the instance of and in the presence of the testator; speaking also as to the signature of the testator, and his competency to execute such an instrument. After the parties had not only announced themselves ready for trial, but had gone into the trial, and offered to read the depositions of Bristow and Miller, counsel for the contestants filed an exception for the first time, to the effect that the depositions were incompetent because not taken pursuant to section 31, c. 113, tit. "Wills," Gen. St. That section provides that "when any will, or any such authenticated copy is offered for probate, and a witness attesting the same resides out of the state, or, if in the state, cannot attend on account of sickness, age, or other infirmity, etc., * * * or resides at a distance of more than fifty miles, such court may cause a commission to be issued annexed to the will or copy, and directed to any person authorized by law to take depositions in other cases to take his deposition. The deposition is required to be certified as depositions are in other cases, and no notice need be given unless the probate is opposed by some one who has made himself a party," etc.

The propounders of the will insisted that the exception came too late, and should be disregarded, but the trial court adjudged otherwise, and sustained the exception. Counsel then asked for an attachment against the witness Bristow, who lived at Covington, a distance of less than 50 miles from the place of trial. The attachment was allowed, and returned by the officer to the effect that the witness was sick in bed and unable to attend court. The affidavit of the witness and his attending physician showed that the witness could not attend. The propounders of the will then offered to read the deposition, but this was refused by the court on the ground that the deposition had not been taken under a commission as provided by the General Statutes. Counsel then filed an affidavit to the effect that they were taken by surprise by reason of the exceptions and the ruling of the court, and asked that the case be continued. This the court refused to do, and instructed the jury to find against the paper, and for the contestants; hence this appeal.

If a commission had been necessary to take the depositions of the attesting witnesses in a case like this, a continuance, under the circumstances, should have been granted. Exceptions to competency and the relevancy of testimony may be made at any time during the trial, but no other exception "shall be regarded unless it be filed and noted on the record before the commencement of the trial, and before or during the first term of the court after the filing of the depositions." Section 587, Carroll's Code.

Besides, the depositions in this case established, if the witnesses were to be believed, and there was nothing to question the character of either for truth, the paper in controversy as the will of Samuel Moore. They were the attesting witnesses to the paper. Their testimony was vital to the propounders, for without it they had no case in court, and sustaining the exceptions left nothing for the trial judge to do but to instruct the jury to find for the contestants. The preparation of the case showed proper diligence on the part of the propounders and their attorneys. They had taken their depositions prior

to the term at which a mistrial was had. No exception had been filed, urging the objection that a commission was necessary, until the trial was under progress, and it was therefore an abuse of judicial discretion to compel the appellants to submit to a judgment against them under such circumstances.

If, however, the question was alone presented as to the application of this section of the statute to the practice in the circuit court, it is evident that it applies alone to the court of original jurisdiction in which the paper is offered. While the statute in regard to wills may be said to contain all the law on the subject, it was never designed that, upon a mere question of practice in the conduct of the appeal in the circuit court, the trial judge should be confined to the mode of obtaining the attendance of witnesses, and the parties to the mode of taking depositions, provided by the statute for the probate of wills in the county court. The circuit court is not a court of probate. It has no power, as the county court has, to admit a will to probate without notice, where no one has made himself a party opposing it. In fact, the circuit court has no original jurisdiction over the subject-matter, and, when brought to the circuit court by an appeal, the hearing should be conducted as any other civil proceeding in that court.

The statute provides that, where a will is offered for probate, the testimony may be obtained in a certain mode; that is, by a summons directed to some one to take the depositions. It was enacted so as to inform that court how to proceed when the witness could not attend who had attested the paper, and, as a rule of procedure, applies alone to the probate court. If the deposition had been taken to be read in the county court without a commission, and then offered to be read in the circuit court, the exception might be well taken, and then the exception should be filed before trial if the contestants had been previously notified that it would be offered. In this case the witness was aged, infirm, and unable to attend court, and therefore, by an express provision of the Code, § 554, the propounders of the paper should have been allowed to read it to the jury. If this commission is necessary in the circuit court, then the propounders of the will could take no step to prepare for trial by taking the depositions of the attesting witnesses until the circuit court convened, and then apply for a commission to take the deposition. It is plain to us that the mode of taking the depositions as provided by the statute applies only to the probate court.

The judgment below is therefore reversed, with directions to set aside the verdict of the jury, and award the appellants a new trial, and for proceedings consistent with this opinion.

WILSON et al. v. SUGGETT's Ex'rs et al.

(Court of Appeals of Kentucky. January 19, 1889.)

PAYMENT—PRESUMPTION—EVIDENCE—LAPSE OF TIME.

In an action on a purchase-money note it appeared that the vendor owned one-third of the tract sold, but the evidence was conflicting as to whether he owned the residue. The vendee took possession under her purchase, and paid one-third of the note. In an action against her executors, 14 years afterwards, the court held that the payment was in full of the vendor's demand, and ordered the note canceled. *Held*, that such ruling would not be disturbed.

Appeal from circuit court, Henderson county; JOHN T. BUNCH, Special Judge.

M. L. Wilson instituted this action against the executors and the devisees of A. E. Suggett, on a promissory note executed by A. E. Suggett to J. B. Griffin, and assigned by the latter to plaintiff. Plaintiff alleged that said note was executed by Mrs. Suggett to pay for certain land purchased by her of Griffin, and plaintiff sought a judgment against the executors of Mrs. Sug-

gett, and a sale of said land to satisfy same. Defendants denied that Griffin had owned said land, or was able to convey same, and made him a party to the action, and asked that the note be canceled, and that their title to said land be quieted. Judgment was rendered canceling the note, and quieting the title of Mrs. Suggett's devisees to said land, from which judgment both Wilson and Griffin appeal.

Thos. E. Ward, for appellants.

HOLT, J. This record presents a confused state of case; so much so that it is difficult, if not impossible, to arrive at a conclusion altogether satisfactory as to the rights of the parties. The appellant J. B. Griffin held as trustee for Daniel E. Brown the title to a tract of land. The latter at his death left four children, to-wit, Almira E. Suggett, James D. Brown, and Eliza and Judith Sheets. It does not appear whether the father had an absolute right to the land, or only a life-estate, nor clearly whether, if but the latter, the land at his death was to pass equally to his children, or to the three daughters only. In any event, prior to his death, in 1857, the son, in 1858, conveyed whatever interest he had, if any, to his sisters, Judith and Eliza Sheets; and Mrs. Suggett, by the same deed, conveyed her interest to L. W. Brown. Judith Sheets died leaving two children, one of whom died leaving the other as the sole heir to this interest. Eliza Sheets died leaving seven children entitled to her interest; James and George Sheets being two of them. In 1858, L. W. Brown, who either claimed to own by purchase the entire land, or else all of the interests save those of James and George Sheets, executed to the appellant Griffin a title-bond for the land. Thereafter, but during the same year, the latter, as he testifies, purchased the interests of James and George Sheets direct from them. A title-bond to Griffin purporting to be signed by James, and the testimony tends to show he executed it, is on file in this action; but no title-paper whatever was given by George Sheets to Griffin, and there is no written evidence or competent verbal testimony showing that L. W. Brown had acquired any right in the land by purchase outside of the deed of 1858 from Mrs. Suggett. On the 10th day of January, 1863, the latter purchased the land from the appellant Griffin, and for the purchase money executed her note to him for \$600, payable March 1, 1864. It was assigned to the appellant M. L. Wilson in December, 1864; \$200 having been paid upon it in March prior thereto. The appellants claim that a title-bond was executed by Griffin, but it is not filed, nor is it shown by competent evidence that any was ever given. Mrs. Suggett died in 1877, and this action was brought in 1878 upon the \$600 note, against her executors and devisees, seeking a judgment *in personam* against the personal representatives, and one *in rem* against the land for the purchase money. It is clear the first could not have been rendered, because Mrs. Suggett was at the date of the execution of the note a married woman, and her coverture is relied upon as a defense to any such relief. The appellees claim that she, finding Griffin had, as they assert, not even an equitable title to the land, purchased the same from L. W. Brown and the Sheets heirs; and they exhibit deeds duly executed and recorded, and purporting to have been made for a valuable consideration, from all of them to her, save James Sheets. That from L. W. Brown is dated May 17, 1864, the others bearing a subsequent date, but all prior to April 1, 1870.

It is claimed by the appellants that by the terms of the contract between Griffin and Mrs. Suggett the latter accepted the former's title-bond, and agreed to look to the holders of the legal title for it. This, however, is denied, and there is no competent testimony tending to show it. The evidence of the appellee Griffin relative to it cannot be considered, as the other party to the transaction is dead, and the testimony relates to her acts and conversation. It is certain that Griffin did not have the legal title to the land. It does not appear that L. W. Brown was in fact the owner by purchase of any interest in the

land save that of Mrs. Suggett, and the evidence tending to show the execution by him of the bond purporting to be from him to Griffin is not of a very satisfactory character. This is true, also, as to the genuineness of the bond from James Sheets to Griffin. At most, the latter is not shown to have acquired even an equitable title to the land, save the interests of L. W. Brown and James Sheets. It is denied that Griffin was the owner of the land or had possession of it at the date of the contract with Mrs. Suggett, or that she took possession of it under him. Upon the contrary, the appellees claim that she did so under her purchases from L. W. Brown and the Sheets heirs. The appellants assert that Griffin had possession of it from 1859 to 1863, when he sold to her. The evidence upon this point is somewhat uncertain. To some extent it sustains the assertion, but there is also testimony tending to show that during this time it was occupied by squatters.

All of the circumstances tend to show, but not very clearly, that Mrs. Suggett took possession under her purchase from Griffin; and, if so, he is certainly equitably entitled to the value of the interest in the land to which he is shown to have had title. The fact that he held the legal title as trustee for her father during his life-time cuts no figure, inasmuch as there is no claim that he made the sale to her by virtue of any such holding. The sale was made by him to her for \$600. No right is shown in him to but little if any more than one-third of the land. She paid \$200 upon the note, or one-third of the price she agreed to pay him for the land. This, coupled with the fact that about 14 years elapsed from the maturity of the note before this action was brought, during which one of the principals to the transaction died, and which delay is unexplained, creates a strong presumption that the lower court, in canceling the note and quieting the title of Mrs. Suggett's devisees to the land, has arrived at the right and equity of the matter as nearly as possible; and we are not disposed in the dim light now shed upon the transaction, after the lapse of many years, by a meager record to disturb its conclusion.

We have considered the testimony taken in the case, so far as it is competent, as we fail to see upon what ground the lower court excluded all of it. Judgment affirmed.

HUME v. McNEES.

(Court of Appeals of Kentucky. January 19, 1889.)

PARTNERSHIP—ACCOUNTING—BASIS OF SETTLEMENT.

Plaintiff and defendant were partners dealing in tobacco. Defendant was also a member of another firm engaged in the same business, and its tobacco was handled in the market in the name of the former firm. Defendant kept the accounts of the two firms in the same set of books, but the books did not show how much tobacco had been bought by each firm, or the cost of it, though they showed the amount expended by the two firms. In an action to settle the partnership affairs of the parties, the commissioner estimated the amount of tobacco bought for defendant's firm by adding to the number of pounds that it had sold a proper amount as shrinkage, the cost of which he found from the average price paid. He deducted this sum from the amount paid by both firms for tobacco, in order to fix the cost of what had been bought for plaintiff's firm. The selling price and expenses being known, the profits of plaintiff's firm were estimated, and defendant's liability to plaintiff fixed. Held a proper settlement.

Appeal from chancery court, Harrison county; J. W. MENZIES, Chancellor.

The two parties to this appeal were in the years 1873-74 engaged in a partnership business under the firm name of Hume & McNees, buying and selling leaf tobacco. Hume was the treasurer and book-keeper for the firm, and he was also a member of the firm of Hume & Owen. This latter firm also bought and sold tobacco, its tobacco being handled in the market in the name of Hume & McNees, and the accounts of the two firms were kept in the same set of books by Hume. This was a suit by A. J. McNees against his partner,

N. L. Hume, for a settlement of the partnership affairs of Hume & McNeess. The commissioner to whom the case was referred found that the books kept by Hume showed the total sum of money expended by Hume for tobacco for the two firms, but did not disclose how many pounds of tobacco had been purchased by either firm, or the cost per pound, or how much tobacco had been paid for by Hume & McNeess, and how much by Hume & Owen. The number of pounds sold by Hume & Owen was ascertained, however. In order, therefore, to ascertain what sum of money Hume ought to be credited with, as expended in purchasing tobacco for Hume & McNeess, the commissioner took the number of pounds sold by Hume & Owen as a basis. To this he added a certain per centum as the shrinkage that would occur between the time of purchase and of sale, and the total number of pounds thus approximated showed the quantity of tobacco purchased by Hume & Owen. Multiplying this total by the average price per pound paid, the commissioner determined how much money Hume & Owen had paid for tobacco. Subtracting this sum from the known amount paid by Hume for tobacco for the two firms, the commissioner fixed the sum that the Hume & McNeess tobacco had cost. The selling price of the same tobacco was known, as likewise was the cost of shipping and handling, etc., and in this manner the profits of Hume & McNeess were determined. By this settlement Hume was found to be indebted to McNeess. The tobacco raised by McNeess' tenants on his farm was eliminated from the partnership accounts. Of the judgment rendered Hume complains.

A. H. Ward and T. T. Forman, for appellant. L. M. Martin, for appellee.

PRYOR, J. It is evident from the report of the commissioner and the facts of the record that Hume obtained credit for all the tobacco purchased, and the question of shrinkage has nothing to do with this case, except the ascertainment of shrinkage on tobacco purchased by Hume & Owen. Hume, whose business it was to keep the accounts accurate, and who purchased this tobacco and sold it, has so confused the purchases for Hume & McNeess with those of Hume & Owen as to bring about all this trouble and litigation that otherwise would have been needless, and the chancellor will not be diligent in so shaping the accounts as to enable him to profit by reason of his own negligent conduct. Still, he is entitled to an equitable adjustment of the partnership business, and this has been done by the commissioner's report. The commissioner ascertained the quantity of tobacco sold by Hume & Owen, and, adding to that the shrinkage that would naturally take place during the time intervening between the purchase and sale, has ascertained the precise number of pounds purchased by them. This tobacco, and the cost of handling, together with the tobacco raised on the farm of McNeess—Siger's tobacco and Gillen's—deducted from all the tobacco purchased as heretofore directed, shows the quantity purchased by Hume & McNeess, and there is no difficulty in ascertaining the amount realized from the sales.

The amount of money paid out by Hume & McNeess, or by Hume, for tobacco, and the amount collected from the sales of the tobacco, presents a simple arithmetical proposition by which the loss or profit is determined. The cost of the Hume & McNeess tobacco, including expenses and cost of handling as well as the cost of the factory built for handling, is \$46,768.77. The factory cost \$1,050. Deduct this from cost of the tobacco, and it leaves \$45,718. The tobacco sold for \$56,751.09, leaving profits, as the commissioner finds, of \$11,032.32. When settling the personal accounts of the two parties, this leaves Hume owing McNeess \$2,105.48. This is the result of the commissioner's report. The appellant makes the cost of the Hume & McNeess tobacco, including expenses, exceed \$50,000. This is done by assuming that the shrinkage on the whole tobacco purchased should be added to the amount sold, and in this way ascertain the quantity purchased, when it plainly appears how much

money Hume & McNees paid for it, for which the firm is credited, or Hume, and then charged with the sum for which the tobacco was sold. If the amount of money paid for the tobacco is found, then what it sold for will show the difference. This is the view taken of the question by the commissioner.

The theory of the appellant and its result follows from an imaginary state of facts, while the commissioner has ascertained what was actually paid out, and then what the tobacco sold for. It was proper to deduct the value of the factory from the sum realized from tobacco. This would show the amount of money due from Hume to McNees, leaving the partners the owners of the building.

We perceive no error in the settlement by the commissioner; and, if any loss has been sustained, it results from the negligent conduct of Hume in keeping the accounts. The commissioner has taken a broad and practical view of the rights of these parties, and adjusted their differences in a just and equitable manner. As we understand this case, the cost of the Hume & McNees tobacco is obtained from the actual purchases made, and not by the estimate of sales. The account of sales realized is stated to show the profit.

No injustice has been done the appellant by the settlement, and the judgment below is affirmed.

BAKER v. COMMONWEALTH.

(Court of Appeals of Kentucky. January 24, 1889.)

CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES—AFFIDAVIT.

Where an affidavit for a continuance, made by a defendant in a criminal case, on account of the absence of witnesses, sets out evidence which, if proved, would entitle the defendant to an acquittal, the court cannot refuse the continuance because of disbelief in the statements of the affidavit.

Appeal from circuit court, Nelson county; W. E. RUSSELL, Judge.

Charles Baker was indicted and convicted of breaking into a dwelling-house in the night-time, and taking therefrom property of value. He prosecutes this appeal.

C. T. Atkinson, for appellant. P. W. Hardin, for appellee.

BENNETT, J. The appellant was indicted, tried, and convicted in the Nelson circuit court of the crime of breaking into the dwelling-house of Dr. H. D. Rodam, and taking therefrom personal property belonging to the owner. The house was broken into between half past 12 and daylight on the night of the 10th of October, 1888. The appellant moved the court, upon his affidavit, to continue the case, on account of the absence of his witnesses. The affidavit disclosed that the appellant had used due diligence to obtain his witnesses; also disclosed that he could prove by one witness that he spent the night that the house was broken into with him at Lebanon Junction, a distance of 15 miles from the place where the crime was committed; also that he could prove by one O'Brien that he gave the appellant the personal property found in his possession for the purpose of taking the same to Louisville to be delivered to O'Brien's wife; that he was on his way to Louisville with said property at the time of his arrest; that he would also prove by said witness that, if said property was stolen, he knew nothing about it.

We cannot see why the court overruled his motion for a continuance, unless it was upon the ground that the statements in the affidavit were not believed. If so, the court went beyond its province. The question to be determined was, did the affidavit disclose evidence, that was absent, material to his defense, and that due diligence was used to obtain it, and that it was within the reach of the process of the court? If the statements of the affi-

davit are true, and we must presume—so should the lower court have done, for the purpose of acting on the motion—that said statements were true, they showed that, notwithstanding the proof for the commonwealth, the appellant was not guilty; for the proof against him was all circumstantial, and the proof that he proposed to furnish would have explained it away.

We have heretofore decided that if, conceding all the statements of the affidavit in reference to absent evidence to be true, the proof upon the trial showed conclusively that the accused was guilty, this court would not grant a new trial, for the reason that the error of the court was not prejudicial to the substantial rights of the accused. Here, however, the statements of the affidavit, if true, would entitle the accused to an acquittal.

The judgment is reversed, and the case is remanded, with directions to grant the appellant a new trial.

STATE v. HERRELL.

(*Supreme Court of Missouri. February 4, 1889.*)

1. HOMICIDE—INDICTMENT.

An indictment for homicide is insufficient which fails to charge that the killing was done feloniously, deliberately, etc., and such failure to charge is not supplied by the allegation that the assault was made feloniously, nor by the concluding words of the indictment, that defendant "feloniously, deliberately," etc., "did kill and murder," etc.

2. SAME—SELF-DEFENSE.

An instruction was correct that if defendant at the time purposely sought deceased, in order to bring on, and did voluntarily enter into a combat with him, with the intent to kill him, or do him great bodily harm, then the law of self-defense could not be pleaded in defendant's behalf.¹

3. SAME—INSTRUCTIONS—INTENT.

An instruction to the effect that the quality of the homicidal act was the same, whether it was perpetrated with or without a felonious intent, provided the perpetrator "brought on the difficulty or voluntarily entered into the same," is error.¹

4. SAME.

There being no testimony that defendant began the quarrel, the effect of these instructions was to mislead and confuse the jury.

5. SAME—MURDER IN FIRST DEGREE.

An instruction that an intentional killing was murder in the first degree, without any qualifications as to malice or deliberation, is erroneous.

6. SAME—JUSTIFICATION—EVIDENCE.

Evidence of adulterous intercourse for a long time between deceased and defendant's mother, of which defendant was fully cognizant, was inadmissible, and the fact constituted no justification for the homicide.

Appeal from circuit court, Greene county; W. D. HUBBARD, Judge.

Newton W. Herrell was indicted and convicted of the murder of one Amos Ring, and appeals from the judgment of conviction.

O. H. Travers, for appellant. *The Attorney General*, for the State.

SHERWOOD, J. The indictment in this cause is as follows: "The grand jurors of the state of Missouri, chosen and selected from the body of Taney county, in said state of Missouri, who after being duly impaneled, charged, and sworn upon their oath, find and present that Newton W. Herrell, late of the county and state of Missouri, did on or about the 7th day of October, A. D. 1884, at said county of Taney and state aforesaid, in and upon one Amos Ring, then and there being, unlawfully, willfully, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, make an assault, and with a certain pistol, commonly called a 'revolver,' then and there being

¹For circumstances under which defendant may invoke the plea of self-defense, though he himself brought on the difficulty, see *Johnson v. State*, (Tex.) 10 S. W. Rep. 285, and note.

loaded and charged with gunpowder and leaden bullets, and which said pistol was then and there held in the right hand of him, the said Newton W. Herrell, at, to, and against, and in and upon, him, the said Amos Ring, did unlawfully, willfully, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, shoot off and discharge, and by means and force of the gunpowder and leaden balls aforesaid, did give to him, the said Amos Ring, two wounds, which said wounds were then and there mortal wounds,—one of said wounds being on the left side of the body of him, the said Amos Ring, near the fifth rib, penetrating and entering the body of him, the said Amos Ring, near said fifth rib, said wound being of the depth of six inches, and width of one-half inch; and the other said mortal wound being on the top of the head of him, the said Amos Ring, and said wound being then and there a mortal wound, being in depth about six inches, and width of one-half inch; of which said mortal wounds he, the said Amos Ring, did then and there, on said 7th day of October, 1884, at the county of Taney and state of Missouri, instantly die. And so the grand jurors aforesaid do say that the said Newton Herrell, the said Amos Ring, in manner and form and by the means aforesaid, feloniously, deliberately, premeditatedly, on purpose, and of his malice aforethought, did kill and murder, against the peace and dignity of the state of Missouri." Under this indictment the defendant was tried, convicted of murder in the second degree, and his punishment assessed at 15 years in the penitentiary. Judgment accordingly, from which judgment defendant appeals.

Various errors are assigned for a reversal of the judgment, among them the refusal of the court below to hold the indictment insufficient on motion to quash and on motion in arrest.

1. The indictment was insufficient in that it failed to charge that the homicidal act itself was done feloniously, etc. The failure thus to charge was not supplied by the allegation that the assault was made feloniously, nor by the concluding words of the indictment, nor by anything else therein contained. This position is abundantly sustained by authority. *State v. Feaster*, 25 Mo. 324; *Respublica v. Honeyman*, 2 Dall. 228; 5 Bac. Abr. "Indictment," G, p. 68; 2 Bish. Crim. Proc. § 564.

There are authorities, however, for holding that an indictment will be made good, notwithstanding it fails to allege that the wound was feloniously, etc., given, provided that the words "feloniously," etc., previously alleged, are connected with the mortal stroke by the words "and then and there;" for in such case the words "feloniously," etc., will run through the subsequent allegations, and thus connect them with the mortal stroke, to which they are essential, as already seen. 1 East, P. C. 346; 2 Hale, P. C. 184; *State v. Lakey*, 65 Mo. 217; *State v. Steeley*, Id. 218; *State v. Sides*, 64 Mo. 383. In the present case it will be observed that this has not been done, nor the necessary connecting words used.

2. Over the objections and exceptions of the defendant, a large number of instructions were given at the instance of the state,—31 in all. How the minds of the jury were to be or were enlightened by such a mass of written matter it is impossible to tell. Three instructions, properly drawn, will embrace every idea which they contain, as well as the whole law of the case arising on the facts developed by the testimony.

3. The defendant relied on the theory and fact of self-defense, and his testimony tended to support his plea. Instruction No. 16 in the longsome series is the following: "But if you believe from the testimony that Herrell was at the time purposely seeking Ring in order to bring on, and did voluntarily enter into and engage in, a combat or fight with Ring, with the intent to shoot and kill or do Ring great bodily harm, then the law of self-defense does not arise in behalf of the defendant, and cannot excuse or justify him for killing Ring,"—it declares the correct doctrine, as announced by this court on former

occasions. *State v. Hay*, 28 Mo. 287; *State v. Packwood*, 28 Mo. 340; *State v. Partlow*, 90 Mo. 608, 4 S. W. Rep. 14; *State v. Berkley*, 92 Mo. 41, 4 S. W. Rep. 24; *State v. Gilmore*, 95 Mo. 554, 8 S. W. Rep. 359, 912; *State v. Parker*, 9 S. W. Rep. 728, (decided at the present term.)

Those cases, as well as all carefully considered cases in other jurisdictions, and all the text writers, recognized as sound and wholesome law the principle that if a man bring on a difficulty with the purpose of wreaking his malice by slaying his adversary, or doing him some great bodily harm, and actuated by such a felonious purpose he does the homicidal act, then there is no self-defense in the case, and he is guilty of murder in the first degree, and nothing less.

The eighth instruction was as follows: "The court instructs the jury that if you believe from the evidence in the case that the defendant sought or invited the difficulty in which Ring was killed, or that he provoked or commenced or brought it on by any willful act of his own, or that he voluntarily and of his own free will engaged in it, then, and in that case, you are not authorized to acquit him on the ground of self-defense. The right of self-defense does not avail as a defense in any case where the difficulty is sought for and induced by the party by any willful act of his own, or where he voluntarily and of his own free will enters into it." This instruction is erroneous, in that it cuts off the defendant from a limited or qualified right of self-defense, though actuated by no felonious intent, provided he "brought on the difficulty," and is condemned by the authorities before cited. Indeed, a more monstrous proposition never found lodgment in print than that the quality of the homicidal act is the same whether it was perpetrated with or without a felonious intent, provided the perpetrator "brought on the difficulty, or voluntarily entered into the same."

The two instructions first quoted, are, for the reasons given, in irreconcilable conflict, and it cannot be told which one the jury took for their guide in arriving at their verdict. *Gay v. Gillilan*, 92 Mo. 250, 5 S. W. Rep. 7; *State v. McNally*, 87 Mo. 644; *State v. Simms*, 68 Mo. 305; *State v. Mitchell*, 64 Mo. 191; *Frederick v. Allgaier*, 88 Mo. 598; *Thomas v. Babb*, 45 Mo. 384.

4. Besides, there is no testimony that the defendant began the quarrel, and so the only effect of the instructions mentioned was to confuse and mislead the jury. *State v. Chambers*, 87 Mo. 406. Prosecuting attorneys throughout the state seem to regard an instruction containing the words "brought on the difficulty" as applicable to every case of homicide. Such an instruction seems to be their stock in trade,—their *vade mecum*,—to be indiscriminately applied in any and every case where death is the result of violence.

5. The sixth instruction is in these words: "He who willfully—that is, intentionally—uses upon another at some vital part a deadly weapon, as a loaded revolver or a fire-arm, must, in the absence of qualifying facts, be presumed to know that the effect is likely to be death, and, knowing this, must be presumed to intend the death which is the probable and ordinary consequence of such an act; and, if such deadly weapon is used without just cause or provocation, he must be presumed to do it wickedly or from a bad heart. If, therefore, you believe that the defendant took the life of Amos Ring by shooting him in a vital part with a revolver or pistol loaded with powder and leaden ball, with a manifest design to use such weapon upon him, and with sufficient time to deliberate and fully form the conscious purpose to kill, and without sufficient reason or cause or extenuation, then such killing was murder in the first degree."

This instruction, so far as it goes, was taken from an instruction of the same number in *State v. Talbott*, 73 Mo. 347; but the remainder of that instruction in that case was as follows: "And while it devolves on the state to prove the willfulness, deliberation, premeditation, and malice aforethought, all of which are necessary to constitute murder in the first degree, yet these

need not be proved by direct evidence, but may be deduced from all the facts and circumstances attending the killing; and if the jury can satisfactorily and reasonably infer their existence from all the evidence, they will be warranted in finding the defendants guilty of murder in the first degree." The instruction in this case, mutilated as it was by lopping off the material portion already set forth, was erroneous in holding, as it does in effect, that an intentional killing, which under numerous decisions of this court is only murder in the second degree, was murder in the first degree. The instruction, taken as a whole, as given in *Talbott's Case*, is sufficiently clear, though not drawn in a very happy manner, but, as given in the case at bar, plainly erroneous. *State v. Sharp*, 71 Mo. 218, and cases cited.

6. The testimony disclosed by the record shows that when the defendant was some five years of age his mother, Mrs. Herrell and a little sister, left Tennessee, in 1867, and came to Missouri with the deceased, and that Mrs. Herrell had been living in adultery with deceased until about six months prior to the homicide, when deceased was indicted for thus living in adultery, and it seems was fined \$50 as a punishment therefor. All this testimony as to deceased having lived in adultery with defendant's mother was wholly outside of the case, and constituted no palliation or mitigation of defendant's guilt of the homicide, and should not have been admitted. After adulterous intercourse has taken place for a long series of years, and a husband is fully cognizant of it, if he slay the paramour in revenge, the adultery constitutes no justification. *Sawyer v. State*, 35 Ind. 80, and cases cited. A like rule would certainly hold as regards a son being the avenger of his mother's honor, when equally well acquainted with similar facts.

For the errors aforesaid the judgment should be reversed, and the cause remanded.

BLACK and BRACE, JJ., concur. BAROLAY, J., not sitting.

KORTE v. HOFFMAN.

(*Supreme Court of Missouri*. February 4, 1889.)

1. WITNESS—IMPEACHMENT.

Where defendant had, on cross-examination of plaintiff, read certain parts of her deposition taken by him, for the purpose of impeachment, it was competent for plaintiff to read the whole to the jury.

2. NEW TRIAL—PHYSICAL CONDITION OF DEFENDANT.

The court properly refused to grant defendant a new trial on affidavits to the effect that when testifying he was so nervous, excited, and embarrassed that he forgot many important facts, and answered in such a manner as to prejudice his case.

Appeal from St. Louis circuit court; SHEPARD BAROLAY, Judge.

Action by Mary Korte against Sebastian Hoffman to recover damages for a breach of promise of marriage. Defendant appeals from a verdict and judgment for plaintiff.

W. B. Thompson, for appellant. Louis Gottschalk, for respondent.

BRACE, J. This is an action for damages for breach of promise of marriage, in which the plaintiff recovered judgment in the trial court for \$3,000. The answer was a general denial. There was evidence tending to show an unconditional agreement between the parties to marry at an indefinite time in the near future; that defendant refused to perform his agreement, and married another woman; and there was evidence tending to prove that the agreement to marry was conditioned upon the approval of the match by the children of the defendant, who was a widower of mature years, in comfortable

circumstances. It was conceded that defendant refused to marry the plaintiff, and married another woman.

The question of fact in controversy was whether the engagement between the parties was absolute and unconditional, as claimed by the plaintiff, or conditional, and dependent upon the approval of his children, as claimed for the defendant. This issue was submitted to the jury upon instructions as favorable to defendant as ought to have been given, and found for the plaintiff. There being evidence in the case to support that finding, its sufficiency will not be inquired into, or the finding reviewed by this court. *Wilbur v. Johnson*, 58 Mo. 600. The contract and its breach being established by the verdict, the damages are not excessive, under all the facts and circumstances as they appear in the evidence.

Several objections are urged to the action of the court in admitting evidence for the plaintiff, but we find no error affecting the merits of the case in this behalf, in any instance where specific objections were made and saved by proper exceptions, and it is only such that this court will review. After defendant had on cross-examination of plaintiff read certain parts of her deposition taken by him, for the purpose of impeachment, it was competent for the plaintiff to read the whole to the jury. *State v. West*, 95 Mo. 139, 8 S. W. Rep. 354, and cases cited.

It was assigned as a ground for new trial that when the defendant was testifying in his own behalf he was so nervous, excited, and embarrassed that he forgot many important facts, and answered in such a manner as to prejudice his case, and the refusal of the court to grant him a new trial on affidavits to that effect is complained of here as error. It is possible that the defendant's nerves might be in a condition to enable him to testify to a better advantage if he were afforded another opportunity, but we hardly feel called upon by the evidence in this case to set a precedent that will enable him to do so.

The judgment is affirmed. All concur, except BARCLAY, J., not sitting.

JENKINS *et al.* v. CAIN *et al.*

(Supreme Court of Texas. November 23, 1883.)

EXECUTORS AND ADMINISTRATORS—PROOF OF CLAIMS—REVIVAL OF JUDGMENT.

The assignees of a judgment for a sum of money, and foreclosing a vendor's lien therefor, after the defendant had died, in ignorance that the judgment had become dormant, filed with the clerk an affidavit of the death, and obtained an order of sale against the administrator, as allowed by Rev. St. Tex. art. 2276, under which the land was sold, and they became purchasers. Article 2086 provides that no judgment shall be rendered on a claim for money against an estate, which has not been legally presented to the administrator, and rejected; and article 2275, that, where a sole defendant dies after judgment, execution shall not issue, but the judgment shall be proved up and paid in due course of administration. *Held*, that the assignees could not petition the district court to revive the judgment, set aside the sale, and enforce the lien, without having first presented the judgment as a claim against the estate, since the debt was the principal object of their suit, and they were not the vendors of the land having a superior title until the price was paid, as in *Robertson v. Paul*, 16 Tex. 472, but merely the owners of a secured debt.

Appeal from district court, Smith county; FELIX J. McCORD, Judge.

Suit by W. G. Cain and S. A. Cain against Mary Jenkins, administratrix of the estate of Andrew Jenkins, deceased, and others, to revive a certain judgment against said Andrew Jenkins, and for other relief. Judgment for plaintiffs. Defendants appeal.

White & Edwards, for appellants. *I. J. Rice*, for appellees.

WALKER, J. A statement of the case made in the brief for appellants, and concurred in by counsel for appellees, is as follows: "Suit was filed in the

court below, June 19, 1888, by Cain & Cain against appellant and other heirs of Andrew Jenkins, deceased, alleging that on March 4, 1881, judgment was rendered in favor of the executors of Sam. L. Earle against Andrew Jenkins for \$379, and foreclosing the vendor's lien on a tract of land described in the petition; that plaintiffs were the owners of the same by assignment; that the judgment had been allowed to become dormant; that an order of sale was issued on said judgment in December, 1886, under which levy and advertisement of said land was made; that prior to the day of sale Andrew Jenkins died, and the order of sale on that account was returned not executed; that some time thereafter one P. W. Rowland was appointed and qualified as administrator of said Andrew Jenkins, but was shortly after removed, and appellant, the widow of the deceased, was appointed and qualified, and is now performing her duties as such; that, after Rowland had qualified as administrator, appellees inadvertently, and without knowing said judgment was dormant, made the affidavit as prescribed by article 2276 of the Revised Statutes, had an order of sale to issue, and caused the land to be sold, becoming the purchasers. They pray that said judgment be revived, the sale held for naught, and that their lien be enforced as originally decreed." The defendants demurred, and the petition was held good. Judgment of revivor followed, and certifying it to the county court for observance. Defendants appealed.

Article 2015, Rev. St., provides: "Every claim for money against a testator or intestate shall be presented to the executor or administrator within twelve months after the original grant of letters testamentary or of administration, or the payment thereof shall be postponed until the claims which have been presented within said twelve months, and allowed by the executor or administrator, and approved by the county judge, have been first entirely paid." Article 2028: "When a claim for money against an estate has been rejected by the executor or administrator, either in whole or in part, the owner of such claim may, within ninety days after such rejection, and not thereafter, bring a suit against the executor or administrator for the establishment thereof in any court having jurisdiction of the same." Article 2036: "No judgment shall be rendered in favor of a claimant, upon any claim for money, which has not been legally presented to the executor or administrator, and rejected by such executor or administrator, either in whole or in part." And relating to executions, article 2330: "The death of the defendant after the execution is issued shall operate as a *supersedeas* thereof; but the lien of the execution, when one has been acquired by a levy, shall be recognized and enforced by the county court in the payment of the debts of the deceased." Article 2275: "Where a sole defendant dies after judgment for money against him, execution shall not issue thereon, but the judgment may be proved up, and paid in due course of administration."

These extracts from the statutes governing the case show (1) that a money judgment against a deceased defendant is a claim to be proved up and paid in due course of administration. (2) That all claims for money must be presented to the administrator for allowance. In this there is no difference in the character of the claims to be presented under the present and under the probate law of 1848. *Buchanan v. Wagoner*, 62 Tex. 377. (3) That unless presented no judgment shall be rendered upon any money claim whatever, and that the right to sue on such claim would only follow the rejection, in whole or in part, by the executor or administrator. Counsel insist that a proceeding to subject to sale the land is not to be classed as a suit upon a money claim. The claim for money, if allowed, would stand as a judgment equally as upon a former revival. The lien cannot be enforced by execution, but only through the probate court. The debt is the principal object of the suit. The petition did not show that the judgment had been presented to the administratrix, and rejected in whole or in part. No right to sue in the district court was shown, and the demurrer should have been sustained.

This case is distinguishable from *Robertson v. Paul*, 16 Tex. 472. In that case Paul sued the administrator of Robertson for a balance due upon a purchase-money note, which balance had been rejected by the administrator. Robertson, on the purchase of the land, executed the note and a trust deed to secure the purchase money upon the land bought. After Robertson's death, the trustee sold the land, and credited the proceeds of the sale upon the note. Claim for the balance was rejected, upon which the suit was brought. The administrator appealed from the judgment establishing the claim. On appeal, HEMPHILL, C. J., delivering the opinion, holding the trustee's sale to be void, recognizes that, "the price remaining wholly unpaid, the vendor has the better right or superior title to the land," and, "to vest an indefeasible title in the estate which shall render the property subject to the payment of other claims upon it, the purchase money must be paid." All the facts being before the court, the balance due having been sworn to, presented, and rejected, the administrator claiming the land, the judgment below was reformed, the trustee's sale set aside, and the entire claim and mortgage allowed and certified to the probate court; all costs being taxed against the plaintiff. Here the vendor is not a party. Cain & Cain are purchasers of the judgment. In their hands the claim is a secured debt, not the better title or superior right to the land. *Cassaday v. Frankland*, 55 Tex. 452. The judgment below is reversed.

RYBURN v. MOORE.

(Supreme Court of Texas. November 23, 1888.)

1. AFFIDAVIT—ACKNOWLEDGED BEFORE PLAINTIFF'S ATTORNEY.

It is not error to refuse to strike out an affidavit of plaintiff's inability to give security for costs, on the ground that it was acknowledged before plaintiff's attorney as notary.

2. FALSE IMPRISONMENT—EVIDENCE—CHARACTER OF PLAINTIFF.

In an action for false imprisonment, defendant cannot, to show good faith and the extent of damages, ask a witness whether plaintiff was not at and before the time of the arrest regarded by the community as a dead-beat, a violator of law, and a fugitive from justice, and whether he had not been frequently confined in jail.

3. SAME.

Charles F. Moore was arrested on a *capias* from another county for the arrest of Charley Moore, for theft. Plaintiff testified that he protested his innocence, and warned the sheriff that he should seek redress. When taken to the other county he was not identified as the person desired. Held, that the evidence was sufficient to sustain a judgment for false imprisonment.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

M. B. Templeton, for appellant.

WALKER, J. This is an action by C. F. Moore against appellant, the sheriff of Ellis county, for false imprisonment. The petition alleges that in June, 1887, in Ellis county, Tex., Ryburn assaulted plaintiff, and with force, compelled him to quit his business, and go to jail in Waxahachie, and then and there imprisoned plaintiff, and kept him a prisoner, without any probable cause or lawful authority, for the space of nine days, causing loss of earnings in his business, \$60; and "that said imprisonment caused him great suffering, distress, agony, and humiliation, both of mind and body, to his actual damage two thousand dollars." The petition also claimed vindictive damages. The defendant specially excepted to the item of \$60, which it was alleged was lost from his falling by the arrest to make his shipments of cattle, in which business he is alleged to have been engaged. Defendant also pleaded general denial, and justified under a *capias* from Johnson county for the arrest of Charley Moore. The case was tried without a jury, and judgment was rendered for plaintiff for \$85.

The first assignment of error complained that the court overruled a motion by defendant to strike out an affidavit filed by plaintiff, of inability to give security for costs filed under article 1438, Rev. St. The ground for the motion was that the notary before whom the affidavit was made was one of the attorneys for the plaintiff. We are referred to no authorities. In *Weeks*, Attys. at Law, under section 122, it is stated: "In all legal proceedings, and at every stage of a cause, a court scrupulously guards against intrusting the execution of its mandates to persons having any interest in the cause. The law will not tempt those having an interest in any way to abuse its process for the purpose of promoting selfish ends. So a solicitor in a cause has been held disabled from acting as a special master to execute a decree in the cause; nor can an attorney make a writ, and indorse his name upon it as attorney for the plaintiff, and also sign it as justice of the peace." Our courts have suppressed depositions when taken by an attorney in the suit, for the obvious reason that the testimony may receive color from the interested official. The notary is authorized to administer oaths, and to give certificates thereto. Attorneys at law often are appointed to the office. It was proper for the attorney for plaintiff to prepare the affidavit, if required by his client. The statute prescribes its contents. If sworn to before his attorney, as a notary, if false it would be perjury. The attorney, as a witness in a prosecution for perjury or false swearing upon the affidavit, would be a competent witness if called to prove the fact of making the affidavit, and of the affiant's knowledge of its contents. As in no possible way could the defendant be injured by one or another officer taking the affidavit, we cannot see that the court erred in refusing to strike out the affidavit.

The second assignment of error complains of the action of the court in sustaining objections, because immaterial and improper, to the question asked by defendant of a witness on cross-examination: "Was it not a fact that plaintiff, Charley Moore, in June, 1887, and long before that time, was regarded by the public generally where he lived as a dead-beat, a violator of law, and a fugitive from justice, and had he not been frequently confined in the calaboose and jail for violations of law?" Appellant insists that, inasmuch "as the gist of the plaintiff's action being that he had been wrongfully arrested and suffered mental damage, etc., the question was germane both to show good faith in making the arrest and upon the question of damage." The statement of facts shows that plaintiff had been arrested by a deputy of defendant as alleged upon a *capias* for Charley Moore; that he was put in jail, and there confined, until at the convenience of the sheriff the plaintiff was sent in custody of a deputy to Fort Worth, to meet the sheriff of Young county; that at Fort Worth the sheriff of Young county failed to identify plaintiff as the man wanted, when he was released, the deputy paying his expenses back to Ennis, where he had been arrested. He was in confinement eight or nine days. There was testimony to the general character of plaintiff as wanting in veracity. This was proper, as he tendered himself as a witness. Testimony also was given to his occupation, and value, and want of it, of his services. There was conflicting testimony to his treatment while in jail. The testimony of the plaintiff was that he was not the party for whose arrest the *capias* was issued, and that he had remonstrated with the officer making the arrest, protesting his innocence; that he had not been long in the country, and could not give bond, etc. The question excluded was simply to prove the general bad character of the plaintiff, and facts warranting it, totally independent of the transaction. "In civil cases, evidence of character is not admitted unless the nature of the action involves the general character of the party, or goes directly to affect it." 1 Greenl. Ev. § 54. "The character of a party in regard to a particular trait is not in issue, unless it be the trait which is involved in the matter charged against him." Id. § 55. If it should even be conceded that, to show good faith in the officer arresting the plaintiff under

the charge of theft, his character for honesty was involved, still the general sweeping questions asked were irrelevant. If asked with reference to the measure of damages, there is no shadow of relevancy. The question, and all parts of it, were properly excluded.

Other assignments question the sufficiency of the testimony. The plaintiff testified that he was innocent of the theft named in the *captas*, and the sheriff of Young county could not identify him as the accused for whom the *captas* was issued. He was arrested after protesting his innocence, and after his arrest he warned the sheriff that he would seek redress. The testimony was sufficient. The plaintiff may have been a tramp, but the courts were open to him. He may have been a notorious offender against the law, but the law nor its officers could call him to account for the crimes of another. Nor do the scales of justice weigh against him his offenses against others, when vindicating his own rights against their invasion by the defendant. Finding no error, the judgment will be affirmed.

BROWN *et al.* v. WATSON.

(Supreme Court of Texas. December 7, 1888.)

1. PARTNERSHIP—WHAT CONSTITUTES.

A contract between wholesale and retail dealers, by which the former furnishes stock, and the latter stores, insures, and sells for a share of the profits, does not constitute a partnership.¹

2. ATTACHMENT—PROPERTY SUBJECT TO—CLAIMS OF THIRD PARTIES.

It appeared that the two dealers had negotiated with a view of a partnership, but that, while the retailer had represented that a partnership existed, the wholesale dealer contradicted such statements, when they came to his knowledge; that the business of each was carried on as before, the articles furnished being of a similar character to those dealt in by the retailer; that the circulars of the latter showed that he dealt in some goods as agent; that the sales account of goods furnished by the wholesaler was kept separate from other sales; and that the attaching creditors of the retailer gave credit on the basis of commercial reports, and not on that of the stock of goods. *Held*, that the wholesale dealer was not estopped from alleging his individual ownership of the goods, and that they were not liable to attachment for the retailer's debt.

Appeal from district court, Ellis county; ANSON RAINEY, Judge.

A lot of pumps were levied upon under an attachment in favor of Charles E. Brown and others against C. N. Owsley & Co., which were claimed by S. H. Watson. Judgment was rendered in favor of Watson, and the attachment creditors appeal.

Lancaster & Maxwell and *G. C. Groce*, for appellants. *J. W. Ferris* and *M. B. Templeton*, for appellee.

WALKER, J. The findings of fact by the trial judge will be taken as conclusive where there is any material conflict in the testimony. This will reduce the labor of this court to the application of the recognized principles of the law of partnership to the undisputed facts, or the facts found by the court, showing the dealings of Watson and the firm of C. N. Owsley & Co. with each other and the public. The written contract by which Watson agreed to furnish C. N. Owsley & Co., on consignment, such a stock of pumps, etc., as the two parties may mutually agree to be necessary and sufficient, and in which Owsley & Co. agreed to store, insure, and sell the pumps, etc., and keep a correct account of said business, further stipulates: "Commissions of one-half profit on retail sales, and one-third profit on wholesale sales, are to be compensation to said C. N. Owsley & Co. * * * for their services in

¹ In general, as to what constitutes a partnership, see *Runnels v. Moffat*, (Mich.) 41 N. W. Rep. 224, and note; *Railway Co. v. Johnson*, (Tex.) 7 S. W. Rep. 838, and note.

storing and selling said pumps," etc. Such a contract for the payment of Owsley & Co. for their services does not of itself make them partners with Watson. "It must be, however, considered as now settled that a person paid for services rendered to a firm by a share of the profits, if this be given him only as compensation for services, and he has no interest in the principal, and no other interest in the profits, is not liable as a partner." Pars. Partn. 92; also note and citations foot of page 718; Story, Partn. § 36; *Parchen v. Anderson*, 51 Amer. Rep. 65; *Wheeler v. Farmer*, 88 Cal. 208.

While courts will not make contracts, but only enforce them as made, still it is not permitted to parties acting together as partners to avoid responsibility for their acts by stipulating among themselves that they are not partners, nor to be held as such to persons dealing with them; that is, partners in fact cannot stipulate otherwise, so as to affect others innocently dealing with them. Appellants insist that Watson is estopped by his acts from denying the alleged partnership; regardless of what his contract relations may have been with Owsley & Co., and that by permitting them to have the possession, with unlimited control of the property, it became a basis of credit for the firm, and that by his relations to the business, and acts in connection therewith, he sanctioned the holding out of the partnership with him by C. N. Owsley; and that the creditors acted upon these representations and acts.

The legal effect of the acts of persons in business together, as affecting the question of partnership, has been a subject of discussion in numerous cases in our courts.

In the cases *Brinkley v. Harkins*, 48 Tex. 225, and *Cothran v. Marmaduke*, 60 Tex. 372, the party furnishing the money or the capital for the business on contract, to receive on settlement the capital and share of profits, was held to be a partner, for the reason that he received profits as principal, not as agent, or, rather, because the circumstances evidenced a partnership in fact.

In the cases *Buzard v. Jolly*, 6 S. W. Rep. 422, and *Buzard v. Bank*, 67 Tex. 83, 2 S. W. Rep. 54, Buzard furnished the capital. Pennington was to invest it in cattle, and to have a share of the profits of the enterprise. While conducting the business, Pennington held out Buzard as partner, and the partnership was generally believed to exist by those dealing with Pennington. It was held that neither the division of the profits, nor the declarations and acts of Pennington, affected Buzard, when denying he was a partner; it not appearing that Buzard knew of Pennington's manner of dealing in the business.

In *Goode v. McCartney*, 10 Tex. 195, and *Stevens v. Bank*, 62 Tex. 503, it was recognized that a community of profits was evidence of partnership in favor of creditors dealing with them. In neither case, however, was it held to be conclusive. Each recognized that an agent did not become partner by receiving compensation for his services in an agreed share of the profits.

The cases *Harris v. Crary*, 67 Tex. 884, 3 S. W. Rep. 316, and *Grabenheimer v. Rindskopf*, 64 Tex. 52, were where a clerk held himself out as a member of the firm, and was permitted to do so by the principals.

From these cases it is evident that the liability of the parties as members of a partnership is determined by the entire facts of each case, and that creditors are protected against private agreements inconsistent with the legal effect to be given to the dealings together of parties in a common business. That there is a common interest is generally presumed from a sharing of profits. There is some confusion of ideas in the use of the term "community of profits" in this case. In the general business of C. N. Owsley & Co., aside from the "pump" business, Watson did not have any interest whatever, save as a creditor for money loaned to the firm, and in no way connected with this litigation. In the "pump" business there was a division of the profit on sales, but no joint or common interest in the stock. Until sold it was Wat-

son's. Owsley & Co. received compensation out of profits at which sales were made, in lieu of or as commission, as factors or agents to sell, and not as merchants. This distinction between acquiring an interest in accumulated profits, and receiving compensation from a stipulated part for services, is well recognized, and this dealing would not make them partners even in this business. 10 Tex. 195.

If the transactions did not make Owsley & Co. partners with Watson, it is idle to say that they made Watson partner with Owsley & Co. If the fact that Owsley & Co. received compensation for storing and selling the pumps out of profits did not constitute them partners in that business, for a stronger reason would it be insufficient to constitute the partnership in the other business. In the general business of Owsley & Co. Watson was not a participant. There was no sharing of profits nor common interest in the capital. Watson put nothing into it, and had no claim or right to take anything out. No agency by Watson to Owsley & Co. existed or was exercised to incur debts upon the stock of pumps, and certainly none with reference to the other business in which Watson had no interest. The circulars and letter-heads used indicated that Owsley & Co. were agents or factors. The credits extended by the plaintiffs in this suit were upon reports from the commercial agencies, and not, so far as shown in the record, upon the show of stock on hand increased by the consignment of Watson's property. The existence of the reports to and by the commercial agencies were unknown to Watson. The undisputed facts show that in the latter part of November, 1885, negotiations began between Watson and C. N. Owsley looking to a general partnership between them. These were never perfected. A special partnership was discussed, and the subject dropped. While these negotiations were pending, a local notice of a partnership between them appeared in two newspapers of the town where the business was carried on, of which Watson was ignorant. The negotiations were pending from one to two weeks. February 18, 1886, Watson having acquired the right to sell the "Red Jacket Pump" for the state, and having purchased from the manufacturer the stock of pumps and fixtures in hands of Owsley & Co., contracted with them that he would furnish the pumps, etc., buying them, to Owsley & Co.; they agreeing to store, insure, and sell upon agreed compensation for their services in so doing, as before stated. The business was thereafter carried on without any apparent change, but in accordance with the contract as to the pump business. Accounts were kept in separate books from the general business. The pumps were advertised by circulars, on the letter-heads, and otherwise. It was profitable. From these facts we do not find an actual partnership to have existed between Watson and C. N. Owsley & Co.

As to the equitable estoppel insisted upon, the facts will be further tested. The use made of Watson's property was simply storing it, insuring it for and in Watson's name, work to effect sales, and in selling. This was carried on in the same building, and by the same clerical force, as was the general business. The circulars and letter-heads disclosed that the firm of C. N. Owsley & Co. were "manufacturers' agents, and dealers in farm, gin, and mill machinery, buggies, and wagons; pumps, a specialty." That pumps were a specialty did not indicate whether they were handled as agents or as dealers, if there be any difference between the terms. This would put upon inquiry any one interested, to the extent of the agency in the business. It is thought that no material difference would exist as to the agency for the pumps from the interposition of Watson between the manufacturer and the firm. The goods came to the firm with the same limited control,—power to sell. While shipped direct to Owsley & Co., the goods were invoiced to and paid by Watson, and when received were subject to the contract by which they were to be sold. The negotiations looking to the formation of a partnership, general and special, fell short of a contract. There were no actual dealings whatever

between them in business prior to February 16, 1886, when the investment in the pump business was made by Watson. The declarations and representations of C. N. Owsley, with reference to the connection of Watson with the Owsleys, and prior to such purchase, were not declarations of a partner, and could not bind Watson. They would be harmless against him, whether made in newspaper locals, in letters to commercial agencies, or in declarations to commercial agents. Watson testified that all these publications, reports, and letters were unknown to him. Had Watson known of these reports being circulated of his connection with the Owsleys, it would have been his duty to correct them. He did hear of a newspaper article connecting him with the firm, but with the information was the impression that it was in another newspaper. He promptly requested the editor and publisher of the newspaper to make the correction. He never heard of the publication in the others before this litigation. Whether Watson used proper care or was negligent in his transactions with the Owsleys, to such an extent as to deceive the creditors of the firm, was itself a question of fact for the court upon the trial. The judgment below necessarily was based to a great degree upon Watson's testimony. If Watson was believed, the court was justified in finding for him. We do not find that Watson held himself out, or permitted himself to be held out, as a partner, so as to bind him. He was not estopped from showing the truth as to his ownership of the pumps. The property in controversy was not subject to attachment at suit of the creditors of C. N. Owsley & Co., upon the facts in the record.

The judgment is affirmed.

MISSOURI PAC. RY. CO. v. HAYNES *et al.*

(Supreme Court of Texas. November 30, 1888.)

CARRIERS OF GOODS—DELIVERY—LIABILITY FOR LOSS.

Under Rev. St. Tex. arts. 281, 282, providing that a common carrier's liability continues until delivery, but that if he uses due diligence to notify the consignee, who does not take the goods, and they have to be stored, the carrier is liable only as warehouseman, a railroad company remains liable as a common carrier for goods not discharged from its car, though a third person has agreed with the consignee to unload them, and the car is at the place of discharge; there being no agreement by the consignee to receive the goods on the car, and no notice, or diligence to give notice, of the arrival of the car at that place.

Appeal from district court, Hopkins county; J. A. B. PUTNAM, Judge.

Action by J. C. R. Haynes & Co. against the Missouri Pacific Railway Company for the destruction of cotton while in defendant's possession as a common carrier. Defendant appeals.

Todd & Hudgins, for appellant. *E. W. Terhune and Perkins, Gilbert & Perkins*, for appellees.

STAYTON, C. J. This cause was tried without a jury, and the conclusions of fact, so far as necessary to be stated, are as follows:

"(3) That on the 9th, 10th, and 11th days of November, 1887, the plaintiffs shipped from Black Jack Grove, Tex., and Campbell, Tex., to Greenville, Tex., through the defendant, Missouri Pacific Railway Company, 99 bales of cotton, and received regular bills of lading therefor,—the haul being entirely within the state of Texas, and part of said cotton being consigned to plaintiffs at Greenville, Tex., and part to the compress company, 'notify J. C. R. Haynes & Co.;' that plaintiffs, J. C. R. Haynes & Co., were the real consignees of all of said cotton, and were so recognized and treated by all the parties to this action.

"(4) That 87 bales of said cotton were brought to Greenville, Tex., by defendant railway company, and had reached said point on the 11th and 12th days of November, 1887, and that plaintiffs learned of its arrival on Sunday, the 13th day of November, 1887.

"(5) That on Monday, November 14, 1887, the plaintiffs made arrangements with the compress company by which the latter agreed, as a matter of accommodation to plaintiffs, to unload said cotton on the compress platform, when the same was ready for unloading, and check it off.

"(6) That the cotton compress was situated in the city of Greenville, not far from the track of the railway company, and that the latter had built a side track from its station and yard to and passing the platform of the compress company, which side track was owned and controlled by the railway company, and was built for the convenience of the railway company and the compress company.

"(7) That early on the morning of November 14, 1887, plaintiffs went to the depot of the railway company, and demanded of the latter's agent the delivery of said cotton, and requested him to have it placed on the compress platform. The agent replied that the cotton was in the yard, and as soon as the necessary switching could be done he would deliver the cotton. The compress platform is not under the control of the railway company.

"(8) About 1 o'clock P. M. of Monday, November 14, 1887, plaintiffs requested the agent of the railway company to have the cotton delivered at the compress platform, as they desired to have it checked and marked and tagged; stating to the agent that Mr. B. C. Mattox, of the compress company, was at the platform, and ready to unload the cotton; and the agent of the railway company replied that as soon as the necessary switching could be done he would place the cotton at the platform.

"(9) That on said 14th day of November, 1887, the said B. C. Mattox was at the compress platform from 1 o'clock P. M. until after 4 o'clock P. M., and that at 2 o'clock P. M., and from 8 o'clock P. M. until after 4 o'clock P. M., plaintiffs had an employe at said platform waiting to sample and mark said cotton when it should be unloaded and placed on the platform.

"(10) That on November 14, 1887, at 8:30 o'clock P. M., the railway company had the three cars, containing plaintiffs' said 87 bales of cotton, placed on the side track, and by the side of the compress platform, but failed to notify either the plaintiffs or the compress company; and neither plaintiffs, nor any of their agents, nor the compress company, or any of its agents, knew or were informed that plaintiffs' cotton had been placed on said side track.

"(11) That at 4 o'clock P. M. of November 14, 1887, the cotton compress, its platform, the cotton thereon, and the cars containing plaintiffs' cotton, together with the plaintiffs' cotton thereon, were destroyed by fire. The evidence fails to show the origin of such fire.

"(12) The amount of cotton belonging to plaintiffs on said cars, and so destroyed, was 40,463 pounds, and was of the market value of 9½ cents per pound, or the aggregate value of \$3,844.08.

"(13) There was no custom as to delivery of cotton consigned to Greenville.

"(14) In agreeing to receive and unload the cotton, the compress company was acting in the way of accommodation to plaintiffs, and not for consideration."

No objection is made to any of these findings, other than the seventh, ninth, and tenth, but it is claimed that the evidence does not support these. A careful examination of the evidence leads to the conclusion that it sustains these findings, and a statement of the evidence would serve no useful purpose.

As conclusions of law, the court found as follows:

"(2) That said cotton at the time of its destruction by fire had never been delivered to plaintiffs or to the compress company.

"(3) That at the time of the destruction of said cotton, the defendant, Missouri Pacific Railway Company, held said cotton as a common carrier, and its liability as common carrier had not terminated.

"(4) That, in order to relieve itself of liability, it devolved upon the defendant, the Missouri Pacific Railway Company, to establish by proof that the loss of said cotton was occasioned by inevitable accident, beyond the power of said defendant to guard against or avoid; and, having failed to establish this, the defendant, Missouri Pacific Railway Company, is liable to plaintiffs for the value of said cotton, to-wit, \$3,844.08, and interest thereon at the rate of 8 per cent. per annum from the 14th day of November, A. D. 1887."

It is urged that the second and third conclusions of law are erroneous. The evidence and the findings leave no doubt that the place of destination for appellees' cotton was the cotton compress in the city of Greenville, and appellant's liability as a common carrier continued from the commencement of the trip "until the cotton was delivered to the consignee at the point of destination." Rev. St. art. 281. The evidence and findings preclude any holding that there was any agreement between appellant and appellees that the latter should have and assume possession of the cotton while on the cars, and, in the absence of this, it must be held that possession was in fact as in law with appellant; the cotton never having been removed from the cars, and placed on the compress platform. The evidence shows that until this was done the right to possession, and possession, was at all times with appellant. So long as possession remains with the carrier, there can be no delivery; but in case of railway transportation the character in which the carrier holds after freight has been safely taken from its cars and deposited on platform or in warehouse may be affected by notice to the consignee of its arrival at destination. There is a conflict of authority as to whether the extraordinary liability that attaches to the carrier continues after goods have been actually removed safely from cars, and deposited in a safe place, unless notice be given to the consignee or owner; but the cases which hold that such liability ceases when the goods are unloaded and placed in a safe place do not claim exemption from the more onerous responsibility until the goods have been unloaded from the cars, and deposited in a safe and suitable place. *Hutch. Carr.* 371, and citations. In *Rice v. Railroad Corp.* the supreme court of Massachusetts thus asserts the rule: "A railroad corporation does not discharge itself of its duty as a carrier by merely bringing goods to the terminus of its road. It is bound also to unload them with due care, and put them in a place where they will be reasonably safe and free from injury. Until this is done the duty and responsibility which attach to a corporation as carriers do not close. *Thomas v. Railroad Co.*, 10 Metc. 472, 477; *Plains Co. v. Railroad Co.*, 1 Gray, 263, 272. In the latter case * * * it is expressly stated that goods must not only be safely carried, but also be discharged on the platform of a depot, or put into a place of safety." 98 Mass. 214; *Cahn v. Railroad Co.*, 71 Ill. 98.

The fact that appellees may have made arrangements with the compress company to have that done which was incumbent on the carrier before there could be a delivery does not alter the situation of the parties nor their rights. If the compress company, as the agent of appellees, had unloaded the cotton, and placed it on the platform where appellees desired to have it, and where appellant was bound to place it before it could be relieved from responsibility as carrier, then the delivery would have been complete; but this was not done by either party, and the cotton was in the possession of appellant as carrier when destroyed by fire. No agreement or usage is shown which could make anything short of an actual delivery operate to relieve appellant from its obligation as carrier. If, however, there had been an agreement between the parties that appellees would receive the cotton on the cars, and unload it themselves when the cars were placed at the destination, under the statute in force in this state, we are of opinion that appellant would then be liable un-

der the facts. The statute provides that, "if the carrier at the point of destination shall use due diligence to notify the consignee, and the goods are not taken by the consignee, and have in consequence to be stored in the depots or warehouses of the common carriers, they shall thereafter only be liable as warehousemen." Rev. St. art. 282. The spirit of this statute, under such an agreement, would require the carrier to use such diligence as the statute contemplates to notify the consignee that the cars were at the place where they were to be unloaded; and especially would this be necessary when the track leading to and by the compress platform was often occupied with cars not to be unloaded at the compress. No effort was made to notify appellees or the compress company that the cars were on the side track ready to be unloaded. It was shown that this might have been done by the exercise of the slightest diligence. If without direction to place the cotton on the platform of the compress company this had been done by appellant, then notice, or due diligence to give notice, that it had been so placed, would have been necessary before appellant would have been relieved from responsibility as carrier, unless, as agent for appellees, the compress company had received it. However the law may be elsewhere, under the statutes in force in this state the liability of the carrier continues until the thing carried is actually delivered to the owner or consignee at such place as the nature of the carriage requires the delivery to be made, or at some other that may be agreed upon, unless due diligence be used to notify the owner that it has arrived at place of destination. After such notice has been given, or due diligence used to give it, if the thing be not received within a reasonable time, the carrier may store it in a safe place, which in some cases, and with some classes of property, may be the car in which transported; and from the expiration of such reasonable time responsibility as carrier will cease, and that of warehouseman begin.

There is no error in the judgment, and it will be affirmed.

BUFORD *et al.* v. STATE.

(*Supreme Court of Texas.* November 30, 1888.)

1. MUNICIPAL CORPORATIONS—NON-USER OF FRANCHISE—DISSOLUTION.

Non-user, or failure to elect officers for a series of years, does not work a dissolution of a municipal corporation created by act of the legislature.

2. SAME—CHANGE OF BOUNDARY.

Act Tex. Feb. 12, 1852, which incorporated the town of Henderson, with limits one mile square, the court-house being in the center, was impliedly repealed by act May 16, 1871, incorporating the same town, with limits extending "one-half mile in every direction from the court-house."

Appeal from district court, Rusk county; J. G. HAZELWOOD, Judge.

W. C. Buford and J. H. Wood, for appellants.

WALKER, J. This is an appeal from a judgment of the district court of Rusk county, removing the appellants from the offices they have been holding as mayor and aldermen of the town of Henderson. Information was filed August 4, 1888, against the appellants by the district attorney, for the purpose of testing the validity and legality of the existing corporation of the said town; the validity of the authority of the municipal officers; and, in view of the several acts of incorporation by the legislature, to ascertain the *status* of said town as to her corporate franchises. It appears that by act of the legislature approved February 12, 1852, the town of Henderson was incorporated with limits extending "one mile square, so laid off as to leave the public square in the center of said corporation." Under this act the municipal government was organized. After several years the inhabitants ceased to elect officers. It appears that in 1861 and in 1866 organizations were at-

tempted, and, so far as the people of the town had the power, they recognized their city government. May 16, 1871, an act of the legislature of the state was approved, incorporating the town of Henderson, in Rusk county, with limits extending "one-half mile in every direction from the court-house on the public square of the town, in the center of said corporate limits." The act provided for the appointment of officers until the next regular election provided for in the act providing for the election of the mayor and aldermen. Officers were appointed and qualified. After several years the elections were not held, and the town was without officers. In 1875 an effort was made by the inhabitants to create a new town government under the general laws for the original organization of cities and towns. This organization soon lapsed. In 1888 another effort was made to secure a government. The proposed limits were "two and one-half miles square; the center of the court-house in said town being the center of said square." The proceedings were regularly taken as in an original organization. Under this new organization the appellants were elected by the voters within the two and one-half mile square included within the elected boundaries. The district judge held the charter of 1852 as still existing and in full force; declared the proceedings in 1888, under which the appellants were elected, to be void; and by decree removed them from the offices they claimed. The only question in the case is whether the reorganization of the town of Henderson, in 1888, was legal. Upon it depends whether the appellants were duly elected to the offices they claim. As these proceedings were regular, if there was no existing corporation, the issue is reduced to the further inquiry whether there was such obstacle. It appears that the town was incorporated in 1852 by act of the legislature, with limits one mile square, the court-house in the center. Passing the proceedings in 1861 and 1866, the act of May 16, 1871, incorporated the town, with slightly reduced limits, if literal effect be given to the words describing its extent. This act, while not in terms repeating the act of 1852, did have the effect of supplying a new municipal government for the identical territory, except the corners of the square not included in the circle of same diameter and center. This was inconsistent with and repealed the charter of 1852. It is shown that for several years prior to the election in 1888 there had been no officers elected; in fact, no city government or officials. The town included over 1,000 and less than 10,000 inhabitants. To such facts our court in *Lee v. Hernandez*, 10 Tex. 137, gave the effect of evidencing a civil death,—a dissolution of the corporation. This, however, has not been followed, though the case was not expressly overruled, in *Blessing v. City of Galveston*, 42 Tex. 659. In the latter case it was held that, the power to create municipal corporations in this state being in the legislature, the inhabitants cannot withhold their consent to the existence of the charter, nor veto the law by neglect or refusal to act under it. Justice MOORE, citing 1 Dill. Mun. Corp. § 23, from which we cite: "Over such corporations the legislature, unless restrained by the constitution, has entire control; and unless otherwise provided by the act itself, or a different intention be manifested, the public corporation is legally constituted as soon as the incorporating act declaring it to exist goes into effect." Again, in 1 Dill. Mun. Corp. § 166: "Here it is the people of the locality who are erected into a corporation, not for private, but for public purposes. The corporation is mainly and primarily an instrument of government. The officers do not constitute the corporation, or an integral part of it. The existence of the corporation does not depend upon the existence of officers." The mode of granting charters, and the general limitations upon their powers, are parts of the state constitution. Article 11, §§ 3-6. In the recent case of *State v. Dunson*, 9 S. W. Rep. 103, (from Nacogdoches, of June 12, 1888,) it was held directly that non-user, or the failure to elect officers for a series of years, did not dissolve the corporation of Nacogdoches created by act of the legislature. The court held, further, that, independent

of the legislative will, the inhabitants of any given territory have no right to incorporate themselves, nor, when incorporated, can they destroy the corporation, save in the manner prescribed by law. Rev. St. art. 340, provide for reorganizing upon a two-thirds majority vote of the town council adopting the general incorporation act. To increase the territorial limits, not to exceed half a mile, an election by the inhabitants of the territory proposed to be annexed must initiate the movement, followed by approval by the council. Rev. St. arts. 343, 503. The election of the appellants by the voters of the two and one-half miles square of territory, as well within as outside the limits of one-half mile each way from the center of the court-house, was not held in accordance with law. They are not legal officers. The organization in 1888 was without authority of law.

The judgment of the court below will be affirmed, but not upon the grounds given by the trial judge. It is here held that the act of 1871 is the existing charter of the town, under which any organization must be taken and held.

MISSOURI PAC. RY. CO. v. BRAZIL.

(Supreme Court of Texas. December 7, 1888.)

1. RELEASE AND DISCHARGE—VALIDITY.

In an action for injuries received by a passenger on defendant's train, it appeared that plaintiff had executed a release to defendant, but he alleged that he was mentally incapacitated at the time, and that it was done at the importunity of defendant's agent, and against the protest of plaintiff's wife. There were remarks in the charge from which the jury might have inferred that there were issues to be tried relative to such importunity and protests, though there was no intimation that the release would be invalid for any other reason than mental incapacity. Defendant asked an instruction that the release could only be held void for plaintiff's insanity. Held, that it was error to refuse to so charge.

2. SAME—BURDEN OF PROOF—PRESUMPTIONS.

In such case an instruction that the burden of proving, by a preponderance of evidence, that the release was invalid, is on the plaintiff, is correct, and it is not error to refuse to charge that the law presumes the release valid, and that, unless the plaintiff satisfactorily establishes its invalidity, the jury should find for defendant; as, while sanity is presumed, it is a presumption of fact, and not of law.

3. INSANITY—EVIDENCE.

In civil cases, only a preponderance of evidence is necessary to establish insanity.

4. RELEASE AND DISCHARGE—RATIFICATION.

There being evidence that plaintiff, though impaired mentally after the accident, was at times competent to understand the settlement made, and ratify or disaffirm it, and that he retained the money received, knowing whence it came, an instruction that if plaintiff, though insane when the release was executed, after becoming conscious of what he had done, retained the money or used it, knowing from whom he had received it, without offering to return it, or if, having used it before becoming conscious, he did not in a reasonable time disaffirm the release, the verdict should be for defendant, is correct.

5. APPEAL—REVIEW—INSTRUCTIONS REFUSED.

If the trial court refuse instructions, because substantially given, which the appellate court finds, upon inspecting the record, to be contrary to the fact, the verdict will be set aside, without examining as to the technical accuracy of the instructions.

6. DAMAGES—EXEMPLARY.

In such an action it is error to charge that exemplary damages are "given as a kind of punishment," leaving the jury to infer that the defendant would be liable to such damages if, with knowledge of the general bad condition of the road prior to the accident, it allowed it to remain so, regardless of whether plaintiff's injury resulted from that known general bad condition.

Appeal from district court, Smith county; FELIX J. McCORD, Judge.

Action by W. N. Brazil against the Missouri Pacific Railway Company to recover for injuries received by defendant's alleged negligence. Verdict and judgment for plaintiff, and defendant appeals.

J. R. Burnett, for appellant. *John M. Duncan, I. J. Rice, T. N. Jones*, and *Robertson & Robertson*, for appellee.

STAYTON, C. J. This is an action by appellee to recover damages, actual and exemplary, on account of an injury alleged to have been received by him while a passenger on appellant's road. On December 26, 1887, he was injured by the derailment of the car in which he was riding, and on January 6th following, in consideration of \$500, then paid to him, he executed a release, which was pleaded in bar of this action. The plaintiff in his petition, anticipating this defense, alleged the circumstances under which the release was executed, but these did not tend to show that the release was procured through fraud or undue influence. The petition, however, did allege the plaintiff's want of sufficient mental capacity to contract at the time the release was executed. The charge correctly stated to the jury the substance of the averments of the petition and answer, which involved a statement that appellee alleged the release was executed over the protest of plaintiff's wife, and on the importunities of appellant's agent; and it is urged that the court, in the charge given, gave the jury to understand that there were issues to be tried involving such matters. This seems to be true, but there was no other intimation to the jury in the body of the charge that they were at liberty to find the release invalid on any ground, if they believed that appellee had sufficient mental capacity to contract at the time he executed it. To avoid, however, the possibility of any misconception on this point, the following charge was requested: "No. 1. Under the pleadings and evidence in this cause, the jury will find for defendants unless the release read in evidence is invalid by reason of plaintiff's insanity, under the rules of law given you in charge by the court. The release cannot be avoided by reason of any supposed fraud in its procurement." This charge was refused, and we are of the opinion, under the pleadings and evidence, that the charge might with propriety have been given; and in view of the evidence bearing on the question of appellee's mental condition, it was important that the very issue on which the validity or invalidity of the release depended should be clearly understood by the jury. The evidence of two witnesses was introduced, showing fully what they remembered as the conversation between appellee and appellant's agent at the time the latter visited the house where appellee was, for the purpose of making the settlement evidenced by the release; and it is urged that the agent's statements made at that time should not have been received, because they neither tended to show fraud nor undue influence. We are of opinion that all that passed between the agent and appellee was properly admitted; for it tended to show the negotiation between them, and would serve to illustrate appellee's mental condition, and capacity to understand the nature of the transaction which he did consummate, through the release and its effect upon his right. While this evidence was admissible, the jury may have understood, under the statement of the issues made by the court, that it was their duty to inquire whether the contract was made against the protest of appellee's wife, and through importunities of the agent, and if they found either of these to be true that the release would be invalid. When a charge was asked that would have relieved the jury of all doubts or ground for misconception as to the fact that would invalidate the release, it ought to have been given.

The court instructed the jury that "the burden is on the plaintiff to show by a preponderance of testimony the facts that would set aside such a release." It is urged that this was error, and that the following requested charge should have been given: "No. 9. The presumption of law is that the release set up by defendants is valid and binding, the plaintiff having admitted that he signed it; and in order for the jury to find it invalid, under the rules of law given you in charge, the burden of proof is on plaintiff to satisfactorily

establish the invalidity of said release, and, if he has not done so, you will find for defendant." When it is shown that an instrument was signed and delivered by the party whose contract it is made to evidence, in the absence of proof of some fact that will invalidate it, the capacity of its maker to contract, and all other facts necessary to the validity of the contract, are sufficiently established to entitle the person claiming rights under the instrument to recover. Sanity is presumed, but this presumption is one of fact, and not of law; and when there is an issue made as to sanity, and evidence introduced under it tending to show insanity, it would be error for a court to instruct a jury that the law creates a presumption the one way or the other. In such a case sanity or insanity is a question of fact to be determined by the jury, if one has been called, uninfluenced by a charge as to the presumption that will be indulged when there is no issue and evidence as to the sanity of the person whose act is in question. In this case the burden of proof to show insanity rested upon appellee, and the court so charged, but it is insisted that this was a fact that could not be established by a mere preponderance of evidence. In civil cases, whatever may be the issue involved, it is not requisite that the person on whom rests the burden of proof shall establish his cause by a greater weight of evidence than a fair preponderance. We understand this to be the rule established in this state, in criminal cases, on an issue of insanity raised by a defendant. The charge asked required appellee to establish his incapacity to contract by a greater weight or intensity of evidence.

Appellant in its answer denied appellee's want of capacity at the time the release was executed; and alleged, further, that if such was then his condition he was subsequently restored to sound mind; and that while in this condition, with full knowledge that he had executed the release and of its terms, he retained and used the money, and before this action was brought acquiesced in and ratified the settlement and release. Appellant asked the following charges: "No. 4. If you find from the evidence that plaintiff was insane when he signed the release, or that the release was invalid under the rules of law given you by the court, but further find from the evidence that plaintiff, after he became conscious and was informed of the release, and that he had released defendant from all claims of damages for \$500 paid to him, continued to use the money, or if he had used it in the payment of debts, and did not promptly, or within a reasonable time after he became conscious, repudiate or disaffirm the contract, then you will find for defendants." "No. 6. If you find from the evidence that plaintiff was, at the time he signed the release and received the money, incapable of understanding the nature and effect of the compromise, but you find that he apparently understood the nature and effect of the transaction, and no fraud or undue advantage is shown to have been taken of him in obtaining the release, and he afterwards used the money in payment of his debts or otherwise, and, after he became conscious of the compromise he had made, did not promptly disaffirm it, but acquiesced in it, then you will find for defendant." These charges were refused on the ground that they had been substantially given in the main charge, but an inspection of that charge shows that no charge whatever was given on the matters to which the refused charges relate. The evidence does not tend to show that appellee, at the time the release was executed or subsequently, was laboring under permanent, settled, or continuous insanity; but there was evidence tending to show that from an injury to his head, inflicted at the time of the accident, epilepsy had resulted, and that from this his mind at times has been unsettled, and his memory greatly impaired at all times. The evidence further tends to show this epilepsy is tending, as time passes, to bring on imbecility, manifested by confusion of mind as well as by failure of memory; but the evidence forbids the holding that, at times subsequent to the execution of the release, appellee may not have had sufficient mental capacity to make a contract, or to ratify one made at a time when his mind was beclouded. The evidence but tends to show the

usual temporary results of epilepsy with the tendency before stated. There was evidence tending to show that appellee knew of the settlement he had made a few days after the release was executed, and that he gave the reasons which induced him to settle. There was also evidence tending to show that he may have been fully conscious, not only of the settlement he had made, but of the source from which the money in his possession came at the time he used some of it. It is not necessary for us now to state the evidence bearing on the condition of appellee's mind at the time the release was executed or subsequently, and it would be improper to draw and state conclusions from it further than is necessary to determine the propriety of the rulings of the court below. There has been some conflict of decision whether the contract of an insane person is void or voidable, but the great weight of authority holds contracts of such persons only voidable. *Elston v. Jasper*, 45 Tex. 413; 1 Whart. Cont. §§ 98-118; Pol. Cont. 76-84; Anson, Cont. 114; 2 Kent, Comm. 593.

Contracts only voidable are only obligatory until in some manner repudiated or annulled, and may, at any time, be ratified, and thereby the right to annul them be lost. That there was an express ratification of the contract, evidenced by the release, is not claimed, and the question before us is, were there facts in evidence from which ratification might be legally inferred? If from the evidence the jury might have found that, subsequently to the execution of the release, appellee had mental capacity sufficient to comprehend the nature, purpose, and effect of the contract evidenced by it, and knew that he had executed it, that the money in his possession came through it, and with this knowledge, without repudiating the contract, used the money, may ratification be legally inferred from these facts, taken with appellee's surroundings? If so, a charge similar to that numbered 4 should have been given. In passing on this question it must be remembered that the contract was executed, continuing in its character, of force until repudiated, and therefore one not requiring any express assent on the part of appellee, subsequent to the making of the contract, to give it validity. Whether appellee, subsequently to the making of the contract, at a time when he had sufficient mental capacity to have made such a contract not voidable, consented that the contract should stand and be obligatory, may be determined by his acts as well as by declarations of intention. If by his acts, done at a time when he had mental capacity to have made a contract absolutely releasing appellants, appellee clearly evidenced his intention to be bound by the contract he had made, then he ought to be held bound, and no subsequent change of intention ought to affect the rights of the parties. Consent to be bound by a contract only voidable is ratification, however that consent may be shown. Ratification of a voidable contract once made cannot be recalled. Many contracts made by infants are held to be voidable, and so, upon the presumption of want of sufficient mental capacity to make contracts absolutely binding, are contracts made by adults; and the same rules in reference to the evidence of ratification of contracts made by minors apply to the ratification of contracts made by persons laboring under mental derangement. The supreme court of Massachusetts, in speaking of the evidence sufficient to show the ratification of a contract made during minority, said: "If, after coming of age, he retains the property for his own use, or sells, or otherwise disposes of it, such detention, use, or disposition, which can be conscientiously done only on the assumption that the contract of sale was a valid one, and by it the property became his own, is evidence of an intention to affirm the contract from which a ratification may be inferred." *Boyden v. Boyden*, 9 Metc. 521. The following cases on minors' contracts assert the same rule: *Henry v. Root*, 83 N. Y. 551; *Pursley v. Hays*, 17 Iowa, 312; *Robins v. Eaton*, 10 N. H. 561; *Robinson v. Hoskins*, 14 Bush, 394; *Delano v. Blake*, 11 Wend. 85.

Contracts made by persons so far intoxicated as to be incapable of exercising judgment, or intelligently giving consent, are voidable, as are the contracts of

insane persons; but in all these classes of contracts any act done, after the removal of the disability to contract, which evidences an intention to avail himself of the benefit of the contract made while under disability, is evidence that the minor, drunkard, or insane person has ratified the contract. The sufficiency of the evidence to show ratification is for the jury, and when it consists in some act done the surroundings of the party may often give character to the act. As said by the court of appeals for Kentucky: "It is not believed by the court that any particular form of proceeding is necessary to operate as a confirmation. It appears to us to be fully sufficient, if any act is done which clearly indicates the assent of the mind to stand by and perform the contract which had been previously entered into." *Taylor v. Patrick*, 1 Bibb, 170. If a person laboring under mental disability to contract be subsequently restored to sound mind, and then "with full knowledge of his previous acts, and of the nature and extent of them, will deliberately adopt and ratify them; if he will knowingly, and in the exercise of his proper faculties, take the benefit of a contract made while he was insane,—it is competent for him to do so. But the consequences will be to give force, effect, and legal validity to his contract, which was before voidable." *Allis v. Billings*, 6 Metc. 420; *Arnold v. Iron Works*, 1 Gray, 499; *Williams v. Inabnet*, 1 Bailey, 343; *Bond v. Bond*, 7 Allen, 8; *Jones v. Evans*, 7 Dana, 98; 1 Whart. Cont. §§ 56-59, 117-121; 8 Wait, Act. & Def. 188.

The inquiry in any case in which it is claimed that a voidable contract has been ratified is, has the person whose right it was to annul it, either by word or act, when he had mental capacity sufficient to contract, and knowledge of what he had previously done, evidenced his consent that the contract shall stand? In many cases it has been held that retention of property acquired under a voidable contract, by the person entitled to avoid it, if long continued, would authorize a finding of ratification. In other cases it has been held that the doing of some affirmative act, as the collection of money, to which a minor, drunkard, or insane person became entitled through a voidable contract, after the disability was removed, would operate a ratification. We do not see that the use of money, after the removal of the disability existing when it was acquired through a voidable contract, if this be done with a clear knowledge of the existence of the contract, and that the money came through it, should not be deemed evidence of the consent of the party that his contract should stand. The use of the money under such circumstances could be justified only on the theory that the person using it deems it his own, which he could not unless he consents to be bound by the contract through which the money came into his possession. An estoppel may grow out of the use or disposition of property, real or personal, other than money, acquired by a minor, drunkard, or insane person, through a contract voidable on account of his mental condition at the time it was made, by reason of the fact that such use or disposition renders it impossible to place the parties *in statu quo*, when the use or disposition of money so acquired would not operate an estoppel; for one dollar is as valuable as another, and will serve the same purpose. In so far, however, as the fact that a person has used or disposed of property acquired by him through a voidable contract may be looked to as illustration of his consent that the voidable contract may stand, we do not see that a difference, unless in degree of probative force, should be made between the use of money and other property. In the one case he uses or disposes of the property, which he has no right to do, unless he consents that the contract through which he acquired it shall stand; for it is through this alone that his right to use or dispose of it exists. This is equally true of money received under such a contract. In the absence of evidence to the contrary, the presumption is that a person in a given transaction intended to act justly, and not to violate another's right; and it ought not to be believed that one who has acquired money through a contract, which he knows he has the right to avoid, intends to keep the price without yielding his

right to the thing for which it was paid. If, however, it be conceded that greater weight ought to be given to the fact that real or personal property, other than money, has been used or disposed of, than should be given to the use of money, still it cannot be denied that the use of money so obtained, with knowledge of the source from which it came, and of the contract on which the right to use it is based, is evidence of ratification, which, accompanied by other facts, may become entitled to as much weight as the use or disposition of any other class of property. Should the person using money so obtained, at the time of using it, be insolvent, and have no means from which he could reasonably expect to be able to return it, then its use would seem to be entitled to as much weight upon an inquiry whether he intended to be bound by the contract as would the use or disposition of any other class of property. We do not wish to comment on the evidence bearing on the question of ratification, but feel constrained to say that there was such evidence bearing on that question as required a charge to be given upon that subject.

Whether the charges, asked and refused, were in all respects strictly correct, we need not inquire, for they were such as called the attention of the court to the question, and were refused on the ground that they were substantially embraced in the main charge. The questions raised by the assignments of error, in reference to the admission of evidence, have been considered in other cases decided during the present term of this court, growing out of the same accident, and need not now be discussed. The charge in which the jury was instructed as to the facts that would authorize the imposition of exemplary damages was faulty, in that the jury were instructed that exemplary damages "are given as a kind of punishment," and they were left to infer that this might be done in this case, if the defendant knew of the general bad condition of the road prior to the accident, and permitted it to remain so, without reference to whether the injury of which appellee complains resulted from that known general bad condition. The other questions presented relate to the sufficiency of the evidence to show the release to be invalid; to authorize exemplary damages; and to the question whether the actual damages awarded are excessive; but, in view of the fact that the judgment will be reversed for reasons already stated, we do not deem it necessary or proper to discuss these questions, involving, as they do, matters of fact.

For the reasons before stated the judgment will be reversed, and the cause remanded.

MISSOURI PAC. RY. CO. v. SHUFORD.

(*Supreme Court of Texas. November 30, 1888.*)

1. DAMAGES—EXEMPLARY—WANT OF ORDINARY CARE.

In an action against a railroad company for injuries to a passenger, a charge upon the question of exemplary damages that gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances, is erroneous, as authorizing the jury to believe that exemplary damages may be awarded where the degree of care exercised is but slightly below ordinary care.

2. SAME—INSTRUCTIONS.

The further charge that if the road had been out of repair for a long time, to the company's knowledge, or if the general bad condition of the road was so notorious that the company, by the exercise of ordinary care, should have known of it, but failed to repair it, the question of exemplary damages may be considered, is erroneous as authorizing exemplary damages, though the road, where the injuries occurred, was but slightly defective, and as authorizing them for the general bad condition of the road, regardless of whether plaintiff's injuries resulted therefrom.¹

3. SAME—EXCESSIVE.

A verdict for \$4,000 actual damages is not excessive where there is evidence that, in addition to temporary injuries, plaintiff received a spinal injury which will probably be permanent.

¹ See, to the same effect, *Railway Co. v. Brazil*, (Tex.) ante, 403.

4. PRACTICE IN CIVIL CASES—DOCKETING—TRIAL OUT OF COURSE.

Though under Rev. St. Tex. arts. 1181, 1182, 1287, 3070, causes should be placed on the general and jury dockets and tried in the order in which the petitions are filed, unless for good cause shown the court otherwise directs, yet the placing of a cause on the jury docket, and trying it in advance of a cause previously filed and preceding it on the general docket, are not reversible error, unless it is shown that injury resulted therefrom.

5. CONTINUANCE—ABSENCE OF WITNESSES—WANT OF DILIGENCE.

No injury is shown where the action was brought January 21st, and interrogatories to witnesses in another county were filed February 15th, and commissions were issued February 22d, and the cause was called for trial February 23d, when a continuance for the want of their testimony was asked for, and there was no application for a postponement to a later day in the term, and it does not appear that the evidence would have been obtained in time for trial if the cause had been tried in its order.

Appeal from district court, Smith county; **FELIX J. McCORD**, Judge.

Action by James Shuford against the Missouri Pacific Railway Company. Defendant appeals.

J. R. Burnett, for appellant. *H. Chilton*, for appellee.

STAYTON, C. J. This is an action by appellee to recover damages for an injury alleged to have been inflicted upon him while a passenger on appellant's train. He alleged that the injury was caused by the failure of appellant to keep its road in good order, and sought to recover damages, actual and exemplary. The cause was tried by a jury, who returned a verdict in favor of appellee for \$4,000 as actual damages, and \$8,000 as exemplary damages, on which judgment was entered.

This and another, both being appearance cases, on proper application were placed on the jury docket. The other case, however, preceded this on the general docket, having been first filed, and both properly numbered in their order, but when placed on the jury trial docket this case was placed first, the proper numbers of the cases, however, being preserved. When this case was called, appellant insisted that the other case should be first tried, but the court ruled that the causes should be tried in the order in which they stood on the jury docket. The statute provides that "all suits in which final judgments shall not have been rendered by default, as hereinbefore provided, shall be called for trial in the order in which they stand on the docket to which they belong, unless otherwise ordered by the court." Rev. St. art. 1287. The statute contemplates that cases shall be docketed and numbered in the order in which the petitions are filed. Id. arts. 1181-1183. In making up the jury civil docket the same order should be observed as on the general docket, and the provisions of article 1287 should be complied with in the disposition of cases on that docket, unless for good cause shown the court should otherwise direct. Id. art. 3070. If through inadvertence the clerk shall not place cases on the jury docket in their proper order, then in calling cases for trial they should be called in their proper order as determined by number.

In *Kirkland v. Sullivan*, 43 Tex. 233, it was held reversible error to call and force a party to try a cause out of its order, but the statute in force when that case was tried is unlike that now in force, in that it required all cases to be tried in their order, "unless otherwise ordered by the court, with the consent of the parties or their attorneys." The statute now in force recognizes the power of the court to require a cause to be tried out of its order without reference to the consent of parties. The exercise of this power may be revised by this court, but it is incumbent on the party seeking a revision of the action of the court in this respect to show that he was injured by the ruling. *Allyn v. Willis*, 65 Tex. 70. The bill of exceptions filed does not show that appellant suffered any injury by the ruling complained of, nor that it was not as well prepared to try the case as it would have been if it had not been tried until the one preceding it had been disposed of. This action was brought on

January 21, 1888, and was called for trial on February 23d following. When called, an application for continuance was made, for the want of the testimony of two witnesses, resident in counties other than that in which the cause was pending. Service on defendant was had on same day the suit was filed; interrogatories to take the depositions of these witnesses were not filed until February 15th; commissions to take their depositions were issued on the 22d, and these were sent to the general attorneys of appellant, at Houston, Tex., in order that they might have the depositions of the witnesses residing in Bowie and Anderson counties taken. This was not the exercise of that diligence required by the law. There was no application to postpone the hearing of the cause until a later day of the term, nor does it appear that the evidence would have been obtained in time for the trial, had it not been tried out of its order.

It is conceded that facts existed which entitled appellee to recover actual damages, but the sufficiency of the evidence to authorize the allowance of exemplary damages is questioned, and there is ground for controversy upon that point. The accident occurred about two miles from Troupe, on appellant's road, between that place and Mineola. The distance between these places is 44 miles. The immediate cause of the accident through which appellee was injured, was shown to be a broken rail, but the evidence as to whether the break occurred at the time of the accident, or had existed for some time before, was conflicting. There was much evidence tending to show that appellant's road, at points other than that at which the accident occurred, had been in very bad condition for a long time prior to the accident, and on the trial the court gave the following charge: "(7) The plaintiff also prays for exemplary damages, and alleges that the accident was caused by the gross negligence of defendant in allowing its road to get out of repair, and allowing the same to remain for a long period of time before the accident, and that the company knew of such condition, and failed to remedy such defects. (8) What is meant by gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances. (9) So that, if you find that defendant's railroad was out of repair, and had been for a long period of time previous to the accident, and the defendant company knew of such condition, and failed to remedy it, or if the general bad condition of the road was so notorious that defendant, by the exercise of ordinary care, should have known of its bad condition, and failed to remedy it, then you would be authorized to consider the question of exemplary damages." The court had instructed the jury that "the evidence offered by plaintiff as to the general bad condition of the road cannot be considered in determining actual damages, but will apply, if at all, to the question of exemplary damages." The giving of the general charges above quoted is assigned as error. From the charges the jury must evidently have understood the court to inform them that they might award exemplary damages if appellant was guilty of gross negligence, as defined in the charge. While doubting the practical utility of attempting to define the different degrees of negligence recognized in the books, when the question is as to the liability, at all, of the person sought to be charged for an injury caused by his failure to use that care which his duty at the time and under the circumstances required, yet, when it becomes necessary to define the degree of negligence requisite to authorize the recovery of other than actual damages, then such definitions should be correctly given. In the charges complained of, was this done? The court did not attempt to define "gross negligence" otherwise than by declaring it to be a total want of ordinary care, and its definition of "ordinary care" was faulty. Ordinary care is said to be that degree of care which ordinarily prudent persons would use to prevent injury, under the circumstances of a given case. If the care used by appellant did not amount to ordinary care, then there was a total want of that degree of care. There can be no partial

exercise of "ordinary care." It exists, as a degree, in completeness, or it is totally wanting in any given case. While, in a given case, "ordinary care" may not exist, yet there may exist at least slight care. Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it. *Cotton Press v. Bradley*, 52 Tex. 600. The jury, under the charge, were authorized to conclude that appellant was guilty of gross negligence, and therefore liable for exemplary damages, even if they believed from the evidence that appellant had exercised a degree of care but slightly less than persons generally would have exercised, and under the same circumstances. A charge that tended to leave such an impression on a jury was erroneous. While the charge correctly informed the jury that the appellee alleged that his injury was caused by the gross negligence of appellant, when it came to inform them on account of what facts they could award exemplary damages it failed to inform them that the act or omission from which the injury resulted must have been one that fixed gross negligence on appellant. It is too clear for doubt that no individual can become entitled to recover damages, actual or exemplary, from a railway company for any act or omission, however negligent or reprehensible, unless from it he receives injury. The legislature might give a *qui tam* action, or it might make the act or omission a crime, and punish it as such; but, unless from it injury results to the person complaining, he has no ground for a strictly civil action. The charge given authorized the jury to impose exemplary damages on appellant, if they believed from the evidence that the railroad was out of repair, and so had been for a long time, if this was known or might have been known to appellant, even though they may have believed that the road at the place where the injury occurred was only slightly defective; for the charge did not specify the extent to which the road must have been out of repair to authorize exemplary damages. The charge, however, is subject to the broader objection that it authorized exemplary damages on account of the general bad condition of the road, without reference to whether appellee's injury resulted therefrom; and the charge, which informed the jury that the general bad condition of the road might be considered on the matter of exemplary damages, not placing any limit on its application, nor informing them for what particular purpose they might look to such evidence, tended in the same direction.

It is urged that the verdict for actual damages is excessive. The evidence tends to show that appellee, in addition to hurts received that were painful, but only temporary in character, received a spinal injury from which it is likely he will never recover. We cannot hold the actual damages awarded excessive.

In view of what has been said, it is not necessary to discuss the other assignments of error. For the errors noticed the judgment will be reversed, and the cause remanded, unless appellee shall file a *remittitur* of the sum adjudged to him as exemplary damages, in which event the judgment for actual damages will be affirmed.

MISSOURI PAC. RY. CO. v. MITCHELL.

(Supreme Court of Texas. November 30, 1888.)

1. PLEADING—EVIDENCE—VARIANCE.

In an action for personal injuries to a wife, it was averred that she had received heavy and serious blows; that her lower limbs were bruised and wrenched, and her nervous system shocked and permanently impaired; and that she had suffered great physical and mental pain from the injury. *Held*, that evidence was admissible of a threatened miscarriage.

2. DAMAGES—PERSONAL INJURIES—EXCESSIVE.

A verdict of \$5,000 in such case is not so excessive as to warrant a reversal, where it appears that two or three months after the injury the wife could not attend to ordinary household duties, and that nervous prostration ensued, which was likely to continue as long as she lived.

3. SAME—EXEMPLARY DAMAGES—WANT OF ORDINARY CARE.

A charge that, if the injuries received were due to the gross negligence of defendant, the jury should consider the question of exemplary damages; that gross negligence was a total want of ordinary care; and that ordinary care was that degree of care which an ordinary person would use under like circumstances,—is erroneous, as inducing the belief that the exercise of care but slightly less than ordinary care would render defendant liable in exemplary damages.

4. RAILROAD COMPANIES—INJURIES TO PASSENGERS—UNAVOIDABLE ACCIDENT.

In such case, where the evidence tended to show that the accident was caused by a broken rail, the defendant alleged that the condition of its track was due to unprecedented rain, cold, and snow, and it was shown that there had been much and continuous rain and snow prior to the accident. *Held*, that a charge that defendant would not be liable if the defect that caused the accident was brought about by weather unusual and unprecedented, against which the company could not have guarded by the use of proper care and skill, was proper.

5. TRIAL—RECEPTION OF EVIDENCE—CONDUCT OF COUNSEL.

The action of counsel in propounding improper questions, and afterwards withdrawing them, stating that he did so, not because he believed the evidence inadmissible, but because he did not wish to afford any ground for exception on review, is not cause for reversal.

Appeal from district court, Smith county; **FELIX J. McCORD**, Judge.
J. R. Burnett, for appellant. *H. Chilton*, for appellee.

STAYTON, C. J. Appellee brought this action to recover damages, actual and exemplary, for an injury alleged to have been received by his wife, who was a passenger on appellant's train. The car in which the wife was, was derailed, and it is alleged and admitted that the evidence is sufficient to show that this was brought about by such a condition of the railroad as would render appellant responsible for the actual damages sustained. The petition set out the injuries to appellee's wife as follows: "That by reason of the fall and derailment the wife of plaintiff has been severely injured and disfigured for life; that she received heavy and serious blows and bruises on both her shoulders, and was wounded in 5 or more places on her person; that her lower limbs were bruised and wrenched, and her nervous system shocked and permanently impaired; that she received a deep and painful gash upon the face and chin, more than an inch long; that in consequence she has ever since said accident been unable to labor or attend to her household duties, and that said disability will probably continue for many years, perhaps for life; that the gash on her face is incurable, and will deform and disfigure her for life." The petition further alleges that the wife suffered great physical and mental pain as the result of the injuries to her person. A physician was asked what dangers the wife had undergone on account of her injuries, and among other things he stated that she had been threatened with miscarriage. This evidence was objected to, on the ground that there was no pleading to authorize the admission of such evidence, but the objection was overruled. Another physician was asked what was the wife's condition as to pregnancy, to which an objection was made on the same ground, and this the court sustained. After these things occurred, counsel for appellee announced, in the presence of the jury, that he would withdraw the question and answer, and consent that the evidence be excluded, and gave as a reason for this that he did not wish to give any ground on which the judgment might be reversed. The court orally instructed the jury not to consider the evidence. It appears that other questions were propounded to witnesses during the trial, and afterwards withdrawn, counsel for appellee stating at the several times, in the presence of the jury, that they were withdrawn for the reason before stated, and not because he believed the evidence sought inadmissible. It is urged that it was

error to admit the evidence afterwards excluded, and that this was not remedied by its exclusion. We do not see that the evidence was not properly admitted. The nature of the injuries to the person of the wife were stated, and we see no reason why their effect upon her in any way might not have been proved under the averments made.

It is further urged that the repeated statement by counsel for appellee of the reasons which induced him to withdraw questions was calculated to prejudice the jury against appellant, and to deprive it of a fair and impartial trial. We do not see that the propounding of questions, and subsequently withdrawing them, even with the statement of the reasons which influenced the withdrawal, could have operated to the prejudice of appellant, more than would the asking of an improper question, and the action of the court in refusing to permit it to be answered. If cases were reversed because improper questions were propounded, and excluded on objection, but few judgments would be affirmed. The remarks of counsel were improper, and should not have been indulged in; but a jury, from the fact that questions were withdrawn without a ruling by the court as to their admissibility, would be likely to infer that they never ought to have been propounded. If it should appear that during a trial questions were propounded to witnesses, apparently to establish things that did not exist, and to which it was known the witness could not testify, or apparently to prove such things in a mode in which they could not be proved, with a view to make a false impression on the jury, then such conduct would be reprehensible; and in such case, if looking to the entire record there was reason to believe the jury had been influenced by such course, and would furnish ground for reversal, there is no claim that these things were done on the trial of this case. It was claimed by appellant that the condition of its track was attributable to unprecedented rain, snow, and cold, and exception is taken to the charge given upon that subject. The court in effect informed the jury that appellant would not be liable, if the defect that caused the accident was brought about by weather unusual and unprecedented, against which the company could not have guarded by the exercise of proper care and skill. The charge was a substantially correct statement of the law applicable to the case which there was any evidence tending to sustain, but it seems to us that the court might well have declined to give any charge whatever, looking to the excuse of appellant for the condition of its road on account of bad weather. It was shown that there was much and continuous rain and some snow for a considerable time before the accident; but, looking to the entire evidence, it seems to us that there was no such state of weather as may not be expected during any winter, or against the bad effects of which reasonable care would not give full protection. The direct cause of the accident, the evidence tends to show, was a broken rail; and as to whether this was broken at the time of the accident, or had been broken before, the evidence was conflicting. The evidence bearing on this question was all introduced, tending, in our opinion, to show inevitable accident, and the charge complained of clearly submitted the law applicable to the facts.

The charge as to exemplary damages is complained of. The charge is as follows: "The plaintiff also sues for exemplary damages. Now, if the proof shows that the injuries received by plaintiff's wife were caused by the gross negligence of defendant company, then you will consider the question of exemplary damages. What is meant by 'gross negligence' is a total want of ordinary care, and ordinary care is that degree of care which an ordinary person would use under like circumstances. Now, if the proof shows that defendant's road was out of repair, and had been out of repair a long time previous to the injuries of plaintiff, and defendant knew of its bad condition, or such bad condition was so notorious that the company could have known it, and they knew its bad condition, and failed to put it in repair, then they

would be charged with gross negligence, which would be ground for exemplary damages; but if the road was in good condition at the time and previous thereto, and in keeping with the business to be done on its road, or if the condition was not known, or could not have been known, then defendant would not be liable in exemplary damages." This charge has all the vices pointed out in the charge given in the case of *Railway Co. v. Shuford*, ante, 408, (this day decided,) except that it does inform the jury, indirectly or by implication, that exemplary damages could not be awarded unless the injury resulted from the gross negligence of appellant. For the reasons given in the opinion in the case referred to we hold that the charge here complained of was erroneous. The verdict was for \$5,000 actual and \$6,000 exemplary damages. It is urged that the verdict, as to both classes of damages, is excessive. That for exemplary damages it will not be necessary to consider. That for actual damages seems to us high, but in this character of case many elements of damages may be taken into consideration which from their nature render it impossible for courts to determine with absolute certainty whether the damages awarded are too much or too little. Much must be left to the honest judgment of the jury trying such a case. The accident occurred on December 26, 1887. This cause was tried on February 18, 1888, and it appears that then the wife's condition was still such as to prevent her appearing as a witness; to that time she had been unable to attend to her ordinary household duties, and had suffered more or less from the time the injuries were inflicted. The testimony of the wife's attending physician tends to show that the shock received by her brought on a nervous prostration, which has continued, and, in his opinion, is likely to continue so long as she may live. While it may be that the court below should have granted a new trial on account of the sum awarded by the verdict, this is not so evident as to authorize this court to do so.

For the errors noticed the judgment will be reversed, and the cause remanded, unless appellee shall remit the sum awarded as exemplary damages, in which event it will be affirmed for the actual damages awarded.

SMITH v. CITY OF NAVASOTA.

(Supreme Court of Texas. January 15, 1889.)

1. INJUNCTION—OPENING STREET—EVIDENCE.

An injunction against the opening of streets and alleys should not be granted on evidence of mere naked possession.

2. EVIDENCE—DOCUMENTARY—COPY OF RECORDED MAP.

Where all the deeds under which a party claims refer to a certain map, the copy of a map so designated, from the record of deeds, is competent evidence, when no other map can be found on record, and said map is indexed four times for the same book and page, and has been recognized as correct by the city and others for many years.

3. DEDICATION—ACCEPTANCE—EVIDENCE.

A map referred to in all the deeds under which a party claims is sufficient evidence that the streets and alleys marked thereon were dedicated and accepted by the city.

4. SAME—DECLARATIONS OF FORMER OWNERS.

Declarations by former owners, made after their title had ceased, are not competent evidence of the dedication of streets and alleys.

5. TRESPASS TO TRY TITLE—IMPROVEMENTS—NOTICE OF ADVERSE RIGHTS.

One who obtains title under deeds referring to a recorded map is charged with notice of the city's right to streets and alleys marked on said map, and cannot recover for improvements made on said streets and alleys.

Appeal from district court, Grimes county; NORMAN G. KITTRELL, Judge. Suit by P. A. Smith to restrain the city of Navasota from opening a street. Decree for defendant. Plaintiff appeals.

J. Earl Preston, for appellant. *H. H. Boone*, for appellee.

STAYTON, C. J. Appellant brought this suit to restrain the city of Navasota from opening ground claimed by the latter to have been dedicated as a street between blocks 7 and 8 in Noland's addition to the city. Appellee, in its answer, asserted a right to open for use a street between the named blocks, and asserted a further right to have opened an alley between blocks 7 and 12. Appellant bases his right on two propositions: *First*, that the land in controversy was never dedicated by Noland for street and alley; *second*, if so dedicated, the right had been lost by adverse possession held by him and those under whom he claims for more than 20 years. The cause was tried without a jury, and as conclusion of fact the court found that the possession of persons through whom appellant claims was not adverse to the city, but permissive, and in subordination to the right of the city to use the land for street and alley, whenever this became necessary or desirable. This conclusion of fact is sustained by the evidence, and as the possession of appellant was not continued for such period of time, and under such circumstances, as to bar the right of the city, it becomes unnecessary further to consider this branch of the case. To entitle appellant to an injunction restraining the city from opening the street or alley, it was necessary that it be shown that the contemplated acts would be violative of his right. This the threatened acts would not be if the land had been dedicated to the use claimed, or if it had not been, unless it was owned by appellant.

For the purposes of this case it may be considered that appellant owns blocks 7 and 12 in Noland's addition to the city of Navasota. The deeds through which appellant claims are not set out in full in the statement of facts, but it does appear that the land covered by the blocks named is not in the deeds otherwise described than by the number of block, city wherein situated, and by reference to a map or plan which is identified by the words, "according to Mills' map and plan of Noland's addition to said city." It appears, however, from a bill of exceptions, that every deed through which appellant claims declares that the map or plan referred to was on file in the county clerk's office. In so far as appellant sought relief, it was incumbent on him to show that he owned the land on which the city was threatening to open a street, and, not showing that he so became by adverse possession, it was necessary that he should show this by deeds. His deeds alone not being sufficient to show the boundaries of the blocks claimed by him, it was necessary that he should introduce the map or plan of the Noland addition, referred to in the deeds, or secondary evidence thereof, in order to prove the locality of the blocks and their boundaries. Without such proof his case must necessarily have failed for want of proof, unless his naked possession was such evidence of right as would entitle him to the equitable relief sought. We are of the opinion that in cases of this character an injunction ought not to be granted on evidence of right consisting only of a naked possession. *Gleason v. Village of Jefferson*, 78 Ill. 899.

On the trial the defendant was permitted to offer from the record of deeds what purported to be a copy of Mills' map of Noland's addition to the city of Navasota, which showed the blocks claimed by appellant, with street and alley as claimed by appellee. The introduction of this was objected to by the appellant on several grounds which went to the question of proper record of the map, and to its identity with that to which reference was made in the deeds through which appellant claims; but in signing the bill of exceptions the court states that "the evidence was admitted because every deed under and through which plaintiff claimed referred to Mills' map or survey of the city of Navasota, as filed in the clerk's office; and it was agreed that the court might examine and see if any other map could be found of record, but no other was found, and the one offered in evidence was indexed four times for the same

book and page, and hence, whether it was technically correctly filed and recorded or not, if this was the map referred to, and according to which the conveyances were made, the plaintiff was bound by the recitals of his deeds to abide by the map." There was no objection that the original map was not produced, or its absence accounted for; and the map found on the record was placed there on December 10, 1859. The map introduced in evidence seems to have been recognized as a correct map of Noland's addition, made by Mills, and as early as 1871 it was recognized by the city as a correct map, and was used and followed in making a survey and map of the entire city by a surveyor employed to perform that work. The court found that the map offered in evidence was the map of the Noland addition made by Mills, and that the deeds through which appellant claims referred to that identical map or plan. In view of the recitals in the deeds relied on by appellant to show title in himself, and of all the facts and arguments attending the introduction of the map, and of the further fact that the map offered had been for many years acted upon, we are not prepared to hold that the court erred in receiving it in evidence, or in holding that it was a true copy of the map or plan to which reference was made in appellant's deeds. As evidence it was conclusive of the fact that a street existed between blocks 7 and 8, and an alley between blocks 7 and 12, as claimed by the city. The evidence of the dedication of the street and alley to public use was sufficient, as was it to show that the city had accepted the dedication.

There was evidence introduced by appellee showing declarations made by persons through whom appellant claims as to the existence of the street and alley, and of their knowledge and recognition of the same while they owned and possessed the blocks. These declarations, however, were made after the persons making them had ceased to own or possess, and should not have been received. The cause, however, was tried without a jury, and the record shows that the court did not consider this evidence on any issue to the prejudice of appellant.

The evidence of a witness was objected to on the ground that it related to alleys, and not to the existence and recognition of a street by persons through whom appellant claims, there being no relief sought in appellant's petition against the opening of alleys by the city in Noland's addition. The bill of exceptions, however, shows that the witness used the words "streets and alleys" in the same sense and as equivalents; but had not this been so, the pleadings of appellee authorized and required an inquiry whether the alleys were dedicated, and as to whether the possession of the ground on which they were placed was adverse to the city.

Appellant certainly cannot be held to be an innocent purchaser of the ground covered by the street and alley the city seeks to open, for he bought under a deed which, for description of the blocks bought by him, referred to a map which showed the street and alley, and that the blocks were bounded by them. If appellant made improvements wholly or in part in the street or alley, under the findings of the court this was done not only with the means of knowledge furnished by his own deeds and map, to which they referred, but with actual notice that he was placing improvements in the street. Under this state of facts such improvements were made in bad faith, and furnish no grounds for relief.

What has been said disposes of the assignments of error, and, finding no error in the judgment of which appellant complains, it will be affirmed. It is so ordered.

JOHN'S ADM'R v. LOUISVILLE & N. R. CO.

(Court of Appeals of Kentucky. January 26, 1889.)

1. RAILROAD COMPANIES—INJURY TO PERSONS ON TRACK.

While a train on defendant's road was running on a down grade, and in the country, at a considerable distance from any road crossing, it broke in two, by some accident, and the engineer, to avoid a collision between the two sections of the train, increased his speed, making a considerable gap between them. Plaintiff's decedent, who was an old lady, went upon the track between the two sections, and was killed by the rear one. The brakeman upon the rear of the train testified that he saw the decedent "standing on the left of the track;" but there was no evidence that any person connected with the train knew she was on the track, or in any peril. *Held*, that there was no evidence to warrant a recovery against defendant.

2. SAME—NEGLIGENCE OF EMPLOYEES.

In such case, an instruction as to the duty of those in charge of the train is not erroneous as precluding the jury from considering any negligence on the part of the brakeman or flag-man on the rear section.

Appeal from circuit court, Gallatin county; J. J. ORR, Special Judge.

Nancy John's administrator brought this action to recover damages of the Louisville & Nashville Railroad Company for the killing of Nancy John by defendant's train, upon the ground that her death was caused by the willful negligence of those in charge of said train. Judgment for defendant, and plaintiff appeals.

Thos. H. Hines and *M. N. Webster*, for appellant. *Winslow & Winslow*, for appellee.

HOLT, J. In January, 1886, Nancy John, an old lady living near the place where she met her unfortunate death, left her home, and started along or near the railroad track towards the little town of Glencoe, distant something over one-third of a mile. A train of the appellee was approaching in the direction, also, of the village, and upon a down grade. Shortly before it reached her it became separated, and the engineer, to prevent a collision between the two portions of it, increased his speed, thus making a gap between the two detached sections.

There appears to have been some claim by the appellant upon the trial below that the train was cut in two by some one engaged in operating it, for the purpose of making what is known as "a running switch," and which is forbidden by the rules of the company. There is, however, no testimony whatever to sustain it. Upon the contrary, the evidence tends to show that the separation occurred by reason either of the breaking or the loss of a connecting pin, occasioned by the bumping or striking together of the draw-heads of the cars in checking them upon a down grade; and this is doubtless the fact. The first section of the train passed Mrs. John, she, of course, not being then upon the track. The two sections were then from 30 to 40 yards apart; the conductor and one brakeman or flag-man being upon the rear one. At this time, and at a point about half way between the two sections, she went upon the track, and was struck by the rear one, and killed almost instantly. Her administrator sues to recover damages upon the ground that occurred through the willful neglect of those in charge of the train. The evidence is convincing that when she so exposed herself she was not more than 20 yards at most in front of the cars, which were moving at 12 or 13 miles an hour. Her head was covered up with a shawl, doubtless to protect her from the cold; and this, together with the noise of the portion of the train that had already passed her, probably prevented her from hearing the noise of the approaching rear section. This occurred upon the line of the appellee's road in the country. There was not even a road crossing nearer to the spot than 250 yards.

There is no evidence showing that any of the persons engaged in the management of the train knew she was on the track, or in any peril whatever.

The testimony offered for the appellant failed *in toto* to so show, either affirmatively or inferentially; and, upon the case as presented by him, the court should have granted the nonsuit which was asked at the close of his testimony. This, of course, should never be done wherever there is any evidence whatever upon which the jury might find a verdict for the plaintiff. It was, however, altogether absent in this instance. The lower court, however, saw proper to let the case go to the jury; and the testimony introduced by the appellee shows affirmatively all want of knowledge upon the part of those operating the train that Mrs. John was either upon the track, or in any peril whatever. We do not understand the brakeman who was upon the rear of the train as testifying that when the train was descending the grade he saw her upon the track. Upon the contrary, he says she was "standing on left of track."

The company was entitled to the exclusive use of its track at the place where the killing occurred. The right of a railroad company to the use of its track is exclusive of the public, save where the public has a right to cross or use it, or where its use in a reckless manner would necessarily endanger the lives of those whose nearness to it requires the exercise of care and caution. In passing through a town or city, greater care must be exercised than upon a portion of the road where persons have no license to be. In the first case, those in charge of a train must be upon the lookout for persons, and must by the usual signals give warning of its approach; while, in the latter, they are not bound to anticipate their presence, and guard against injury to them, but must, when made aware of their peril, avoid the injury by the exercise of all reasonable means. In this instance the deceased was upon the track at a place where she had no right to be. Those in charge of the train never discovered her peril, and hence there was no opportunity for the exercise of the care which the law requires under such circumstances.

The grounds for a new trial expressly confined the appellant's objection to the ruling of the court as to instructions,—to the second one given, and the refusal to give the first and second ones asked by the appellant. A ground for a new trial which merely states that the court erred in giving or refusing instructions is sufficient to raise any and all questions upon this point; but where the party expressly indicates the giving or refusal of certain instructions as error, and names none others, either expressly or in a general way, he will be confined to them. It does not clearly appear from this record what instructions were given to the jury. The record is confused in this respect. Thus no instruction marked "Second" appears to have been given; but from all that appears we suppose the one appearing in the record as "Nine" is in fact the one which was objected to by the appellant. We will therefore briefly consider them. The two instructions asked by the appellant, and refused, failed to embody the rule above expressed by us as to the duty of those in charge of a train as to one upon the track at a place where he has no right to be, and were therefore objectionable; and the second instruction, or number "Nine," as it appears in the record, substantially conformed to it. It told the jury, in substance, that although the deceased negligently went upon appellee's track, and at a place where there was no public crossing, yet, if those in charge of the train became aware of her danger, it was their duty to use proper care to avoid injuring her. It is urged that this instruction expressly confined the exercise of this care to those managing the train, and that this took from the consideration of the jury any negligence upon the part of the brakeman or flag-man upon the section which killed Mrs. John. We do not see how this is possible. The jury certainly understood that he was one of the parties engaged in the management of the train.

The instructions, taken as a whole, were more favorable to the appellant than he had a right to ask, and the judgment is affirmed.

STARKS *et al.* v. CURD *et al.*

(Court of Appeals of Kentucky. January 22, 1889.)

1. BANKRUPTCY—RIGHTS OF ASSIGNEE—WAIVER OF LIENS BY CREDITORS.

Under the federal bankrupt act, § 14, all the property rights of the debtor vested in the assignee, as from the commencement of the proceedings, and though creditors having attachments levied four months before that time waived their liens as against the assignee by filing their claims as unsecured, yet such waiver cannot be taken advantage of by the bankrupt, whose title is extinguished.

2. ATTACHMENT—SALE OF LANDS IN GROSS—VALIDITY.

It is error to direct a sale in gross of attached lands, which are separate tracts, and situated in different counties. The judgment should direct a sale by the tract, and only so much as necessary to satisfy the debt and costs.

Appeal from circuit court, Calloway county; A. R. BOONE, Judge.

Several actions on contracts were instituted by W. H. Curd and others against W. M. Starks, and attachments were sued out against certain tracts of land owned by him. The several actions were consolidated. Defendant pleaded his discharge in bankruptcy in bar of plaintiffs' claims. The wife and children of Starks claimed that they owned the attached lands by reason of conveyances made to them by Starks. Judgment was rendered subjecting the attached property to plaintiffs' claim, but no personal judgment against Starks was granted. From this judgment defendants appeal.

Gilbert & Reed and *W. M. Smith*, for appellants. *Wm. Lindsay*, for appellees.

BENNETT, J. The appellees instituted their several actions in the Calloway circuit court against the appellant Starks, to recover debts due them on contract by him. They obtained attachments in said actions, which were levied upon the several tracts of land in controversy. More than four months after the levy of these attachments the appellant W. M. Starks abandoned his residence in said county and state, and moved to the state of Missouri, in which state he took up his residence, and after making said state his place of residence he filed his petition in the United States district court for that state to be declared a bankrupt. The register in bankruptcy took charge of his case. An assignee was duly appointed, and qualified. The appellant W. M. Starks was duly and finally discharged from all his debts and liabilities existing at that date. After getting his final discharge, he returned to this state, and filed answers to the appellees' actions, among other things contesting the grounds of the attachments, and denying that the real estate in controversy was subject to said attachments, and that the appellees, except one, had filed their claims in the bankrupt proceedings, and had them allowed as unsecured claims, which was a waiver of the attachment liens, if any they had. His wife and children also appeared in said actions, and set up title in themselves to said lands by reason of conveyances by deed to them by the appellant W. M. Starks.

It is perfectly manifest that the conveyances by the appellant W. M. Starks to his wife and children were made with the design to defraud his creditors; therefore, as against said creditors, no title passed to them, but thereafter passed to his assignee in bankruptcy, subject, however, to the appellees' attachment liens.

The fourteenth section of the bankrupt act provided "that, as soon as said assignee is appointed and qualified, the judge, or where there is no opposing interest the register, shall, by an instrument under his hand, assign and convey to the assignee all the estate, real and personal, of the bankrupt, with all his deeds, books, and papers relating thereto, and such assignment shall relate back to the commencement of said proceedings in bankruptcy, and thereupon, by operation of law, the title to all such property and estate, both real

and personal, shall vest in the said assignee, although the same is then attached on mesne process as the property of the debtor, and shall dissolve any such attachment made within four months next preceding the commencement of said proceedings." It has been uniformly held that, if the attachment out of the state court was levied as many as four months before the filing of the petition in bankruptcy, the lien created by such levy would continue, notwithstanding the filing of the petition in bankruptcy. Also it has been uniformly held that if a creditor of the bankrupt had a lien, by attachment or otherwise, for the securing of his debt, and he filed his debt in the bankrupt court, and asked that it be allowed and prorated as an unsecured claim, without apprising the assignee of the existence of the lien, he thereby waived said lien. Were the rule otherwise, such creditor would not only have the benefit of his lien security, but would prorate equally with the other creditors, which would be a fraud upon the equality of right among the creditors of the bankrupt that the bankrupt law attempted to establish. But the waiver of the lien was for the benefit of the assignee only, as trustee for the bankrupt's creditors. The lien, however, by proving the claim as unsecured, was not extinguished, but was simply waived at the instance of the assignee, for his benefit as subrogee. See *Cook v. Farrington*, 104 Mass. 212; *Hiscock v. Jaycox*, 12 N. B. R. 512. By the section *supra*, the title of the property passed to and vested in the assignee, whereby the bankrupt was totally divested of title; and, as just said, if the bankrupt had previously conveyed his property for the purpose of defrauding his creditors, nevertheless the title passed to the assignee for their benefit as fully and completely as though no such conveyance had been made. Therefore it has been uniformly held that the bankrupt could not appear in the state court and take advantage of the waiver. He had parted with his title to the property and had been discharged from liability on the debt, and of course had ceased to have any interest whatever in the proceedings. See cases *supra*.

If the assignee, who was the party in interest, could, if he wished, take advantage of the waiver, and defeat the attachment, and take the property freed of its lien, on the other hand, as the waiver was only for his benefit as subrogee, he could waive his right to it, and let the property be subjected to the attachment lien; which waiver on his part would be presumed, under circumstances similar to this case, by his failure to appear and assert his right. Therefore the judgment of the circuit court subjecting said property to the attachment liens, but not giving personal judgment against W. M. Starks, is affirmed. But the tracts of land attached were separate tracts, and were situated in Calloway and Marshall counties, and the judgment, as we understand it, directed the master commissioner to sell the several tracts lying in each county in gross, and without reference to the fact whether it would be necessary to sell it all to pay the debts, interest, and cost. This it will be readily seen was an error, and for this error the case must be reversed, with directions to amend the judgment so as to direct the sale of said land by the tract, and only so much thereof as will be sufficient to satisfy the debts, interest, and costs.

SPALDING, Master Commissioner, v. COMMONWEALTH.

(Court of Appeals of Kentucky. January 17, 1889.)

1. RECEIVERS—LIABILITY FOR TAXES.

A receiver of property of a decedent's estate, which is in litigation, may be required to list and pay the taxes upon it.

2. SAME—LISTING PROPERTY FOR TAXATION—PROCEDURE.

The proper procedure would be for the court appointing the receiver to direct him to list the property in the county court, and pay the taxes, but it is not improper for the former court to grant leave to institute a suit in the county court, against the

receiver, to compel him to list the property; and the county court having ordered the receiver to do so, and its order having been appealed to the court appointing him, and there affirmed, the latter court may be considered as having directed the listing.

8. TAXATION—FAILURE TO LIST—PENALTY.

Under Gen. St. Ky. c. 92, art. 5, § 25, requiring the sheriff to report persons failing to list their property, to be fined and taxed as delinquents reported by the assessor, it is proper to proceed against the delinquent by summons to show cause why the property should not be listed. The remedy is not confined to a fine and triple tax, for which judgment is required, by section 22, to be entered against a delinquent reported by the assessor. Such summons substantially charges the offense of failure to list as required.

Appeal from circuit court, Marion county; J. W. LEWIS, Special Judge.

Proceedings against J. B. Spalding, master commissioner, to compel him to list and pay taxes on property in his possession. The commissioner appeals. Gen. St. Ky. c. 92, art. 5, § 25, provides that, "when it shall be known to the sheriff that any person has failed to give in a list of his taxable property in any year when it shall be liable to taxation, he shall report such person to the county clerk, to be dealt with, fined, and taxed as delinquents reported by the assessor. * * *" Section 21 provides for returning delinquents by the assessor, and section 22 requires "the county clerk to issue a summons in the name of the commonwealth, in which shall be stated the offense in general terms against each of the delinquents. * * * If the defendant be found guilty, the court shall enter judgment for the fine, and triple tax and costs. * * *"

S. Avritt, for appellant. *Lewis Edelen* and *S. T. Spalding*, for appellee.

HOLT, J. The estate of Felix Mercer being in litigation in the Marion circuit court, an order was made by it, in 1881, placing in the hands of the appellant, and directing him to loan it out, about \$20,000 left by the decedent. The commissioner complied with the order, and has since continued to loan it, owing to the right to the fund remaining unsettled, taking notes therefor, presumably payable to himself. In June, 1885, upon motion of the proper parties, the court granted leave to them to institute suit in the Marion county court to compel the commissioner to list the fund for state and county taxation for the years 1881 to 1885, inclusive; and the order further provided that the commissioner should out of the fund pay such sums as might be adjudged for these purposes. It does not appear that the estate had ever been listed for taxation, or that any taxes had ever been paid upon it for the years named. After the granting of this leave the sheriff of the county reported in writing, to its county court clerk, the appellant as delinquent in having failed to list said fund or pay taxes upon it; and thereupon the latter officer issued a summons against the commissioner to appear before the county court at a time named, and show cause, if any existed, why the estate in his hands should not be listed for the years above named for county taxation. A demurrer to the proceeding having been overruled, as well as a motion to quash the summons, an answer was filed by the appellant setting up how he had received the fund; that he had no interest in it, the notes being held by him subject to the order of the court; that the money belonged to Mercer's heirs, who mainly resided in other counties, and were necessary parties to the proceeding; that they were the proper parties to list it; and that he was not the possessor of it, save as commissioner. A demurrer having been sustained to the answer, and the appellant failing to plead further, the county court rendered a judgment holding him liable for the taxes, and directing its clerk to take the list of the estate in appellant's hands for said years. He appealed to the circuit court. The record is a meager one; and while in the last-named court the motion to quash the summons appears to have been renewed, and the demurrer to the proceeding again presented, yet there does not appear to have been any express ruling as to either, nor was the demurrer filed in the county court to the

answer renewed by any order in the circuit court; but it is perhaps proper to regard the final judgment in the latter court, and which affirmed the judgment of the county court, as acting upon them, and we will so treat it. No reply was ever filed to the answer in either court.

It is contended, first, that there is no law warranting such a proceeding; that under the statute a delinquent can only be proceeded against for a fine and a triple tax; and that a listing can only be compelled, if at all, by means of this penalty. It was, however, settled otherwise in the case of *Railroad Co. v. Com.*, 85 Ky. —, 8 S. W. Rep. 139; it being there held that under section 25, art. 5, c. 92, Gen. St., the county court could, in case of a mere failure to list, direct its clerk to take the list of the delinquent; he having first been summoned to show cause against it. The offending in such case is confined to the mere failure to list, and a summons under said section need charge no more. This was substantially done in that issued against the appellant, because he was required to show cause, if any existed, why the estate should not be listed.

It is a general rule that before suit can be brought against a receiver leave of the court by which he was appointed must be obtained. This is because one court should not be allowed to take the property or fund already properly under the control of another court away from it. To do so would be a disregard of the rights of those already contending over the estate, and create a conflict of jurisdiction injurious to public interests and individual right. *Barton v. Barbour*, 104 U. S. 126. There was no necessity, however, in this instance, for a resort to another forum. It is true that under our law the county court is the only power which can direct the listing of property for taxation which has been omitted by the assessor. Here, however, was a fund in the hands of the court's receiver. It was under its control. It was the estate of a decedent of Marion county. The right to it was in litigation. If the averment of the answer that it belonged to Mercer's heirs can be considered as one of fact, and is therefore, in the absence of a reply, to be taken as true, yet the fund had never been distributed, and it was not known what portion of it would finally go to each of them. He or she could not, therefore, intelligently list his or her interest in it. Indeed, the litigation might be of such a character as to consume it, or as a result of it the heir might not ultimately receive anything, and from the very nature of the case he or she could not list any portion of it. It was yet the estate of the decedent, subject to distribution by the court. It, or its receiver, was the possessor of it. The money has always been in Marion county, and has there received the protection of the law, and must in fact yet be distributed by its court. Undoubtedly, if it had already been listed for taxation, the court having control of it could have ordered its receiver to pay the taxes; and we see no reason why, when it had not been listed, the court could not have directed its receiver to do so, and also pay the taxes. There was therefore really no necessity for obtaining leave to resort to legal proceedings in another tribunal. The circuit court could have ordered its receiver to go into the county court, and have it listed, and then pay the taxes. It, however, saw fit to arrive at it in an indirect manner, and, while it was not the best mode, yet it was not an illegal one. It consented that another tribunal might take jurisdiction over its receiver as to this particular matter, and direct him as to it; and at last, in this instance, by reason of the appeal, it in fact controlled its receiver in the matter, and affirmed what the inferior tribunal had ordered to be done. So that at last the circuit court may be regarded as having directed its receiver to go into the county court and list the estate under its control.

It is contended that it will not do to charge officers, like receivers and sheriffs, with the taxes upon funds transiently in their hands, and which may happen to be held by them upon the particular day when the owner or possessor is chargeable with the taxes. In this we concur. It would interfere with the

proper transaction of business. The case presented is, however, a different one. Here was the estate of a decedent under the control of the court. It was yet to be distributed. It was as yet uncertain as to whom it belonged, or at least what portion, if anything, each heir would finally receive. From the very necessity of the case, it was proper for the court to consent that another tribunal might direct its receiver to list the estate in his hands, or, what would have been preferable, it should itself have directed its officer to go and list it, and pay the taxes. The order of the circuit court, granting the leave to another tribunal to pass upon the question of assessment, also directed its receiver to pay any taxes that might be assessed against the fund. This entitled him to a credit for any sum he might thus pay, and in fact its judgment upon the affirmance of the appeal from the county court expressly directs such credit to be given. No loss can therefore come to him. The provisions of chapter 92 of the General Statutes show it was intended that all property should contribute its proper proportion to the means necessary to support the county and state governments. They were enacted in the spirit of fairness and equality, and property situated like that in question will escape, and receiverships become exceedingly popular, unless the court in control of it can order its officer holding it to list it and pay the taxes upon it. Where the ownership of the fund is in question, and it is in litigation, there is no other practical way of reaching it.

Here it could not be properly assessed to the owner. Even if by reason of the averment in the answer of ownership in the heirs it can be said that the owners were known, yet there had been no distribution of it to each of them,—its *situs* had not changed,—and one of them in giving in his list could not take into consideration any of this estate, because he could not tell what he would ever get, if any of it. It is unlike the case which was presented in *City of Louisville v. Sherley*, 80 Ky. 71, because there not only the ownership of the fund sought to be taxed had been ascertained, but it had been allotted to the owner. It is contended, however, that it belongs either to the personal representative, or the heirs, and that they should have been brought before the county court, and the question determined. This would perhaps have required the inferior court to determine the very question at issue in the superior tribunal, and which might for years be undetermined. Such a conflict of jurisdiction would not only be useless, when the taxes could without injury to any one be paid out of the fund by the receiver under the order of the court, but might result in serious injustice. If the heir alone were proceeded against, he could very well say "there has been no distribution of the estate. I do not know the value of my interest, if I have any, or what I will ultimately receive." The estate should pay its proper proportion of the public burden in return for its protection under the law; and, unless the mode indicated herein be followed, it, and many thousands of dollars situated like it, would escape taxation. Judgment affirmed.

ALEXANDER *et al.* v. NOLAND.

(Court of Appeals of Kentucky. January 17, 1889.)

1. PUBLIC LANDS—TITLE FROM STATE—FILING CAVEAT—ADVERSE CLAIMS.

Code Civil Proc. Ky. § 473, providing that, if any person obtains a survey of land to which another claims a better right, such other may enter a *caveat* to prevent the issuing of a grant until the right be determined, and that the *caveat* shall show plaintiff's claim, be verified by affidavit, and state that it is entered in good faith, for plaintiff's benefit, applies only to vacant land, and plaintiffs have no right to a *caveat* where they rely on a patent theretofore issued to the persons under whom plaintiffs claim.

2. SAME—MISDESCRIPTION IN CAVEAT—JURISDICTION.

Where the description of the land in the *caveat* differed as to one course from the description given in the patent and deeds under which plaintiffs claimed, and the

instructions required the jury to believe that the land in controversy was that set out and described in the *caveat*, a judgment on a verdict against plaintiffs will be reversed, though the court had no jurisdiction of the case.

Appeal from circuit court, Estill county; H. L. WHEELER, Special Judge. Silas Alexander and others instituted this proceeding against Thomas Noland by filing in the register's office a *caveat* to prevent the issuing of a certain patent to defendant. A certified copy of said *caveat* having been lodged in the Estill circuit court, the defendant controverted the plaintiff's superior right to the land in controversy. There was a judgment for Noland, from which plaintiff appeals.

Riddell & Fluty, for appellants. *John Bennett, H. C. & W. H. Lilly*, and *J. B. White*, for appellee.

BENNETT, J. The appellants, in August, 1883, entered a *caveat* with the register of the land-office to prevent the issuing of a patent to the appellee for 70 acres of land lying in Estill county, Ky. A copy of the *caveat*, certified by the register, was, within 60 days from the time it was entered, lodged with the clerk of the Estill circuit court, and the appellee, having been duly served with summons, filed his answer, controverting the appellants' right to the said land.

Section 473 of the Civil Code, under which the proceedings were had, provides: "If any person obtain a survey of land to which another claims a better right, such other may enter a *caveat* with the register to prevent the issuing of a grant until the right be determined. The *caveat* shall state the plaintiff's claim, and the reason why the grant should not issue. It shall be verified by his affidavit, or by that of his agent, and declare that it is entered in good faith, with the intention of procuring the land for the plaintiff, and not for the benefit of the person against whom it is entered." The filing of a *caveat* with the register of the land-office is to prevent that officer from issuing a patent for vacant and unappropriated land to a claimant who is not entitled thereto by reason of a prior entry and survey by another, or by reason of some other fact that gives him a prior right to a grant from the commonwealth. That the foregoing is the correct construction of the section *supra*, is made manifest by the fact that it must appear from the affidavit that the *caveat* "is entered in good faith, with the intention of procuring the land for the plaintiff." If, at the time of entering the *caveat*, he has a patent for the land, he cannot make the affidavit that the *caveat* is entered with the intention of procuring the land for himself; for the patent presumably invests him with all the commonwealth's title to the land. See *Preston v. Preston*, 2 S. W. Rep. 501.

The appellants rely upon a patent issued by the commonwealth to Shirley's heirs as the foundation of their title to the land in controversy. This being true, the land was not vacant or unappropriated. Therefore the appellants had no right to enter the *caveat*, and the circuit court had no jurisdiction to try it, and the proceeding on it should have been dismissed.

The case, however, was tried by a jury, who found for the appellee. The court, in instruction No. 1, required the jury to believe that the land in controversy was set out and described in the appellant's *caveat*. The *caveat*, in attempting to give the boundary of the land as set forth in the patent, described one of the lines as running "S., 50 E., 170 poles," when the description should have been, in order to correspond with that given in the patent, "S., 50 W., 170 poles." It is probable that the jury understood the instruction to mean that the *caveat* should correctly describe the land, and if it failed to do so the appellants could not recover. The patent and the deeds under which the appellants claimed all gave the same description of the land, and they were put in evidence before the jury; and the description therein should have controlled the court in giving the instructions, instead of the description

contained in the *caveat*, as it is manifest that the misdescription was the result of a slip of the pen. Ordinarily, as the circuit court had no jurisdiction of the *caveat*, and as the appellants gained nothing by the proceeding, we would affirm the judgment; but as the jury, influenced, doubtless, by an erroneous instruction, have returned a verdict against the appellants, which may hereafter impoverish their rights, we will take hold of the error of the court in instructing the jury, for the purpose of reversing the judgment, and directing the circuit court to dismiss the case without prejudice. But the appellants must pay the costs in this court, and the costs of dismissal.

The judgment is reversed, at the costs of the appellants, and the circuit court is directed to dismiss the case without prejudice, at the costs of the appellants.

LOUISVILLE & N. R. CO. v. ADAMS.

(Court of Appeals of Kentucky. January 7, 1889.)

1. COURTS—JURISDICTION OF POLICE COURTS—CONSTITUTIONAL LAW.

Const. Ky. art. 4, § 41, providing that "the city court of Louisville, the Lexington city court, and all other police courts established in any city or town, shall remain, unless otherwise directed by law, with their present powers and jurisdictions," applies only to police courts in existence when the constitution was adopted; and the legislature may confer civil jurisdiction upon police courts subsequently created.

2. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Though the evidence may seem to preponderate in favor of defendant, yet, there being a substantial conflict, a verdict for plaintiff will not be disturbed, on appeal, particularly where it is the third one rendered in the action in his favor.

Appeal from circuit court, Marion county; W. E. RUSSELL, Judge.

Action for damages for killing a mule, brought by Richard Adams against the Louisville & Nashville Railroad Company. Verdict and judgment for plaintiff, and defendant appeals. Const. Ky. art. 4, § 41, referred to in the opinion, reads as follows: "The city court of Louisville, the Lexington city court, and all other police courts established in any city or town, shall remain, unless otherwise directed by law, with their present powers and jurisdictions. * * * The general assembly may vest judicial power, for police purposes, in mayors of cities, police judges, and trustees of towns."

Wm. Lindsay and W. J. Lisle, for appellant. Harrison & Belden, for appellee.

PRYOR, J. The police judge of the town of Lebanon was invested by the legislature with the power to try civil cases where the amount in controversy, exclusive of interest and cost, does not exceed \$500. Section 4 of article 41 of the constitution, as this court has heretofore decided, applies only to police courts in existence when the constitution was adopted. *Trustees of Owensboro v. Webb*, 2 Metc. (Ky.) 576. It follows, therefore, that the police court, having jurisdiction in civil cases, properly heard and determined the controversy between the appellant and the appellee. The history of legislation in this state on like subjects, and the judicial decisions sustaining it, leave no room to question the constitutionality of the enactment conferring the jurisdiction. The case was heard in the police court, resulting in a verdict and judgment for the appellee, and on an appeal to the circuit court a similar verdict and judgment were rendered, from which this appeal is prayed. The claim by the appellee against the appellant is for the negligent killing of a mule belonging to the appellee by the employees of the appellant, and while in the discharge of duties pertaining to the employment. While the weight of the testimony is with the appellant, the instructions being proper, this court has no power to reverse the judgment, unless the verdict upon which it is based is flagrantly against the evidence. The cause of the verdict against the

company is the conflict of the testimony of those in charge of the train and that of those testifying for the plaintiff. If the mule was knocked from the track at the place designated by the witnesses for the plaintiff, the company's agents might have avoided the injury; while on the other hand, if the animal was struck at the point fixed by the employees, and in the manner detailed by them, it was impossible to have prevented the accident. If the statements are true as made by the plaintiff, and sustained by his witnesses, then the theory of the defendant as to the cause and manner of the killing may be doubted, and the mere weight of the testimony being on the side of the railroad company does not authorize a reversal. Besides, there have been three trials of this case, the jury in each instance returning a verdict for the plaintiff. The jury returned a verdict in the police court. On the appeal to the circuit court the jury returned a like verdict. That was set aside by the trial judge, and a retrial ordered. On the third trial, still a verdict was rendered for the plaintiff. Under such circumstances, this court ought not to disturb the judgment below. Affirmed, with damages.

ROWE v. FOGLE *et al.*

(Court of Appeals of Kentucky. January 10, 1899.)

ATTORNEY AND CLIENT—ATTORNEYS' LIENS—COMPROMISE OF SUIT.

Where an attorney sues for specific performance, but afterwards, by agreement between plaintiff and defendant, the action is dismissed, each party paying his own costs, and it does not appear that there is any intention to defeat the claim of the attorney for services, the latter has no lien which he can enforce against the defendant, under Gen. St. Ky. c. 5, § 15, providing for attorneys' liens on demands arising on contracts, or on judgments in actions of tort or on contract.¹

Appeal from circuit court, Ohio county; L. P. LITTLE, Judge.

J. F. Fogle and H. B. Kinsolving, attorneys at law, brought a suit for Mary A. Neittman against H. D. Hinton, to enforce a contract made by plaintiff with defendant for the purchase of a tract of land, and, if this could not be done, plaintiff sought to recover of defendant the money that she alleged she had paid him on said land. After defense had been made and issue joined, the plaintiff and defendant compromised and settled the case; it being agreed that the suit should be dismissed, each party paying his or her own costs. When this agreement was filed, and the defendant moved to dismiss the action, Fogle *et al.*, the attorneys for plaintiff, objected, and caused a rule to issue against Rowe, executor of Hinton, (against whom the action had been revived,) to show cause why the plaintiff's attorneys should not be adjudged a lien on the land in controversy to secure the payment of their fees. Response being filed thereto, the trial court adjudged that said attorneys had a lien on said land for their fees, and also gave them a personal judgment against Rowe, executor. From this judgment Rowe, executor, appeals.

E. D. Walker and *E. W. Hines*, for appellant. *T. H. Hines* and *J. E. Fogle*, for appellees.

PRYOR, J. The lien asserted or allowed an attorney for his services in this state is purely statutory. Where the demand arises out of contract, and is placed in the hands of an attorney, to be collected by suit or otherwise, the attorney has a lien; or where the claim is reduced to judgment, whether in contract or for a tort, or the property is recovered, the attorney has his lien. Gen. St. § 15, c. 5. The payment by the debtor to the creditor of a claim arising

¹Concerning the lien of attorneys for fees on judgments recovered for their clients, see *Weeks v. Judges*, (Mich.) 41 N. W. Rep. 266, and note; *Gill v. Truelsen*, (Minn.) 44 N. W. Rep. 254, and cases cited; *Goodrich v. McDonald*, (N. Y.) 19 N. E. Rep. 649.

out of contract, with notice that it is in the hands of an attorney for collection, will not deprive the attorney of his lien, and an action brought by the attorney would be deemed sufficient notice. Suppose, however, that no action is brought, and the plaintiff regards his claim as worthless, and proposes to withdraw it from the attorney, or to dismiss it after suit has been instituted, is the statute giving the lien to be so construed as to prevent an abandonment of the claim, if done in good faith, and not with a view of defeating the lien? Such a construction would result in useless litigation, and compel the payment by the defendant to the attorney of the plaintiff of his fee, or to submit to a litigation upon an alleged cause of action, when both parties plaintiff and defendant agree that no recovery can be had.

Where the defendant has paid, or agrees to pay, the plaintiff for withdrawing the suit, or the claimant receives a consideration for forbearing to sue when the claim is in the hands of the attorney, and is known to the defendant, the rule would be different. In cases of tort before judgment, this court has held, and still holds, that the statute under which such liens are asserted does not prevent the parties from settling the litigation, and in such a case the attorney must look alone to his client for compensation. In this case both the parties plaintiff and defendant agreed that the action in which the lien is asserted should be dismissed, each party paying his own costs. Nothing was recovered by the defendant from the plaintiff, and no recovery had by the latter, and there is nothing in the record showing that the object to be accomplished was to defeat the claim of the attorneys for their services. The plaintiff in good faith dismissed the action, and there was no reason for compelling the defendant to pay the attorneys of the plaintiff \$100, or any other sum, for their services. They must prosecute their claim against the plaintiff, and not the defendant.

The judgment below is reversed, with directions to discharge the rule.

HANEY v. McCLURE *et al.*

(Court of Appeals of Kentucky. January 17, 1889.)

1. RECORDS—RESTORING LOST PAPERS.

Gen. St. Ky. c. 72, § 4, provides that where the records or papers of a court are lost, destroyed, or defaced, the court shall appoint a commissioner to take in writing evidence relative thereto. Section 5 provides that, unless the party offering testimony as to such records or papers files an affidavit that no certified copy thereof known to him is in existence, such testimony shall not be received. *Held*, that where it does not appear that such affidavit was filed, or the evidence taken in writing, the court has no authority to substitute the papers accompanying the commissioner's report for the original.

2. JUDGMENT—RE-ENTRY—NOTICE OF APPLICATION.

Section 1 of said chapter provides that when an unexecuted judgment, and the record thereof, have been lost, etc., any person, on 10 days' notice in writing to the adverse party, may move for a re-entry of the judgment, which shall be allowed on satisfactory proof of the loss, etc. Though the notice required by this section was not given, defendant had notice that the records in question had been destroyed, and that plaintiff had moved to supply them, and to re-enter the judgment, and he was in court when the order was made. The judgment was by default, and an appeal was barred by limitation. *Held*, that the court properly ordered a re-entry of the judgment on satisfactory proof.

3. JUDICIAL SALES—REPORT OF COMMISSIONER.

A commissioner's report which does not show for what price the land sold, or that he offered to sell less than the whole tract to pay the debts for which it was liable, will be set aside.

Appeal from circuit court, Rowan county; A. E. COLE, Judge.

Action by J. H. McClure against Paschal Haney for a sale of certain land to satisfy a personal judgment recovered by plaintiff against defendant. Judgment for plaintiff, who at the sale of the land became its purchaser.

Defendant filed exceptions to the commissioner's report of sale, which were overruled. Defendant prosecutes this appeal.

V. B. Young, Z. T. Young, and H. L. Stone, for appellant.

LEWIS, C. J. The papers and records of this case having in November, 1880, been destroyed by fire, the commissioner appointed to take evidence relative thereto, at the April term, 1881, of the court where the action was pending, filed a report in which it was stated the attorney for the plaintiff presented substitutes for the petition and answer filed in 1868, and the judgment rendered in 1869, and testified they were correct copies of the originals, which had been burned. The deposition of the clerk of the court was taken, wherein he testified the petition and judgment were correctly copied. The papers accompanying the report show the action was instituted by appellee McClure, to enforce the satisfaction of a personal judgment recovered by him against appellant for \$148.60, upon which an execution had been issued and returned, "No property found;" that it was stated in the petition the tract of land sought to be subjected was purchased by appellant from one Evans, who had assigned the note for the balance of purchase money unpaid, amounting to \$200, to appellee Moody; and that the latter filed an answer setting up the note, and claiming he had a superior lien on the land for the payment of it. In the judgment purporting to have been rendered, the land, or so much as necessary, was directed sold to pay the two debts; it being stated therein that appellee McClure had become owner of both. At the May term, 1881, appellant filed exceptions to the report of the commissioner appointed to take evidence in relation to the destroyed papers and records, and also to the report of sale, which it appears was filed at the November term, 1880; but each of the exceptions was overruled, the sale was confirmed, a deed directed made to the plaintiff, who was the purchaser, and a writ of possession to issue in his favor.

Section 4, c. 72, Gen. St., provides that, in case the records and papers of any court shall be lost, destroyed, defaced, or obliterated, such court shall appoint a commissioner, who shall have power and authority to fix on a convenient place to meet and sit from time to time, giving reasonable public notice thereof. Section 5 is as follows: "The commissioner may at the instance of any person issue a summons, and cause the attendance of witnesses, and take evidence in writing of such witnesses relative to any record or paper so destroyed, defaced, or obliterated; which deposition shall be legal evidence, and shall be returned to the clerk of the court, and safely kept by such clerk. Before any such proof is taken, the party offering it must make and file with the commissioner an affidavit that there is no attested copy of such record or papers in existence known to him. If such affidavit is not made, no testimony taken shall be evidence. The commissioner shall not remain in office longer than one year."

It does not appear the affidavit mentioned was made and filed by the plaintiff, or any one for him, nor that the testimony of the attorney for the plaintiff in regard to the substitutes produced by him was taken in writing; and, as the clerk of the court in his deposition states merely his opinion of the correctness of the copies of the petition and judgment, making no reference to the answer of appellee Moody, it is clear there was not such compliance with the provisions of section 5 as gave authority to the lower court to substitute the papers accompanying the report of the commissioner for the originals.

But we think that in addition to the inherent power which, as said in *Deshong v. Catn*, 1 Duv. 309, every circuit court has to supply its lost or defaced records, the lower court was authorized by section 1 to re-enter the judgment in this case without the previous appointment of a commissioner to take testimony. That section is as follows: "When any judgment or final order of any court of record of this state remains unexecuted, and the record thereof

has been lost, mutilated, defaced, or destroyed, it shall be lawful for any person interested therein, upon ten days' notice in writing to the adverse party, to move the court in which such judgment was rendered, or final order was made, to re-enter the same of record; and upon satisfactory proof that such judgment or final order had been theretofore entered of record, that the same had been mutilated, defaced, or destroyed, and the purport thereof, it shall be the duty of the court to re-enter the same of record," etc. It does not appear the notice required by that section was formally given, but the defendant did have notice the records and papers of the action had been destroyed by fire, and that the plaintiff had moved to supply the lost papers, and re-enter of record the judgment, and was present in court when the order was made. Whether the court acted upon the report of the commissioner alone, or heard other evidence, does not appear, nor is it material; for it had, under the special provisions of section 1, the power upon satisfactory proof, which it is to be presumed was made, to re-enter the judgment.

It is true that by reason of a non-compliance with the provisions of section 5, that seems to apply to the pleadings and other papers of an action, the court had no authority, upon the report of the commissioner as it stood, to substitute the copies produced for the original petition and answer of Moody; and a state of case might exist where it would be erroneous and prejudicial to the defendant to give full effect to and execute such a judgment, in the absence of properly authenticated pleadings and papers belonging to the case. But no defense was made to the action by appellant, and the judgment, from which, by reason of the length of time, there could be no appeal, was rendered by his default, and the debts for which it was rendered are set out, and the land directed to be sold is fully described. We think, therefore, as the court had the power to re-enter the judgment, and properly did so, there is no reason why it should not have the same effect and be executed as if the record of the original had not been destroyed by fire.

But the court erred in overruling exceptions to the report of sale; for the commissioner does not show for what price the land sold, nor that he offered to sell less than the whole tract to pay the two debts, and as a consequence the purchaser gets the entire tract without there being any evidence of record showing for what amount appellant is entitled to credit.

The judgment confirming the report of sale, for a deed and writ of possession, is reversed, with directions to set aside the sale, and for further proceedings consistent with this opinion.

LOUISVILLE & N. R. CO. v. BALLARD.

(Court of Appeals of Kentucky. January 22, 1889.)

1. CARRIERS OF PASSENGERS—CONTRACT OF CARRIAGE—FAILURE TO STOP AT STATION.

The plaintiff, a woman, got on defendant's train, to ride to her home, having purchased a ticket for that purpose. There was evidence that the train passed her destination without blowing a whistle; that plaintiff asked to be put off at her destination, but the conductor refused, offering to take her on to the next station; that plaintiff then got off the train, the conductor not offering to assist her in any way, and his voice and manner to her being rude and insulting; that she walked back about a mile, to the station to which she had purchased her ticket, carrying a bundle and valise; that her route lay through an uninhabited country; and that, as a result of the walk and the excitement, she was sick for several days. *Held*, on a second trial, that a verdict of \$3,005 against the railroad company, for injuries sustained by the plaintiff, would not be disturbed.

2. SAME—CONDUCT OF EMPLOYEES—EXEMPLARY DAMAGES

An instruction in such case that, if defendant's employees "were insulting, either in words, tone, or manner," to the plaintiff, the jury should award damages, is not erroneous, on account of the use of the word "tone."

8. SAME—MEASURE OF DAMAGES.

An instruction that the jury should "award damages in their discretion, not exceeding in all five thousand dollars," etc., is proper as an instruction on punitive damages.

Appeal from circuit court, Marion county; W. E. RUSSELL, Judge.

Action by Lou E. Ballard against the Louisville & Nashville Railroad Company, to recover damages for injuries sustained by her by reason of defendant's negligently carrying her on its train beyond Harper's Ferry, the station to which she had purchased her ticket, and by its refusal to take her back to said station. The first trial resulted in a judgment for plaintiff of \$3,000, which judgment was reversed by this court on March 5, 1887, (3 S. W. Rep. 530;) whereon there was a second trial, and another judgment for plaintiff for \$3,005. From this judgment defendant appeals.

H. W. Bruce, Wm. Lindsay, and W. J. Lile, for appellant. Rives & Spaulding, for appellee.

BENNETT, J. The appellee, a young lady, was in February, 1882, teaching school at Loretto, Marion county, Ky. Her father lived between a half a mile and a mile from a flag station on the appellant's road known as "Harper's Ferry." The appellee on Saturday evenings usually went to her father's home, and returned again on Monday morning to her school. She made her trips to and from Harper's Ferry station on the appellant's passenger train. Her father was in the habit of meeting her at Harper's Ferry, and taking her from that place to his home on horseback. She, Saturday evening, February 13, 1882, purchased a passenger ticket, which entitled her to travel on the appellant's train from Loretto to Harper's Ferry. She boarded the train at Loretto to make her trip to the latter place. She carried with her a bundle of considerable size, and a valise. The conductor, Sweeny, was in the habit of running said train on Saturday evenings, and had said train in charge that evening, and took up the appellee's ticket before the train reached Harper's Ferry. The appellee swears that the train did not blow its whistle for Harper's Ferry, nor did it stop at that place. In this she is corroborated by several persons who were passengers on the train. Also her father says that he was on his way to Harper's Ferry for the purpose of taking the appellee home, but, as the train passed the station without stopping, he concluded that the appellee was not on it, and he returned to his home without going to the station. The appellee says that she discovered that the train had passed the station. That she then called to the conductor, who was at the far end of the car, engaged in conversation with some one, several times before she got his attention. That he then came to her, and asked her at what place she wished to get off. She said, at Harper's Ferry, to which point she had purchased her ticket. He said that the train had passed Harper's Ferry, and that he could not go back to it; but he would take her on to the next station. She declined to be taken on to the next station, but claimed that she should be put off at Harper's Ferry. He said if she would not go on she would have to get off the train and walk back. She said she could do so, but she would make him pay for it. He waived his hand towards the door as if to say go, and she went, carrying her bundle and valise, and he following to the door, and standing on the platform without offering to assist her. That she had to get off the train without any assistance whatever. That a brakeman was at hand, but offered her no assistance, but seemed to be enjoying the situation. That as she got on the ground from the coach steps, the lowest step being some three or four feet from the ground, the brakeman, being right by her, grinned at her with a broad grin. That the conductor's tone of voice and manner towards her were insulting. That she got off the train about a mile from Harper's Ferry, and she had to walk back to it, and from thence home, carrying her bundle and valise. That from the place that she got off of the

train to Harper's Ferry there was no pathway. The route was rough and muddy, and uninhabited. That from the walk and excitement she was made sick—not, however, in bed all the time—for four days. On the other hand, the conductor swears that owing to some casualty over which he had no control, the train was not stopped at the platform, but was stopped within 60 or 70 yards after passing it. That he waited to see if any one would get up, as if to get off, but no one did. That he then called out, "All out for Harper's Ferry," and, no one getting up as if to get off, he went on. He denied *in toto* the conduct attributed to him by the appellee. He says that she was put off not exceeding four or five hundred yards from Harper's Ferry. The brakeman sustains the conductor. He also says that he was not rude to the appellee, but helped her off the train. The testimony of others is to the same purport. The father of the appellee swears that on the next morning the appellee showed him the place that she got off the train, and he stepped the distance to Harper's Ferry, and it was 1,975 yards.

It is manifest that the jury believed the appellee's entire story; therefore they awarded to her \$3,005 in damages. Theretofore there had been a trial of the case upon substantially the same evidence as was introduced on the trial of this case, which resulted in a verdict of \$3,000 for the appellee, which this court set aside on account of an error in one instruction, which was as follows: "If the jury believe from the evidence that the defendant's agent or employes, or any of them in charge of the defendant's train, carried the plaintiff beyond the station for which she had purchased a ticket, and refused to put her off at her station, and were indecorous or insulting, either in words, tone, or manner, they should find for the plaintiff, and award her damages in their discretion, not exceeding five thousand dollars." This court disapproved said instruction, upon the ground that it was improper to authorize the jury to find for the appellee on account of the indecorous conduct of the appellant's employes alone; but the remaining portion of the instruction was approved.

Instruction No. 1 in this case uses the language, "were insulting, either in words, tone, or manner." The appellant objects to this instruction on account of the use of the word "tone." We cannot see the force of the objection, as applied to a female passenger. The jury were told that if the appellant's employes "were insulting in tone" they should award damages; that is, if their voices were so accented, inflected, or modulated as to express intentional insult, then the jury should find for the appellee. It was in the foregoing sense that the word "tone" was used, in which sense the word would be commonly understood by men of ordinary intelligence.

The appellant also objects to the latter part of the instruction, which reads: "They should find for the plaintiff, and award damages in their discretion, not exceeding in all five thousand dollars," etc. This part of the instruction is objected to, because it authorizes punitive damages. It does authorize punitive damages, and the trial judge doubtless intended that it should authorize punitive damages. We think that, as an instruction on punitive damages, it was properly drawn. The remaining instructions given by the court draw a correct distinction between compensatory and punitive damages. Also the composition of compensatory damages was correctly defined in one of said instructions. Indeed, instruction No. 1, having correctly submitted the question of punitive damages to the jury, and one of the other instructions having correctly submitted the question of compensatory damages to the jury, it was unnecessary to have given the remaining instructions.

The refusal to give instructions B, C, and D, at the instance of the appellant, was not an error, because the jury were already fully and correctly instructed. This court held, when the case was here before, that the evidence in reference to the conduct of the brakeman was competent. See 3 S. W. 530.

The jury having returned two verdicts for substantially the same amount, we will not reverse on account of its excessiveness.

The judgment is affirmed.

Cox et al. v. PREWITT et al.

(Court of Appeals of Kentucky. January 19, 1889.)

PUBLIC LANDS—DEATH OF PATENTEE—ISSUE OF PATENT.

A patent issued in the name of a deceased person, on a survey made after his death, is valid, under Gen. St. Ky. art. 1, c. 50, providing that, when a patent is issued to a person who is dead at the time, the heirs of the patentee shall hold as if the patent had been issued to them.

Appeal from circuit court, Whitley county; R. BOYD, Judge.

Ejectment by Sarah Prewitt and others, heirs at law of William Prewitt, against W. C. Cox and John White. Judgment for plaintiffs, from which defendants appeal.

C. W. Lester, for appellants. *R. D. Hill*, for appellees.

LEWIS, C. J. Appellees instituted this action to recover the land in contest, claiming under a patent issued in 1869 in the name of William Prewitt, whose heirs at law they are. A recovery was resisted in the lower court upon two grounds: *First*, that in 1857 appellant Cox, under whom appellant White claims, had the land duly surveyed according to law, with a view of obtaining a grant therefor from the commonwealth; and, *second*, that the patent to Prewitt, in 1869, is void, and consequently the land was unappropriated, and subject to the entry and survey made for Cox in 1872, which was followed by a patent to him therefor. There is no record evidence furnished by the appellants showing either an entry or survey of the land made for Cox in 1857, nor does it appear he ever obtained an order of court entitling him to enter and have the land surveyed.

The patent obtained by him in 1872 is void, and gave him no right to the land whatever, if the one issued to Prewitt in 1869 be valid; and therefore the decisive question in this case is whether that patent is void. It appears that William Prewitt, the ancestor of the appellees, died in 1862, previous to the date of the patent, and also before the survey, which, as appears from a recital in the patent, was made December 9, 1868. Article 1, c. 50, Gen. St., is as follows: "When a patent is issued, or shall issue, or a deed shall be made to a person who is dead at the issuing of the patent or the making of the deed, the heirs of such patentee shall take, hold, and enjoy the title to the estate so patented or conveyed as if such patent had issued or deed had been made to such heirs by name." It seems to us the patent under which appellees claim cannot be held invalid without a disregard of the plain language of the statute, which meets just such case as is now presented. It does not make any difference that the survey was made after the death of the person in whose name the patent was issued, for it must be presumed that the price fixed for vacant lands by the county court was paid, and an order of court authorizing him to enter and survey the land was duly obtained; otherwise the patent would not have been issued. The patent, having been issued in the manner and in the name of a person expressly authorized by statute, and for land it must be presumed was at that time vacant and unappropriated, must in this case be held valid and effectual to give appellees a title to the land in dispute, and a right to recover it of appellants, whose only claim is under a prior patent, which is void, at least, as to the land sued for. Judgment affirmed.

TIERNEY v. SPIVA.

(Supreme Court of Missouri. February 4, 1869.)

1. MORTGAGES—FORECLOSURE—PARTIES—REDEMPTION.

Under Missouri acts 1845 and 1855, declaring that, in case of the mortgagor's death before or after action brought, his personal representative shall be defendant, the grantee of the devisee of the mortgagor is not a necessary party to a foreclosure instituted after the mortgagor's death, and such grantee is not entitled to redeem from the foreclosure because he was not made a party thereto.¹

2. EXECUTION—SALE—TERM OF COURT—LEVY.

An execution sale in mortgage foreclosure, made at the April term, 1865, on an execution issued in February, 1864, to April term, 1864, and turned over by the then sheriff to his successor, is valid; no term having been held in the county from September, 1863, to April, 1865, and act March 23, 1863, providing that an execution and the lien of the levy should remain in full force until a term of court in the county where the property can be sold. An actual levy of such execution was not necessary.

Appeal from circuit court, Mississippi county; JOHN D. FOSTER, Judge.

Suit by Joseph Tierney against Eliza H. Spiva, to redeem from mortgage foreclosure. Plaintiff appeals.

Smith, Silver & Brown, Carter & Nalle, and John E. F. Edwards, for appellant. Cahoon & Cahoon, for respondent.

BLACK, J. This is a suit to redeem 90 acres of land, situate in Madison county, from a foreclosed mortgage. In 1858, Patrick Tierney and his wife, Mary, executed a mortgage on the land to secure a debt due D. M. Fox. Patrick died in 1861, leaving a will by which he devised the land to his wife, Mary, who, by her deed recorded in June, 1862, conveyed the property to W. N. Nolle in trust for the plaintiff, who is the son of Patrick and Mary Tierney. This deed is in consideration of love and affection, and the trust is to cease and the title become vested in plaintiff when he arrives at the age of 21 years. In 1863, Fox commenced a suit and recovered a judgment foreclosing the mortgage. Mary Tierney, and Daniel Rhoades, administrator with the will annexed of Patrick Tierney, were the only defendants to this foreclosure suit. Thomas R. Grigsby purchased the land at a sale made under the foreclosure judgment, and thereafter conveyed it to the defendant.

1. It is contended by the plaintiff that the sheriff's sale to Grigsby is void, because three terms of court intervened between the date of the execution and the term of the court at which the property was sold; that the execution was *functus officio*. The execution was issued on the 10th February, 1864, returnable to the April term, 1864, of the Madison circuit court. Sheriff Grigsby turned the execution over to Foster, his successor in office, in December, 1864; and Foster, as sheriff, sold the property on the 13th April, 1865. It is agreed that no term of the Madison circuit court was held between the September term, 1863, and the April term, 1865; so that the sale took place at the first term of the court which was held after the execution was issued; As sheriff, Grigsby had not executed the writ when his term of office expired. It was his right and duty to turn it over to his successor, whose duty it was to proceed to execute the command thereof. 1 Rev. St. 1855, p. 749, § 59. The second section of the act of March 23, 1863, (Acts 1863, p. 20,) kept the execution alive and in full force and effect until a term of court was held at which the property could be sold. *Stewart v. Severance*, 43 Mo. 322; *Groner v. Smith*, 49 Mo. 318.

¹ As to who are necessary parties to a foreclosure suit in the different states, see *Merritt v. Daffin*, (Fla.) 4 South. Rep. 806, and note; *Jones v. Richardson*, (Ala.) 5 South. Rep. 194, and cases cited; *Hambrick v. Russell*, (Ala.) *Id.* —.

It is urged that that act does not apply to the present case, because there was no actual levy of the execution. The execution is general and special, and, so far as the land in suit is concerned, no levy was required. The writ, following the judgment, directed the sale of the mortgaged property, and a levy would have been a useless ceremony. The last clause of the second section of the act of 1863 provides: "Said execution and the lien of said levy shall remain and continue in full force until a term of court is held in the county, where said property can or may be sold." This act was passed because of the then disturbed condition of the country, and there can be no doubt but it applies to special, as well as general, executions. It is not only the lien of the levy, where a levy is required, which is preserved, but the execution itself is continued in full force and effect.

2. The plaintiff claims a further right to redeem from the fact that he and his trustee were not defendants to the foreclosure suit. In the absence of any statute on the subject, he should have been a party defendant, and, if not, his right to redeem would not be foreclosed. But our statutes of 1845 and 1855 enact: "In case of the death of the mortgagee or his assignee, or of the mortgagor, whether before or after action brought, the personal representative of the deceased party shall be plaintiff or defendant, as the case may require." Under these statutes it has been held that a foreclosure judgment may be revived against the administrator of the mortgagor. *Riley's Adm'r v. McCord*, 21 Mo. 285. The administrator of the mortgagor is a necessary party, and, if the suit be brought against the widow and heirs alone, the petition should be dismissed. *Miles v. Smith*, 22 Mo. 502. In the case of *Perkins v. Woods*, 27 Mo. 547, there had been a judgment of foreclosure against the administrator of the mortgagor. The heir of the mortgagor, not having been made a party, brought his suit to redeem. It was held that the heir was not a necessary party, and that his right to redeem was cut off by the foreclosure against the administrator. The administrator represents the rights of the heirs and devisees in a foreclosure suit, and, if it is not necessary to make them defendants, then it must follow that it is not necessary to make their grantees defendants. The rule of the case last cited has become an established rule of property in this state, and is not to be questioned. Without this express ruling we could come to no other conclusion. It follows that the plaintiff has no right to redeem, and it is therefore useless to consider the secondary question discussed in the briefs. The judgment is affirmed.

The other judges concur.

STATE *ex rel.* GIVENS, Collector, v. WABASH, ST. L. & P. RY. CO.

(Supreme Court of Missouri. February 4, 1889.)

1. TAXATION—LEVY BY COUNTY COURT—VALIDITY.

Under Rev. St. Mo. 1879, §§ 6798, 6801, authorizing the county court to levy certain taxes without an order of the circuit court, and prohibiting it from levying any other tax except by such order, a tax not of the former class, levied without such order, is void.

2. RAILROAD COMPANIES—TAXATION—LEVY FOR BACK TAXES.

The statute empowering the circuit court to direct a levy being prospective only, such court cannot authorize the levy by the county court of a tax against a railroad company for prior years, though section 6879, in relation to the levy and collection of taxes against railroad companies, provides that, in case of failure of the county court to levy a tax, or in case of an illegal or erroneous levy, such tax shall be levied in addition to the regular levy; that section not applying where there was no authority for levying the tax.

Appeal from circuit court, Daviess county; C. H. S. GOODMAN, Judge.
Action by the state *ex rel.* Givens, collector of Daviess county, against the Wabash, St. Louis & Pacific Railway Company. The state appeals.

W. D. Hamilton, for appellant. *W. H. Blodgett* and *G. S. Grover*, for respondent.

BLACK, J. The county court of Daviess county for the tax year ending August 1, 1880, levied the usual state and county taxes upon all the taxable property of the county, and among the other taxes a tax of 8 mills on the dollar for "railroad interest purposes." This tax was levied for the purpose of paying interest on certain bonds issued, it is to be inferred, in payment of railroad subscriptions. This tax was thus levied by the county court of its own motion, and without having first procured an order therefor from the circuit court, or the judge thereof in vacation. The tax-payers in general paid the tax, but the defendant, which is the lessee of the St. Louis, Council Bluffs & Omaha Railroad Company, declined to pay this tax levied upon the property of the last-named company. Thereafter the prosecuting attorney of that county, at the request of the county court, presented to the judge of the circuit court a petition stating, among other things, that the error in the levy of this 8-mill tax for 1880 consisted in a failure to comply with section 6799 of the Statutes; and on that petition the circuit judge made an order, dated 8th July, 1882, directing the county court to levy a tax of 8 mills on the dollar on the property of the last-named corporation for the year 1880. The county court then made the levy, taking the assessment of 1880 therefor; and the tax thus levied amounts to the sum of \$507.20. To recover this tax the collector prosecutes this suit in the name of the state, and the action is resisted on the ground that the tax is illegal and void.

1. Under the provisions of the act of 1879, now sections 6798-6801, Rev. St. 1879, the county court may levy the state tax, and tax necessary to pay the funded or bonded debt of the state, the tax for current county expenses, and for schools, without an order from the circuit court. But it provides in express terms that no other tax for any purpose shall be levied or collected, except by first procuring an order therefor from the circuit court, or the judge thereof in vacation. The order, when made, is continuing, and authorizes the annual levy and collection of the tax for the purpose in the order specified. It is made a misdemeanor for any county judge or other county officer to assess, levy, or collect such tax "without being first ordered so to do by the circuit court of the county, or the judge thereof."

It may be that this law is a piece of useless machinery, but with that question we are not concerned. It applies beyond all doubt to the tax in question. The power of the county court to levy the tax is made dependent upon the order of the circuit court, and without such order the tax has no sanction or authority to support it, and is therefore void. *State v. Railroad Co.*, 87 Mo. 236; *State v. Railway Co.*, 92 Mo. 137, 6 S. W. Rep. 862.

2. But it is next insisted that this order of the circuit judge, made in 1882, gave the county court power to go back and relevy the tax for 1880; and the order seems to have been framed with that purpose in mind. For authority to relevy the tax, plaintiff relies upon section 6879, which has relation to the levy and collection of taxes upon railroad property. It enacts that in case the county court has failed or omitted, for any cause, to levy the taxes, or any portion thereof, for any year or years; or in case the taxes, or any portion thereof, for any year or years, shall have been illegally or erroneously levied, —then the court at the time of making the regular levy upon railroad property shall, in addition thereto, levy the tax which may have been omitted, or illegally or erroneously levied; the levy to be made upon the assessment returned for the year or years in which the tax was omitted or illegally levied. This section is based upon the theory, and it presupposes, that the county court had the power, and might in some past year or years have levied the tax, but omitted to make the levy, or made it in an illegal manner. It is not to be assumed that the legislature intended to say that the county court could go back

and levy a tax for some past year, when the court was then without power to levy the tax. It is a general rule that curative laws may heal irregularities in actions, but they cannot cure a want of authority to act at all. *Cooley, Tax'n*, (2d Ed.) 302. There is nothing in this section which professes to give the county court the power to go back and levy or relevy a tax which it then had no power to levy. Nor does the order of the circuit judge help the matter. The statute giving him the power, on the petition of the prosecuting attorney, to direct and order the county court to levy the specified tax, is prospective only. It furnishes him no power to direct the county court to make levies for by-gone years.

Plaintiff lays some stress upon the fact that other tax-payers paid this tax, and that defendant alone refused to pay it; but we do not see how that fact can aid the plaintiff in this suit. It is foreign to the question of power.

Affirmed.

BAROLAY, J., not sitting. The other judges concur.

STATE *ex rel.* TILLERY, Collector, v. HANNIBAL & ST. J. R. CO.

(*Supreme Court of Missouri.* February 4, 1889.)

1. RAILROAD COMPANIES—TAXATION—ASSESSMENT OF BRIDGES.

Rev. St. Mo. 1879, § 6901, provides for the assessment of bridges of joint-stock companies and bridges for crossing which a toll is charged. Sections 8866, 8876, provide for the assessment of all property of railroad companies, the road and rolling stock to be assessed as a whole. *Held*, that a bridge forming part of a railroad must be assessed with the road, and not as a separate structure, though it is used also for the passage of carriages and foot-passengers, for which tolls are charged.

2. BRIDGES—ASSESSMENT BY STATE BOARD—RES ADJUDICATA.

Though the state board is empowered to assess toll-bridges, its determination that a bridge is a toll-bridge is not conclusive.

3. SAME—TOLL-BRIDGES—RAILROAD BRIDGES.

A railroad company, with power to bridge navigable streams, was also given the powers conferred on a certain bridge company, and permitted in connection with its railroad bridge, to erect a bridge for vehicles and foot-passengers, and to receive compensation therefor. Other railroad companies were given the right to use the bridge on terms to be agreed upon or fixed by the governor. *Held*, that a bridge thus built and used was a railroad bridge, and not a toll-bridge.

Appeal from circuit court, Clay county; JOHN P. STROTHER, Judge.

Suit by the state *ex rel.* Tillery, collector, etc., against the Hannibal & St. Joseph Railroad Company. Both parties appeal.

H. F. Simvall, James L. Sheets, and D. C. Allen, for plaintiff. Strong & Mosman and Warner, Dean & Hagerman, for defendant.

BLACK, J. For the tax year ending August, 1888, the state board of equalization assessed the defendant's bridge over the Missouri river at Kansas City as a toll-bridge, placing the valuation at \$500,000. The bridge being in two counties, one-half of this valuation was certified down to Clay county, and on that the county court levied taxes for that year. This is a suit to enforce the payment of the taxes thus levied. The circuit court gave judgment for plaintiff, except for the item called "funded debt tax," and as to that found for the defendant. Both parties appealed.

The case was here before on the plaintiff's appeal from a judgment sustaining a demurrer to the petition. While the petition states that the bridge is owned by the defendant, it also states that it is a toll-bridge, and does not disclose the fact that it is a part of the defendant's road. On this state of the pleadings we held, and could only have held, that the bridge was properly as-

essed as a separate structure. On return of the cause defendant denied the above allegation, and averred the fact to be that the bridge formed a part of the railroad itself, and on this allegation the plaintiff made an issue of fact. It is therefore plain that we have to deal with another and different question from that considered on the former appeal.

The Kansas City, Galveston & Lake Superior Railroad Company was created by the act of February 9, 1857, with power to build a railroad from Kansas City northward, and to bridge navigable streams. By authority of law, the name was changed to the Kansas City & Cameron Railroad Company, and the fourth section of the amendatory act of March 11, 1867, (Laws 1867, p. 143,) provides: "The said railroad company shall have the same authority, rights, and powers as are conferred upon the Kansas City Bridge Company, incorporated by an act of the general assembly of February 20, 1865, and may, in connection with its railroad bridge, erect a bridge for the passage of teams, carriages, and foot-passengers, and shall have the same right and authority to receive compensation therefor as are granted to the said Kansas City Bridge Company; and all railroad companies whose roads shall terminate at or near such bridge, on either side of the Missouri river, or which shall construct a branch road to such bridge, shall have the right to run their cars and engines on and over such bridge, at such times and on such terms as may be agreed on between the companies, respectively; and, if such companies shall not agree on such terms, then on such terms as shall be prescribed by the governor of this state." The bridge act provides, among other things, that "when said bridge is completed the said company shall be entitled to demand and receive tolls for crossing the same, and to fix the rates of toll, of which a schedule shall be kept conspicuously posted at each end of the bridge; which rates shall be as follows, and shall never exceed the same, to-wit: * * * And said bridge company may permit any railroad company to extend their railroad track over said bridge upon such terms as may be agreed upon by said bridge company and such railroad companies."

The Kansas City Bridge Company failed to build a bridge, but the Kansas City & Cameron Railroad Company constructed its road from Kansas City to Cameron, and in doing so, and under the authority of law before stated, built the bridge in question. Thereafter, and in 1870, that company and defendant were consolidated.

The structure is an ordinary railroad bridge, with a plank floor between and on either side of the rails for the passage of teams, vehicles, and the like, and for such use tolls are charged. The bridge, and defendant's tracks in connection therewith, are used by a number of other railroad companies for the passage of their trains, they paying a rental therefor. These rentals paid by other railroad companies are not denominated tolls in the law under which the bridge was built, nor are they tolls in the sense in which we use the term when speaking of toll-bridges. From these facts, and especially the law by authority of which this bridge was built, there can be but one conclusion, and that is this: The bridge is an integral part of the road-bed and track of defendant's road from Kansas City to Cameron, with a highway toll feature attached to it as a mere incident, and a small and inadequate one at that. The tolls collected amount to only about \$4,000 per annum. With this conclusion we now come to the statutes which provide for the assessment of toll-bridges, and for the assessment of railroad property, and the question is, under which should the bridge be assessed?

The act of April 21, 1877, was carried into the Revision of 1879 without change. The first section, now section 6901, enacts that "all bridges over streams in this state, or over streams dividing this state from other states, owned by joint-stock companies, and all such bridges where a toll is charged for crossing the same, * * * and all property, real and personal, including the franchises owned by telegraph and express companies, shall be subject

to taxation, * * * and the president or other chief officer of any such bridge, telegraph, or express company, or the owner of any such toll-bridge, are hereby required to render statements of the property of such bridge, telegraph, or express company, in like manner as the president or other chief officer of railroad companies are now or may hereafter be required to render for the taxation of railroad property." It is to be observed that railroad property is not mentioned in this act.

A few days after the passage of the above act, and on the 2d May, 1877, the legislature passed another act relating to the assessment of railroad property, (Acts 1877, p. 366.) The substantial parts of this act were carried into the Revised Statutes by way of a revised bill. Section 6866 makes it the duty of the president or other chief officer of every railroad company to furnish the state auditor each year, by a designated date, a verified statement, "setting out in detail the total length of their road so far as completed, including branch or leased roads, the entire length in this state, and the length of double or side tracks, with depots, water-tanks, and turn-tables, the length of such road, double or side tracks, in each county, municipal township, incorporated city, town, or village, through or in which it is located in this state; the total number of engines and cars of every kind and description, including all palace or sleeping cars, passenger and freight cars, and all other movable property owned, used, or leased by them, on the 1st day of August in each year, and the actual cash value thereof." The state board is then required to assess the aggregate value of all such property belonging to any railroad company, and to apportion that value to the counties, townships, etc., according to the mileage of the railroad therein. Section 6876 declares: "All property, real, personal, or mixed, including lands, machine and work-shops, round-houses, warehouses, and other buildings, goods, chattels, and office furniture of whatever kind, owned or controlled by any railroad company or corporation in this state, not hereinbefore specified, shall be assessed by the proper assessors in the several counties, cities, * * * wherein such property is located, under the general revenue laws of the state, and the municipal laws regulating the assessments of other local property in such counties, cities; * * * but the taxes on the property so assessed shall be levied and collected according to the provisions of this article."

Now, it will be seen that the statute relating to the assessment of railroads includes and provides for the assessment of all railroad property of every kind and description. The road and rolling stock must be assessed as a whole, and then a distribution made to the counties according to the mileage therein. All other property must be assessed by the local assessors, as local property. All bridges belonging to the railroad company, and forming a part of the road, must be included in the assessment of the road, and cannot be detached for the purpose of taxation. Nor is there anything in the bridge act in conflict with what has just been stated. In former years many bridge companies were created by special acts; they are now organized under the general law. Toll-bridges owned by such corporations are properly assessed under the bridge act, and this is true though the bridge may be used in part for the passage of trains of cars. So, too, if the bridge is owned by the railroad company, and is a part of the railroad, it must be assessed and taxed with the road itself, and it thus enters into the aggregate value of the entire road; and in such cases it makes not a particle of difference that the bridge is in part a toll-bridge for the passage of teams, wagons, and the like. The statutes must be construed together, and they are consistent with each other. Any other construction of the bridge act makes it repeal in part the law relating to the assessment and taxation of railroad property. It appears that in former years the state board assessed this and like bridges as constituting a part of the railroad, and that practice was in accord with the plain meaning of the law. It follows that the board had no power to assess this bridge as a separate struct-

ure. The assessment is void, and lays no foundation for the levy of the taxes sued for.

The point is made by the plaintiff that, as the state board has power to assess toll-bridges, it has the power to determine what bridges are toll-bridges; that, as the value fixed by the board is conclusive, so is the finding that the bridge is a toll-bridge conclusive. The board has the power to assess toll-bridges, and it may be conceded that the courts would not review the finding as to value; but it does not follow that it can change the character of the property. Unless the bridge comes within the bridge act, the board has no power to assess it under that act. Authorities are also cited which show that, in general, assessing officers are not personally liable for erroneously listing persons or property for taxation, but they are without application to the present case. With these conclusions, it is unnecessary to consider the question made on the plaintiff's appeal. The judgment is therefore simply reversed.

BARCLAY, J., not sitting. The other judges concur.

BLOCKER v. STATE.

(Court of Appeals of Texas. January 16, 1889.)

HOMICIDE—MURDER—INSTRUCTIONS.

The evidence showed that the defendant, accompanied by another person, and both armed with rifles, went to a place where the deceased was at work, and shot him, and then fled precipitately from the scene of the killing. But there was no evidence of any motive for the crime. It was not known what transpired between the parties at the very time of the killing; and some of the chambers in a pistol with which deceased was armed were found to be empty. *Held*, that the failure of the court to charge upon murder in the second degree was error sufficient to warrant the reversal of a conviction of murder in the first degree, and the granting of a new trial.

Appeal from district court, Bowie county; W. P. McLEAN, Judge.

On rehearing. No opinion filed on first hearing.

This conviction is in the first degree, for the murder of G. W. Wood. Wood was shot three times, and killed, about two hours after sunrise. The killing occurred at a tie-cutter's "shanty" in the woods, between a half and three-fourths of a mile from the house of one Clowers. Clowers testified, for the state, that, when the sun was about two hours high, the defendant, and another person by the name of Pittman, each riding a horse, and armed with a Winchester rifle, came to where he was at work. They left witness, and about 15 minutes later the witness heard three gunshots fired at or near Wood's shanty. When he went to the shanty, soon afterwards, he found Wood lying near it dead, shot in three places from behind. He found the tracks of a horse shod in front, and of an unshod horse about 20 steps from the body, and with others he back-trailed those tracks to the point in the woods where he was at work, and was accosted by the defendant and Pittman. The horse tracks at the last-mentioned place, he knew were made by the horses ridden then by defendant and Pittman. Measurement and appearance showed the horse tracks at the shanty, along the trail, and at the place where defendant and Pittman came up to him, to be the same. Other state witnesses testified as did Clowers, and, as Clowers did, stated that it was apparent that when shot Wood was tearing down the shanty, and preparing to move it. They stated, also, that an empty No. 38 cartridge shell and a double-bitted axe were found near the "shanty," and that when the coroner's jury arrived a five-shooting pistol of 44 calibre, two chambers empty, was found in the hip pocket of the deceased. Peacock testified that he passed the shanty a very few moments before the shooting, and saw Wood on the roof of the same,

tearing off and throwing down boards. When witness had driven his wagon about 200 yards he heard three shots, blended with falling boards, and a moment later saw two men, one riding a sorrel pony, and the other a bay horse, fleeing rapidly away from the shanty. Miss Pretty, who lived about 200 yards from the shanty, testified for the state that Wood, in an axe-wagon, passed her house, going towards his shanty, early on the fatal morning. Later, and when the sun was more than an hour high, two men, one riding a sorrel horse, and the other a bay, and each armed with guns, passed the house, going towards the shanty, which, from the sound of falling boards, she thought was then being pulled down. Two minutes later she heard three gunshots, and later saw the dead body of Wood at the shanty. She did not know the two men at the time, but thought that in Pittman she had since recognized the man who was on the bay horse. It was shown that the direct route from Clowers' house to the shanty passed Pretty's house.

Dillard, Harrell & Jones, Tilson & Henderson, and Crawford & Crawford, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. In this case the appeal is from a conviction for murder in the first degree, the penalty assessed being confinement for life in the penitentiary. At our last term at Tyler the cause was submitted on oral arguments and briefs for both parties, and we affirmed the conviction without delivering a written opinion. Counsel for defendant filed a motion for a rehearing, and submitted the same upon oral argument and brief, and said motion was transferred to this branch of the court for decision.

It is strenuously insisted by counsel for defendant that the judgment of conviction should be reversed, because the trial court omitted to submit to the jury the issue and law of murder in the second degree. In our first consideration of the case our conclusion was that the evidence adduced on the trial did not present the issue of murder in the second degree, and that, therefore, the trial court did not err in omitting to instruct the jury as to the law of such issue. After a careful re-examination and reconsideration of the voluminous statement of facts, in the light of the able argument of the counsel for the defendant, we entertain very grave doubts of the correctness of our conclusion.

It is a well-settled rule that, if from the evidence there is a doubt as to which of two or more degrees of the offense charged the defendant may be guilty, the law as to such degrees should be given in charge to the jury. It is only when there is no evidence tending to establish a particular grade of the offense that a charge as to such grade may be omitted. And in a murder case, if by any possible legitimate construction of the evidence the jury might convict of murder in the second degree, the law of that degree must be given in charge to the jury. Willson, Crim. St. §§ 1064, 2387.

In this case there is no direct evidence of express malice on the part of the defendant towards the deceased. It was not shown that defendant entertained any grudge or any enmity whatever against the deceased, nor does the evidence disclose any motive actuating the defendant to commit the homicide. The only evidence of express malice consists in the character of the weapons used; the manner of their use; that the defendant was accompanied by another person, armed with a gun; that defendant, in company with such other person, followed the deceased to the place of the homicide; and that after the killing the defendant and his companion precipitately fled from the scene. That the evidence sufficiently establishes express malice we do not doubt nor question, but we are not prepared to say that there is no evidence from which a jury might not legitimately conclude and find that the homicide was upon implied, and not upon express, malice. No witness saw or heard what transpired between the parties at the very time of the killing. It is not known what words, if any, passed between the parties, or what, if anything, pre-

voked the killing. Deceased was armed with a repeating pistol, some of the chambers of which were found to be empty. Entertaining, as we do, a serious doubt of the correctness of our first view of the evidence, and of our conclusion that it did not demand a charge upon murder in the second degree, we shall grant the motion for rehearing, set aside the judgment of affirmance, reverse the judgment of conviction, and remand the cause for another trial.

Counsel for the defendant earnestly and ably contend that in all prosecutions for murder in this state, without regard to what the evidence adduced may be, it is the imperative duty of the trial court to submit to the jury the issue and law of murder in the second degree. We have been profoundly impressed with the strength of the reasoning advanced in support of this position. Article 607 of the Penal Code provides: "If the jury shall find any person guilty of murder, they shall also find by their verdict whether it is of the first or second degree; and, if any person shall plead guilty to an indictment for murder, a jury shall be summoned to find of what degree of murder he is guilty, and in either case they shall also find the punishment." This provision is imperative, and a verdict of guilty of murder, without specifying the degree of murder of which the defendant is found guilty, is a nullity. *Willson*, Crim. St. § 1051. It unquestionably confers upon the jury the power to fix the crime in the second degree where it ought, under the law and the facts, to be fixed in the first; and a verdict of murder in the second degree will not be set aside upon the ground that the testimony showed the homicide to be one of murder in the first degree. *Blake v. State*, 3 Tex. App. 581; *Baker v. State*, 4 Tex. App. 223; *Powell v. State*, 5 Tex. App. 234; *Parker's Case*, 22 Tex. App. 105, 3 S. W. Rep. 100; *Monroe v. State*, 23 Tex. 227; *State v. Lindsey*, 19 Nev. 47, 5 Pac. Rep. 822. This power of the jury to find the degree is unrestricted, and cannot be controlled or abridged by the charge of the court, or by the omission of the court to submit the issue of murder in the second degree. It has, however, been held in this state that, if the court does not instruct upon murder in the second degree, but the jury finds the defendant guilty of that degree, the conviction cannot stand. *Taylor v. State*, 3 Tex. App. 887; *Garza v. State*, Id. 286.

The writer is inclined to the opinion that such a verdict must be received by the court, and judgment entered in accordance therewith, and that it would operate as an acquittal of murder in the first degree. In accord with the writer's view, it has been held in other states, under statutes similar to ours, that the court cannot deprive the jury of their power and right to fix the degree by imperatively instructing them that, if they find the defendants guilty, they must find him guilty of murder in the first degree. *Rhodes v. Com.*, 48 Pa. St. 398; *Lane v. Com.*, 59 Pa. St. 375; *Shaffner v. Com.*, 72 Pa. St. 61; *Robbins v. State*, 8 Ohio St. 193; *Beaudien v. State*, Id. 639; *State v. Lindsey*, 19 Nev. 47, 5 Pac. Rep. 822; *People v. Ah Lee*, 60 Cal. 85; *State v. Dowd*, 19 Conn. 387; *Roberts v. People*, 19 Mich. 411; *People v. Williams*, 73 Cal. 533, 15 Pac. Rep. 97; *Whart. Hom.* §§ 186-198.

Such an imperative instruction is regarded as an unwarranted assumption of the province of the jury, and will vitiate a conviction of murder in the first degree. We have, however, found no authority which directly holds that an omission to submit to the jury the issue and law of murder in the second degree, where the evidence conclusively shows murder in the first degree, presenting no facts from which a jury might legitimately find murder in the second degree, will vitiate a conviction for murder in the first degree. In this state the decisions are numerous and uniform the other way; holding that, where there is no evidence from which, by any possible legitimate construction, the jury could conclude that the homicide was murder in the second degree, the court may properly decline to submit to the jury the issue and law of murder in the second degree. It was so held by our supreme court in the early case of *O'Connell v. State*, 18 Tex. 343. The rule laid down in that

case has been followed by a long line of decisions. *Washington v. State*, 1. Tex. App. 647; *Taylor v. State*, 3 Tex. App. 387; *Hurby v. State*, 8 Tex. App. 597; *Lum v. State*, 11 Tex. App. 488; *Neyland v. State*, 13 Tex. App. 536; *Davis v. State*, 14 Tex. App. 645; *Gomez v. State*, 15 Tex. App. 327; *Darnell v. State*, Id. 70; *Smith v. State*, Id. 139; *Rhodes v. State*, 17 Tex. App. 579; *Jackson v. State*, 18 Tex. App. 586; *Johnson v. State*, Id. 385; *Bryant v. State*, Id. 107; *May v. State*, 22 Tex. App. 595, 3 S. W. Rep. 781; *Henning's Case*, 24 Tex. App. 315, 6 S. W. Rep. 137; *Trumble's Case*, 25 Tex. App. 631, 8 S. W. Rep. 814.

These decisions have been the law of this state for many years, and have met with the tacit sanction and approval of the bar and the legislature of the state. We shall adhere to them as the established law of the land, in cases coming within their purview. We take occasion, however, to suggest to trial judges that they should be exceedingly cautious in murder trials in declining to charge upon murder in the second degree. Instances are comparatively rare in which such a charge may be properly dispensed with. It is only when there is no evidence tending to present that issue that such a charge may be safely omitted.

We have not discussed other questions of minor importance presented in the record, because they are of a character not likely to arise on another trial.

Upon the ground before stated, the rehearing is granted, the judgment of affirmance is set aside, and the judgment of conviction is reversed, and the cause remanded for a new trial.

STONARD v. STATE.

(Court of Appeals of Texas. November 21, 1888.)

1. CRIMINAL LAW—CONTINUANCE—SEPARATE TRIAL.

Where defendant and another were separately indicted for the same offense, defendant is not entitled to a continuance on an application that such other defendant be first tried, under Code Crim. Proc. Tex. art. 669a, which provides that either of several defendants indicted for an offense growing out of the same transaction, on a proper affidavit, may have the party whose testimony is desired tried first, but that the affidavit shall not, without other sufficient cause, operate a continuance as to either.

2. SAME—ABSENCE OF WITNESS.

Defendant is not entitled to a continuance on account of the absence of a material witness, where during part of the time preceding the trial he was confined in the same jail with the witness, and neglected to serve process on him.

3. HOMICIDE—MURDER—EVIDENCE OF ACCOMPLICE.

A witness on a trial for murder, whom the evidence showed to be at least an accomplice of the murderer, and who lived at the house of deceased, with defendant, who was deceased's son, testified that he was returning to the house from a field, when he heard a gun, and saw defendant standing near the house, with a gun in his hand, and his mother running towards the house; that defendant then went to the spot where the body was afterwards found, pointed the gun down, and fired again; that witness was induced by threats and offers to promise "not to tell it." Deceased's gun was found, containing the shell of a recently discharged cartridge, and near the body was a shell exactly similar. The gun was kept in the house, and equally accessible to witness and defendant. A daughter testified that her mother was with her about a mile from the place at the time of the homicide. There was no motive for the killing. *Held*, that the accomplice was not sufficiently corroborated to warrant a conviction.¹

Appeal from district court, Shackelford county; T. H. CONNER, Judge.

James Stonard was convicted of the murder in the second degree of his father, W. D. Stonard. The body of deceased was found in the lot near his

¹ Concerning the necessity of corroborating the testimony of an accomplice, and as to what is sufficient corroboration to sustain a conviction, see *Commonwealth v. Chase*, (Mass.) 18 N. E. Rep. 565, and cases cited; *State v. Walker*, (Mo.) 9 S. W. Rep. 646, and cases cited; *State v. Banks*, (La.) 5 South. Rep. 18; *Hillman v. State*, (Ark.) 3 S. W. Rep. 384, and note; *People v. Elliott*, (N. Y.) 13 N. E. Rep. 602, and note.

residence. There was one wound in his body, and one in his head. The empty shell of a 44-caliber Winchester rifle cartridge was found near the body. A 44-caliber Winchester rifle was found in the house, and in it was the shell of a recently discharged cartridge.

Elbert Crow testified that those present at breakfast were the deceased, defendant, Mrs. Jane Stonard, the three grown daughters, and the two small children of deceased and Mrs. Jane Stonard, and the witness. After breakfast the witness went about a mile distant to cut poles. He returned about 11 o'clock to an early dinner, and found deceased, defendant, Mrs. Stonard, and the two small children at the house. After dinner the witness, by direction of defendant, went to the horse lot, about 150 or 200 yards distant, got the jack, and took him to water. When returning, on reaching a point about 50 yards from the lot, he heard the report of a gun. Looking up he saw the defendant standing with a gun in his hand, and Mrs. Stonard, about 50 yards away, running rapidly towards the house. A moment later the defendant went through the gate, into the lot, and to the point where soon afterwards witness found deceased's dead body, pointed the gun downwards, and fired again. He then jumped the fence and fled to the house. Witness then went to the house, where he found defendant and his mother. He asked defendant: "What does that mean?" Defendant seized the gun from the bed, and replied: "If you ever tell it I will kill you." Witness replied that he would never tell unless he had to. Mrs. Jane Stonard then said that if witness would not tell she would give him two ponies, a saddle and bridle, and the Revis place. She then told witness and defendant to go to Jack Brown's place, ostensibly to hunt jennets; not to come back until night; and to tell Brown that it was the request of deceased for him (Brown) to come to his house next day, and go horse-hunting with him on Hubbard creek. Witness and defendant carried out the instructions of Mrs. Stonard, reaching Brown's place between 1 and 2 o'clock. Witness and defendant found the jennets, and drove them to an old ranch, which they left about an hour by sun, and reached home about dark. There was a light then in the house, but nobody to be seen. Defendant went to the house, and returned to witness, and said to him: "There is not a soul in the house; but, d—n him, [deceased,] he is lying out there yet." He also stated that he had testified differently before the coroner's jury because of certain threats and offers made by defendant. He assigned as a reason for finally testifying as he did that defendant was trying to "saddle the whole thing" on him.

Defendant could have secured the service of process upon the witness Essery, as he and Essery were confined together in the same jail from the time of the defendant's arrest until the venue in this case was changed; and he knew that the witness Wofford was afflicted with an incurable malady, and unlikely to be able ever to leave his bed, but had taken no steps to procure the deposition of the said Wofford.

A motion for rehearing was made and refused, but no opinion was written. *Veale & Son* and *De Berry & Wheeler*, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. This conviction is for the homicide of W. D. Stonard, the appellant being convicted of murder in the second degree, with punishment fixed at 60 years in the penitentiary. Mrs. Jane Stonard was separately indicted for this same offense, the indictments against each being presented in the district court of Stephens county, at the May term, 1887. When the case was called at the said term, the defendant, James Stonard, answered ready. Afterwards, on May 25, 1887, after having exhausted a venire of 200 men, the district attorney moved for a change of venue to Shackelford county, because of the failure to procure a jury. Thereupon it was agreed by the defendant that the case might be sent to Shackelford county. At the same term

the case of *State v. Jane Stonard* was continued. Now, on November 11, 1887, the case being in the district court of Shackelford county, the defendant filed his first application for continuance for certain witnesses; his mother, Jane Stonard, not being one of the number. The case was continued at the instance of the defendant. This case was called for trial on May 4, 1888, in the district court of Shackelford county; whereupon the defendant presented his second application for continuance for want of the testimony of Mrs. Jane Stonard, and because of the absence of other witnesses. The application was denied, and defendant excepted, reserving his bill.

Mrs. Stonard's testimony being material, and probably true, did the court err in refusing to continue the case until she could be tried, and, if acquitted, be permitted to testify for the defendant? Whether indicted jointly or separately, if the offense grew out of the same transaction, either defendant, by making proper affidavit, is entitled to have the party for whose evidence said affidavit is made first tried. Code Crim. Proc. art 669a. By this article it is also provided that the making of such affidavit does not, without other sufficient cause, operate as a continuance to either party. This would seem to settle the controversy as to a continuance for the want of the testimony of Mrs. Jane Stonard. Independent of this provision, appellant is chargeable with the grossest negligence with regard to this matter, and upon this ground the court acted correctly in denying the application. Appended to the application to continue there is an explanation of the facts and circumstances relating to the other parties named in the application which completely sustains the court in refusing to continue for the want of their testimony, and hence there was no error in refusing the application.

The witness Elbert C. Crow was evidently an accomplice, if not the sole perpetrator of the crime. The law applicable to the testimony of such a witness was correctly given in charge to the jury. Crow being an accomplice, the counsel for appellant earnestly contends that he is not corroborated in such manner as will justify a conviction. We have examined the statement of facts with great care, and are of the opinion that the evidence does not sufficiently corroborate the testimony of the accomplice witness.

Natural affection speaks strongly against such an act as the one charged,—the son slaying his father. There were no former grudges, no antecedent menaces, no bad blood, no motive for the crime shown. The deceased's family consisted of his wife, James, the accused, William, three daughters, and three small children. William was at Albany when the killing occurred. The sisters were not at home, but were a mile away, washing. Crow states that at dinner there were at the house deceased, his wife, defendant, and two small children. One of the girls who was washing states that her mother came to the wash-place with the two children about 11 o'clock. If this is true, the homicide may have occurred after the wife and two children had left the house for the washing-place. Here we have a conflict between a daughter of the deceased and an avowed accomplice. But again, Crow was also a member of the family. He had been living with the deceased about three months, and had access to the gun as well as did James Stonard. The gun was the property of the deceased. Crow and defendant lived with deceased. Now, let us concede that deceased was shot with his own gun. Why not infer that Crow shot him? Let it be conceded that there was no motive inducing Crow to commit the deed, neither is there any shown prompting the son or wife. Their opportunity was the same; the gun being as convenient to the one as to the other. Then why infer the son's guilt, and not Crow's? Nature revolts against the crime if committed by Crow, but tenfold stronger if committed by the son. Then why infer the unnatural act from facts tending equally to prove the guilt of another? The accomplice, Crow, repeatedly denied all knowledge of the crime. The record shows that he lied most infamously. Nor did he charge the appellant with this most unnatural deed

until he was induced to believe that he would be himself accused by the appellant or his mother. In view of these facts, and in view of the fact that the accused was the son of the deceased, we again urge the question, why infer appellant's guilt, and not Crow's? Where the physical facts attending the homicide show that but one party did the killing, evidence which tends with equal force to criminate several, without pointing out which, has but little force. Hence, if Crow is corroborated at all, it is so slight as to render it dangerous to sustain the conviction.

Because the testimony of the accomplice is not sufficiently corroborated, the judgment is reversed, and the cause remanded.

MILLER v. STATE.

(Court of Appeals of Texas. January 19, 1889.)

1. HOMICIDE—EVIDENCE—DYING DECLARATIONS.

On the day after deceased was mortally wounded by a pistol-shot in the bowels, he suffered great pain, and said that he was bleeding internally. When asked if he knew that he was going to die, he said: "Aunt, I am bound to die." Held, a sufficient predicate to warrant the admission as a dying declaration of a statement by deceased after he was shot.¹

2. SAME—THREATS.

Where defendant in a trial for murder introduces evidence of previous threats against him by deceased, it is proper to permit the state to show that about a year before the homicide defendant had said that the threats of deceased did not amount to more than those of an old woman.

3. SAME—JUSTIFIABLE HOMICIDE—ADEQUATE CAUSE.

A charge, on a trial for murder, that adequate cause means "such as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection;" that insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are not adequate causes; and that an assault causing pain and bloodshed, a serious personal conflict, in which deceased used weapons, etc., though defendant was the aggressor, provided such aggression was not for the purpose of killing, or insulting words or conduct towards defendant's wife, are adequate causes,—is correct.

4. SAME.

A charge that "homicide is justifiable, also, in the protection of the person against any other unlawful and violent attack besides those mentioned; * * * and in such cases all other means must be resorted to for the prevention of the injury; and the killing must take place while the person killed is in the very act of making such unlawful and violent attack,"—is correct; being within Pen. Code Tex. art. 569 *et seq.*, defining justifiable homicide.²

5. SAME.

A refusal to charge that "if the homicide was committed in protection of the person against an attack which produced a reasonable expectation or fear of death, or some serious bodily injury, then it would not be necessary for the party so attacked to resort to any other means before killing his assailant," is proper, in the absence of any evidence as to self-defense.³

6. SAME—TRIAL—INSTRUCTIONS—OBJECTIONS WAIVED.

Where a charge giving the abstract law of manslaughter is not objected to at the time, a conviction will not be set aside unless it appears or seems probable that defendant was injured.

Appeal from district court, Dallas county; G. N. ALDREDGE, Judge.

Mason Miller was convicted of the murder in the second degree of one John Collier. The conviction was affirmed on appeal, but no written opinion

¹ As to the prerequisites for the admission of dying declarations in evidence, see *Bryant v. State*, (Ga.) 4 S. E. Rep. 853, and note; *Testard v. State*, (Tex.) 9 S. W. Rep. 383, and cases cited; *Westbrook v. People*, (Ill.) 18 N. E. Rep. 304, and note.

² As to when a homicide is justifiable on the ground of self defense, and for instructions on that subject, see *High v. State*, (Tex.) ante, 233, and cases cited.

was delivered. Defendant now moves for a rehearing. The facts of the case, as disclosed by the testimony, are as follows:

Deceased, who was drunk at the time, and defendant had an altercation on the day of the shooting, during which deceased fired at defendant and missed him. Defendant then wanted to go home for his pistol to kill deceased, but was dissuaded by persons present, and he finally agreed to let the matter drop. Later he procured a pistol and shot deceased while he was getting water to drink at the roadside.

Several witnesses for the defense testified that they frequently heard deceased threaten to kill defendant. Two of them stated that they heard such threats uttered by deceased on the fatal Saturday, in Dallas, and that they communicated the threats to defendant. One witness testified that deceased told her that he was going to kill the whole d——d Miller family; that she said to him: "You won't kill his [defendant's] wife, who is your sister, will you?" and that he replied: "I don't know about her, but she is nothing but a d——d little black-eyed whore." Other witnesses for the defense contradicted various statements made by Rose. One or more stated that Rose told them that when he found Collier lying on the ground, he picked up his (Collier's) pistol from the ground. Others that Rose told them that he was present, and saw the shooting; that Collier ran on defendant with his pistol, and that he attempted to hold Collier, but that Collier pushed him aside, and was trying to get at and was rushing on defendant, when defendant, in order to save his own life, fired the fatal shot. A number of defense witnesses testified that the reputation of the defendant's wife for chastity was good. This was met by rebutting testimony that it was notoriously bad.

Beets testified for the state that, about a year before the homicide, defendant, in a conversation with him about Collier's threats, said that "John Collier's threats amount to no more than the threats of an old woman." The state's rebutting witnesses testified that Collier's reputation was that of a noisy man when drunk, but at all times harmless; at least, not dangerous. The defense witnesses testified that he was a violent and dangerous man, well calculated to execute a threat.

The charge of the court on adequate cause reads as follows: "By the expression 'adequate cause' is meant such as would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection. Insulting words or gestures, or an assault and battery so slight as to show no intention to inflict pain or injury, are not adequate causes. The following are deemed adequate causes: (1) An assault and battery by deceased, causing pain and bloodshed. (2) A serious personal conflict, in which great injury is inflicted by the person killed, by means of weapons or other instruments of violence, or by means of great superiority of personal strength, although the person guilty of the homicide were the aggressor, provided such aggression was not made for the purpose of killing. (3) Insulting words or conduct towards the wife of the party guilty of the homicide."

Pen. Code Tex. art. 569 *et seq.*, defines justifiable homicide as set out in the charge on that subject given in the opinion.

Coombes & Gano, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

HURT, J. At the Austin term, the judgment in this case was affirmed without a written opinion. Counsel for appellant presents this motion for rehearing, insisting earnestly that the record contains errors for which the judgment should be reversed, and we will now notice the errors assigned. The appellant was convicted of murder in the second degree for killing John Collier.

The first error assigned is that "the court erred in admitting the statement made by Collier after he was shot, because the proper predicate had not been

laid." The statement under this proposition is that Collier was shot after dark on the evening of October 28, 1886, and was carried into the house of S. B. Rose. On the next day after he was shot, his sister-in-law, Mrs. Fleming, saw and conversed with him. To her he made a statement under these circumstances: He was shot in the bowels. On Sunday he suffered intensely; at times more than at others. His bowels were swollen, and he was very sick; vomiting at intervals. He complained of fullness in the bowels, and said that he was bleeding internally. Mrs. Fleming took a seat by the bed, and said to him: "John, do you know that you are going to die?" He did not say that he was dying, or that he expected to die, but replied to Mrs. Fleming: "Aunt, I am bound to die." The counsel for appellant contend that the declarations were not made under a sense of impending death; that it does not appear that deceased was impressed with the belief of almost immediate dissolution; that the reply to Mrs. Fleming, "I am bound to die," may be true, yet this fails to show that the declarant believed he was in danger of almost immediate dissolution. We infer, under the facts attending deceased when this statement was made, that he simply meant that at some time he was bound to die, would be unnatural and unreasonable. Thus to presume would be to place the deceased in the attitude of a jester while in the most awful condition in which a man can be placed. The declarations must be made under a sense of impending death, but it is not necessary that they should be stated at the time to be so made. It is enough if it satisfactorily appears in any manner that they were made under that sanction; whether it be directly proved by the express language of the declarant, or be inferred from his evident danger, or the opinions of medical or other attendants stated to him, or from his conduct or other circumstances of the case; all of which are resorted to in order to ascertain the state of the declarant's mind. 3 Greenl. Ev. 192. Looking, therefore, to all the facts surrounding the deceased when the declarations were made, we are of opinion that they were made under a sense of impending death, and, so far as this objection is concerned, were competent evidence. The same observations apply to the question of the sanity of the deceased.

The appellant introduced evidence of threats by deceased shortly before the homicide. The state, over objection, proved by Beets that appellant, about a year before the homicide, stated to the witness (Beets) that the threats of John Collier did not amount to more than those of an old woman. Under the above state of case, this was most evidently competent evidence.

A number of bills of exception were reserved by appellant to remarks and statements made in argument by counsel for the prosecution. In every instance, however, the court acted in such manner as to render the remarks and statements harmless.

There was no error in the charge of the court in regard to adequate causes. Appellant complains that the court gave to the jury abstract law upon the subject of manslaughter. Appellant did not object at the time to these charges; hence, to reverse for this, some injury must appear or be probable, which does not appear in this case.

Appellant objected on the trial to this charge: "Homicide is justifiable, also, in the protection of the person against any other unlawful and violent attack besides those mentioned; * * * and in such cases all other means must be resorted to for the prevention of the injury; and the killing must take place while the person killed is in the very act of making such unlawful and violent attack." This charge is in the language of the statute, and is correct.

Appellant requested the following charge, which was refused, and he excepted: "You are instructed that, if the homicide was committed in protection of the person against an attack which produced a reasonable expectation or fear of death, or some serious bodily injury, then it would not be necessary for the party so attacked to resort to any other means before killing his as-

sailant." Counsel cite us to no statement, no fact in the record, presenting the question of self-defense; and, if there be such evidence in this record, we have failed to discover it. Rose swears to no fact raising the question; and, if he stated such facts to others, they could only be used to impeach him. This being so, whether the instruction was abstractly correct or not, the court acted properly in refusing to give it in charge to the jury.

The objections urged to the charge of the court relating to accomplices' testimony were not made at the time, nor does it appear that the appellant was probably injured in this matter.

Under the facts of this case, there was no necessity for the court to instruct the jury on "cooling time."

It is seriously contended that the verdict of the jury is not supported by the evidence. We think differently. The facts in this record establish, to the mind of the writer, a cold-blooded, deliberate assassination, and the appellant should rejoice that he escaped capital punishment.

We have very carefully considered all the grounds (though we have not written upon them all) relied upon for a reversal of the judgment, but we think none of them are well taken, and the motion for rehearing must be denied.

HINES v. STATE.

(Court of Appeals of Texas. January 26, 1889.)

1. HOMICIDE—EVIDENCE OF ACCOMPLICE—INSTRUCTIONS.

In a prosecution for murder, the crime was shown to have been committed with a gun belonging to a witness for the state. The gun was found under a brush-pile, which was pointed out by the witness to the officers making search for it, although there were a number of such piles in the neighborhood; and a statement by the witness that, before finding the right pile, he had examined several others, was shown to be false. The witness stated that the defendant had told him that the gun would be found under one of the brush piles, but did not claim that he had pointed out the particular pile. *Held*, that there was sufficient evidence that such witness was an accomplice in the crime charged to make a refusal to charge upon the weight of accomplice testimony error.

2. SAME.

Such refusal is error where one of the witnesses for the state was shown to have had knowledge of the whereabouts of the deceased at the time of the killing, where his tracks were found going to and from the body, and he had been seen going with a gun in the direction of the scene of the killing shortly before; and where he had told some one before the body was found that the deceased had been killed, and related the manner of the killing.

Appeal from district court, Marion county; W. P. McLEAN, Judge.

W. T. Armistead, J. H. Culberson, and Camp & Taylor, for appellant.
Asst. Atty. Gen. Davidson, for appellee.

HURT, J. This is a conviction for murder of the first degree, with the death penalty assessed. We have carefully examined all the grounds relied upon for a reversal of the judgment, and are of opinion that none are well taken except that contained in the third assignment, to-wit: "The court erred in failing and refusing to charge the law applicable to the corroboration of an accomplice,—the witness Armistead Cove being an accomplice." The court's attention was called to this subject, and counsel requested a charge thereon, but did not prepare a charge. The court refused to prepare and submit to the jury instructions relating to this subject, and counsel for appellant excepted, reserving a bill.

No doubt the learned trial judge did not believe there was any evidence in the case raising this question, and hence the failure to charge thereon. It will not be questioned that, if there be such evidence, it was the duty of the court to instruct the jury with reference to the necessity of, and the character

of, corroboration required to authorize a conviction upon the testimony of an accomplice. Was there evidence reasonably tending to show that Cove or Davenport, or any other witness, upon whose testimony the state relied for a conviction, was an accomplice? If so, under the facts of this case, the court should have instructed with reference thereto. What are the facts?

On Wednesday, March 28, 1888, in Marion county, Tex., in what is known as the "Bend Neighborhood," the deceased, Ike Bailey, left his house, two miles from the "Lake" field, where he was afterwards, on Friday, March 30, 1888, found dead. He had evidently been killed, as in his head and body were found two gunshot wounds, apparently of a rifle or pistol of 38 caliber. His skull was also fractured by blows from some heavy instrument. The body was found in the Lake field, about 300 yards from the house of the defendant, Hines, on a path or road leading from Hines' house to the Gray field, which Hines cultivated, and about 20 steps from an old well. Near the body of deceased were his saddle and saddle blanket. Wednesday evening—the same evening deceased left home—his mule, with bridle, but no saddle or blanket on, was seen going from the Lake field. A ramrod and piece of the stock of a shotgun was found near the body. This ramrod was identified as the ramrod of Armstead Cove's shotgun; also the piece of gun-stock. The tracks of Henry Davenport were found going towards and from the body. Davenport was seen going in the direction of the Lake field a short time before the killing, with a gun, and was seen going from the field late on Wednesday evening. Late Wednesday evening, when Ike Bailey did not come home, Davenport told witness that Ike Bailey would not come home; that he had been killed, and his head beaten, and shot all to pieces. Thursday he told other witnesses the same, in substance, and said he had been killed in the Lake field. Wednesday Davenport ate dinner at the house of the witness Frank Reynolds. He then had his gun, and said to Reynolds: "If me and another negro gets into a fracas, you white men ought to have nothing to do with it." In the evening he went off with his gun in the direction of the Lake field. Just after the shots were heard in the field Davenport was seen going from the direction of the place where the shots were heard and the body afterwards found. He also told the witness on the Thursday after the killing that the first shot did not kill Ike Bailey. Davenport and his wife knew that Ike Bailey went to the Lake field that evening, and were the only persons who knew of this, so far as the evidence shows.

The witness Armstead Cove was the half-brother of the appellant, and lived with him, and owned an old shotgun in very bad repair. The ramrod and piece of stock found by the body belonged to this gun. The night of the evening the body was found Armstead Cove, Henry Davenport, Jim Williams, and appellant were arrested and taken to the inquest separately. The constable and a crowd of armed men, in an excited condition, were present, threatening to kill all the prisoners. They were taken out and threatened with death if they did not confess. When it was brought to the knowledge of Cove that the ramrod was identified as being his, and being threatened with death, he said that the appellant, Hines, told him at the horse lot that he had killed Ike Bailey with his (Cove's) gun, and pointed to some brush-heaps, and said the gun was under one of them. One hour and thirty minutes before daylight, he, with the constable and others,—he guiding them,—went straight to the brush-heap, and to the side of the heap where the gun was; stopping at no other, though he insisted that he had examined several others before finding the gun.

Ike Bailey, the deceased, and Bob Hines had had some trouble about some cotton, in which it was charged that Hines stole the cotton from Bailey. Hines was under bond to appear and answer the charge. Davenport was the principal witness against Hines in the cotton case. Two or three witnesses testified that Hines had threatened to kill Bailey.

The state attempted to explain some of the facts which tend to show that Cove and Davenport were accomplices, but, this being a question for the jury, the court could not assume that the explanations were full and complete, and withdraw the question of accomplice *vel non* from the jury, or refuse to call their attention to this question by proper instructions.

Again, there is no attempt to explain some of the most cogent facts which tend to show these witnesses to be accomplices. We mean by "explain," to render these facts completely consistent with the hypothesis that neither Cove nor Davenport were accomplices. Let us present a case so as to illustrate our views upon this subject: There is evidence in a case tending to show that a witness upon whose testimony the state relies alone or in part for conviction was an accomplice, but the other facts in the case render it reasonably certain that the witness was not an accomplice. Can the trial judge assume these facts, to-wit, the facts which render it reasonably certain that the witness was not an accomplice, to be true, and refuse to submit to the jury the law relating to the testimony of an accomplice? We seriously doubt if in any case the judge can so assume and refuse to instruct upon the question of an accomplice. But, to warrant the court in thus acting, the case must be one in which the testimony which tends to show the witness to be an accomplice is very slight, and the other facts must render it absolutely certain that he (witness) is not an accomplice. The rule that the court should charge upon the theory of the case relied upon by the accused should be applied to this question. But in this case, there being evidence strongly tending to show that Cove and Davenport were accomplices, do the other facts in the case render it even reasonably certain that they, nor either of them, were not accomplices? They do not, and hence the necessity for the proper instructions relating to the testimony of an accomplice.

We will relate briefly the facts bearing on Cove which tend to show him an accomplice: Deceased was killed with his gun. He had access to his gun, it being in his house. He denied all knowledge of the crime. He went at night with the officers and others to the brush-pile, guiding them. He went to the pile—there being a number of brush-piles in the clearing—in which the gun was concealed. He went directly to the pile which contained the gun, and directly to the side of the pile where the gun was concealed. Upon the trial he swears that he went to several piles before he found the right one. This was shown to be false. Now, Hines may have told him where the gun was concealed, and may have given him such a description of the brush-pile, its locality, etc., as to enable him to go at night directly to it; but this would be remarkable. But to give him such a description and such directions as to enable him to go at night to the right pile, and to the right side of the pile of trash at which the gun was concealed, is not reasonable. Especially so when considered in the light of his statement bearing upon this matter. He says that Hines told him that he had killed Ike Bailey with his (Cove's) gun, and pointed to some brush-heaps, and said it was under one of them. There is no pretense that the appellant pointed out the particular pile, or gave the witness such description of it as would enable him to go directly to it. This is contradicted by the witness himself in this: that he "did turn down two or three brush-heaps in hunting for the gun." Now, under these facts, it is reasonable to infer that this witness did not obtain knowledge of the whereabouts of the gun from the defendant. But, be this as it may, these facts tending strongly to inculcate the witness as a principal or an accessory, the question of accomplice *vel non* should have been submitted to the jury, with instructions that, if they found him to be an accomplice, then, to convict on his evidence, he should be corroborated as the law directs.

As to whether Davenport was an accomplice or not, that also should have been submitted to the jury, with proper instructions.

The judgment is reversed, and the cause remanded.

DOOLEY v. MONTGOMERY *et al.**(Supreme Court of Texas. January 15, 1889.)*

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—DEED BY HUSBAND—ESTOPPEL.

One who assumes, by virtue of a power of attorney, to convey land deeded to his wife during the marriage, estops himself and his heirs to claim the land, since, though the power of attorney is of no effect, the land is under Rev. St. Tex. art. 2852, community property, which during the marriage may be conveyed by the husband alone.

2. TRESPASS TO TRY TITLE—PLEADING—ESTOPPEL.

The defense of estoppel may be raised in trespass to try title under a plea of not guilty.

Appeal from district court, Harris county.

Trespass to try title by Catherine Montgomery, her husband, and others against H. H. Dooley and others. Plea of not guilty. Judgment for plaintiff. Defendant Dooley appeals.

W. N. Shaw and *S. R. Perryman*, for appellant. *F. G. Morris*, for appellees.

HENRY, J. This is an action of trespass to try title. The defendant pleaded not guilty. The case was tried by the court without a jury, and judgment was rendered in favor of the plaintiffs for the land. The defendant appealed.

The record shows a regular chain of title down to Amelia Harrell, she being at the time of the conveyance to her the wife of Josiah T. Harrell. The deed to her was made in 1845, and recited receipt of consideration of \$500. There was no recital in the deed or fact in evidence giving to the deed to the wife other than its operation of conveying the title to the community. The wife made to her husband a power of attorney in terms authorizing him to sell the land. Afterwards, and during the life of the wife, the husband, in pursuance of the terms of this power of attorney, deeded the land to John H. Walton. This deed contains the following clause: "I, the said attorney, declare that I am duly authorized to sell and convey said property, and that I will warrant and defend the same against any and all claims whatever." The record shows a regular chain of title from Walton to appellant. Amelia Harrell died intestate, and appellees are her only heirs.

Appellant assigns as error that "the court erred in giving judgment for plaintiff, because the proof shows that the property in question was the community property of J. T. and Amelia Harrell, and the deed executed by him, and signed by him as attorney in fact for said Amelia Harrell, is in law a legal and valid conveyance of said community property."

We agree in every particular with this assignment. The wife's power of attorney gave the husband no power to sell the land, but, because it was community property, he had full power under the law to sell it. Rev. St. art. 2852. The conveying clause of the deed to Walton sufficiently shows that the land was conveyed as the property of the wife, and the husband's name is signed to the deed only as the agent of his wife. In the case of *Heard v. Hall*, 16 Pick. 460, it is said to be "the well-established rule of equity that where one having title acquiesces in the disposition of his property, for a valuable consideration, by a person pretending to title, and having color of title, he shall be bound by such disposition, and shall not afterwards be allowed to set up his own title against the purchaser. And so it has been held that if one having title stands by while another purchases from a third person claiming title, and does not forbid the purchase or disclose his own title, he shall be bound. *A fortiori*, if he encourages the purchase, or, as in the present case, a person sells his own property as the property of another, to a *bona fide* purchaser, for a valuable consideration. In this case the petitioner ex-

pressly covenants that he is lawfully authorized and empowered to make sale of the granted premises. Most certainly he was not so authorized; and this covenant operates to avoid circuitry of action, by way of rebutter, and estops the petitioner from setting up his title." We think the deed of the husband conveyed to Watson the common title of the husband and wife, and left no estate for the heirs of the husband or wife to take at their deaths.

It was objected in the court below, and is insisted here, that the defense by estoppel must be specially pleaded. We think that in the action of trespass to try title the proof is admissible under the plea of not guilty. Rev. St. art. 4793; *Mayer v. Ramsey*, 46 Tex. 371.

The judgment of the district court will be reversed, and such judgment here rendered as ought to have been rendered by the court below, which will be that the appellees take nothing by their suit, and that appellant recover of them all costs of the court below, and of this court; and it is accordingly so ordered.

BLANTON v. MAYES.

(Supreme Court of Texas. January 15, 1889.)

1. EXECUTORS AND ADMINISTRATORS—SALE OF LAND—VALIDITY.

An executor sold land of his testator, the validity of the sale depending on the existence of debts due from the estate at that time. The taxes of the estate amounted annually to about \$300, and at least part of one year's taxes were due at testator's death, which, with part of the taxes for another year, were paid during the executor's continuance in office. Another sum was probably paid by the executor. The executor, on the day before the taxes first mentioned were paid, borrowed money for that purpose, mortgaging land of the estate. The administratrix, who succeeded said executor at his death, reported that the estate owed a considerable sum when she became administratrix, all which she had paid except some taxes accruing since her appointment. *Held* sufficient evidence to justify a verdict that the estate was indebted at the time of the sale.

2. SAME.

Such a sale would be valid if debts existed, whether the executor properly used the proceeds or not.

3. SAME—GOOD FAITH OF PURCHASER.

Whether the purchaser bought the land in good faith, believing it to be sold for the payment of debts or not, is immaterial, when the jury have found that such debts actually existed; and instructions given and evidence admitted on that issue, if improper, are not ground for reversal.

4. APPEAL—REVIEW—OBJECTIONS WAIVED.

An objection to a juror for disqualification, if discovered during the trial, must be then brought to the notice of the court, or it will be waived.

5. JURY—SUMMONING—OATH OF SHERIFF.

Under Rev. St. Tex. art. 3056, providing that a sheriff, when necessary to summon talesmen as jurors, shall be sworn to summon impartial and sensible men, etc., an oath once taken during the term is sufficient, and need not be repeated at each time it becomes his duty to so summon talesmen.

Appeal from district court, Liberty county.

Action by M. R. Blanton, administratrix *d. b. n. c. t. a.* of the estate of T. Schlutter, deceased, to recover lands, and the rents and profits thereof, from one J. J. Mayes. The land had been sold by John Howard, formerly executor of said Schlutter's will, to pay debts, and purchased by Mayes. A former trial resulted in a verdict and judgment for plaintiff, which was reversed on appeal. 3 S. W. Rep. 40. A second trial resulted in a judgment for defendant, and plaintiff appeals. Rev. St. Tex. art. 3056, provides that, when it shall be necessary to summon talesmen to serve on a jury, an oath shall be administered to the sheriff, to the effect that he shall select impartial, sober, and sensible men, etc.

Wharton Branch, for appellant. *Cleveland & Lockhart*, for appellees.

STAYTON, C. J. On a former appeal it was held that the one executor who qualified had the power to sell the land in controversy to appellee, if debts against the estate represented by him existed. 67 Tex. 246, 8 S. W. Rep. 40. On the trial from which this appeal is prosecuted, the court instructed the jury, in effect, that the title acquired by appellee through his purchase was valid, if at the time he purchased there were debts against the estate represented by the executor which made it necessary for him to make the sale; and it further placed the burden, not only of showing these facts, but that the money paid by appellee for the land was applied by the executor to the payment of those debts, on the appellee. Under this charge, which placed on appellee a burden greater than the law imposes upon him, a verdict was rendered in his favor. If the evidence was sufficient to show that debts, legally a charge on the estate of the testator, existed at the time appellee bought from the executor, then the judgment must be affirmed, unless there be some error in the proceedings not involved in the question of the power of the executor to sell the land.

The testator, Schlutter, died on May 6, 1875, and soon after that date Howard, one of the three executors named in the will, caused it to be probated and qualified as executor, the others having declined to do so. The will and order of probate court authorized the administration of the estate without the control of the court. The executor, Howard, died on June 25, 1876, after having sold and conveyed the land in controversy on January 27, 1876, to appellee, in consideration of \$1,000 then paid. On August 4, 1876, appellant was appointed administratrix of the estate. She does not show fully what particular debts stood against the estate at the time she qualified, but in a report made by her to the probate court, to its March term, 1878, she stated "that, while the estate is entirely solvent, yet considerable indebtedness hung over it at the time petitioner assumed the responsibility and duties of the administration; that the estate, among other items, was largely in arrears to the state, county, and municipality for overdue taxes and penalties." She then proceeds to state that from money derived from the estate, other than by sale of property, she had succeeded in paying, at the time the report was made, all indebtedness against the estate, except about \$800 due for taxes for the year 1877. The evidence further shows that a part, at least, of the taxes due for the year 1874, were unpaid at the time of the death of the testator; that taxes, state, county, and municipal, were paid on August 7, 1875, but that of this the municipal tax was for the year 1875, and the state and county taxes for the year 1874. It is not shown that state and county taxes for the year 1875 were paid by the executor, but it does appear that they were not paid by appellant, and does not appear that they are unpaid. The inference is strong that the executor paid them. The taxes for the year 1876 had accrued before the land in controversy was sold to appellee, and were not paid until after appellant qualified as administratrix. On the day before the municipal taxes for 1875, and the state and county taxes for 1874, were paid, it is shown that the executor for the estate borrowed \$1,150, to secure which he, joined by the widow of the testator, who owned half of the estate, executed a mortgage on property of the estate. It is further shown that the money thus borrowed was procured to pay taxes, and that for this purpose it was turned over to the executor, but that it was not repaid to the lender until after appellant qualified as administratrix.

Taxes due at the time of the death of the testator, and those subsequently accruing, would constitute debts of the estate that would empower the executor to sell property; and we do not see, if he borrowed money on the credit of the estate to pay taxes imposed by law, that the indebtedness thus created would not be one that would empower him to sell property in order to raise money to discharge it. Taxes on the estate seem to have amounted to about \$800 annually, and, if no other indebtedness than for accrued taxes for the

years 1874, 1875, and 1876 were shown to have existed, this would be sufficient to confer on the executor the power to sell which he exercised in making the sale to appellee. Looking to the evidence, there was no error in that part of the court's charge which informed the jury that the existence of indebtedness on the part of the estate, at the time the executor sold to appellee, would confer on the former the power to make the sale; for the indebtedness shown was all such as would confer on the executor the power to sell. There was no objection to the evidence of indebtedness offered, on the ground that there was no sufficient pleading to authorize the admission of the evidence.

The appellee pleaded that he purchased the property in good faith; that it was sold to pay debts of the estate, or the beneficiaries under the will had the benefit of the money paid by him; and he sought its recovery, in case he was not entitled to hold the land. Evidence was offered under these pleas, and it is urged that it was error to admit evidence of the good faith of appellee in making the purchase, and paying the price of the land, or to give a charge under which the jury might have found on this issue in favor of appellee if they had not found in his favor for the land. The evidence was properly admitted, and the charges on this issue correctly given; but, if there had been error in either of these respects, it would be immaterial, for on the issue of title to the land the finding was in favor of appellee, which could not in any manner have been affected by the evidence and charges given on another issue.

Appellant, for the purpose of showing that the executor had not applied the money received from appellee to the discharge of the debts of the estate, proposed to prove a settlement made between the executor of Howard's will and the appellant as the administratrix of the estate of Schlutter, but, on objection, it was excluded. Such evidence would have been admissible for the purpose of showing that neither the estate of Schlutter, nor the beneficiaries under his will, ever received benefit from the money paid to Howard by appellee, but as the case was disposed of became unimportant; for, in order that appellee should be entitled to the land under his purchase from the executor, it was not necessary that he should show that the latter properly appropriated the money paid by him for the land. It was sufficient that he showed a state of facts that gave the executor power to sell.

The fourth, seventh, eighth, ninth, and tenth assignments of error relate to the ruling of the court in giving and refusing charges upon the facts which would confer power on the executor to sell the land to appellee, and have already been considered. The action of the court in these respects was as favorable to appellant as the former decision made in this case, following *Johnson v. Bowden*, 43 Tex. 674, and *Anderson v. Stockdale*, 62 Tex. 54, would authorize.

A juror was impaneled on the jury that tried this cause who was disqualified for jury service by reason of having been convicted of a disqualifying crime. At the time the jury were impaneled this fact was not known to appellant or her counsel, but before the cause was submitted to the jury the fact became known to them, and they raised no objection to proceeding with the jury as impaneled, but took the chances of a verdict in her favor, and for the first time raised the question on motion for new trial. We think the objection came too late.

To fill up the jury it became necessary to summon three talesmen, one of whom was challenged by appellant, who thereby exhausted her peremptory challenges. The others were not shown to be subject to challenge for cause, and were impaneled. It was urged, as ground for new trial, that the oath prescribed by article 3056, Rev. St., was not administered to the sheriff before he summoned these jurors, and the action of the court in overruling the motion for a new trial, based on this ground, is assigned as error. It appears, however, from the statement of the court contained in an explanation

to the judgment overruling the motion, that the oath prescribed by that article had been administered to the sheriff on a former day of the term, and that when the order to summon talesmen was given in this case the attention of the sheriff was again called to his duties under the oath prescribed. We think this was a compliance with the law, and that it is not necessary that the oath prescribed by the article referred to should be administered to the sheriff every time it becomes necessary during a given term to summon jurors other than those selected by the jury commissioners. If this were not so, appellant or her counsel should have objected to the jurors at the proper time, being present and cognizant of what was done in filling up the jury.

In the motion for new trial it was stated that appellant believed the two talesmen were not impartial persons, but no effort was made before they were impaneled to ascertain whether this was so. The chief objection to the two jurors seems to have been that they were intelligent men, and of strong will, while the other ten were not of that class.

We find no error that calls for a reversal of the judgment, and it will be affirmed. It is so ordered.

FISHER v. DOW *et al.*

(*Supreme Court of Texas. January 18, 1889.*)

1. **VENDOR AND VENDEE—ACTION FOR PRICE—FAILURE OF TITLE.**

Where a vendee of land, who has since conveyed such title as he received, is sued for damages for failure to deliver goods agreed on as the purchase price, he can defend on the ground of failure of title, if at all, only by showing a complete failure of title in his vendors, or a failure of such title as they represented that they had at the time of sale.

2. **DELIVERY—CONTRACTS—PERFORMANCE—WAIVER OF DEMAND.**

Under a contract providing for the delivery of lumber on the purchaser's order, notice by the seller to the purchaser's attorney, the latter having called for a settlement, that the seller would not deliver on account of failure of title to land given in exchange, is a waiver of a demand for delivery of the goods.

3. **APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

A finding that the value of lumber sued on was \$10 per thousand will not be disturbed, though the only competent testimony as to its value was that of one witness that lumber generally at the place was worth about \$10, it appearing that defendant, who was to deliver the lumber, testified afterwards, and failed to testify as to the value, and that the contract called for first-class merchantable lumber.

Appeal from district court, Polk county.

Action by Dow Bros. against Charles N. Fisher for damages for failure to deliver lumber according to contract. Judgment for plaintiffs, and defendant appeals.

R. E. Corry, for appellant. *J. A. McCardell* and *Joe Holshausen*, for appellees.

GAINES, J. Harriet E. Moore and her son, Tom Moore, conveyed to appellant a lot in the town of Livingston, and a tract of land, near the town, of four acres, for which he executed a contract in the form of a promissory note for the delivery to Harriet Moore or order of 50,000 feet of lumber on the 1st of September, 1884. Mrs. Moore transferred the obligation to her son, to whom Fisher delivered one-half of the lumber before the obligation became due. Tom Moore then assigned the contract to appellees. Fisher having declined to deliver the lumber, the assignees brought this suit to recover damages, and obtained a judgment.

The defenses set up in the court below were that Tom Moore, who made the sale, represented to the defendant that the title to the lot was good, but that the title had wholly failed, and that no demand had been made upon defendant for the lumber. The defendant testified that "Tom Moore, at the

time of the trade, represented that the title to the land was perfectly good; that they had a good title from George W. Davis, and also had title by limitation." It was agreed that the survey of which the lot was a part "was titled by the government of Mexico" to M. L. Choate, and defendant introduced a deed from Choate to Polk county for a portion of the league, and showed that the lot was a part of the land so conveyed, but made no further proof as to the title. He also testified that, being threatened with a suit, and being satisfied his title was not good, he had conveyed the lot to the Presbyterian Church, to whom the county had leased it for 99 years. If defendant, after having conveyed such title as had been granted to him by the vendors of the lot, and by such action placed it out of his power to reconvey to them or their assigns such title as he had received, could be permitted at all to defend against his contract on the ground of a failure of title, it could only be by showing absolutely that the vendors had no title whatever, and especially that they did not have such title as they represented. He made no offer to show that his vendors did not have title by limitations, and we think this was fatal to his special defense.

The contract provided that the lumber should be delivered upon the cars upon the order of Mrs. Moore, and that it should be of such dimensions as she should direct. No order for the lumber was proved, and it is claimed that in the absence of proof of a demand according to the terms of the agreement, the plaintiff was not entitled to recover. It was, however, shown that in a short time after the obligation matured, the attorney for the plaintiffs called upon the defendant for a settlement, and that he was told by the defendant that the title to the lot had failed, and that he made no offer to the attorney to deliver the lumber. He had previously informed the plaintiffs that he would not deliver it, on account of the failure of title to the lots. This must be deemed a waiver of any further demand. A special demand, stating the quantities and dimensions of the lumber, after this, would have been but an empty form. Besides, the contract would seem to have contemplated that the lumber was to be shipped upon the cars, and, it is to be presumed, to such persons as the holder of the agreement might contract to deliver it. After defendant refused to comply, plaintiffs could not have contracted safely with third parties for the delivery of lumber from this source. We think no further demand than that shown in the evidence was necessary.

It is also insisted that there was no competent proof of the value of the lumber at the time and place of delivery. The lumber was to be delivered in Livingston. The testimony of the witness Moore as to the price in Belton was irrelevant. The only other evidence as to value was that of a witness, testifying at the place of delivery, that he "thought that lumber was worth about \$10 per thousand feet." There is a bill of exceptions in the record, which shows that defendant objected to the proof of the value of the lumber offered, upon the ground that the evidence was not confined to the time and place of delivery, and the quality of the lumber mentioned in the contract. The objection was overruled, but what particular testimony was admitted over the objection does not appear. A modification, appended to the bill by the trial judge states that the testimony showed that the value of the 25,000 feet of lumber unpaid was \$10 per thousand feet, making \$250. No specific objection was made to this. The defendant subsequently testified in the case, and the presumption is that he knew the value of the property he had contracted to deliver, and that, if it was not worth at the time of the delivery the amount testified to by plaintiff's witness, he would have said so. We think that the evidence in connection with defendant's failure to testify upon the point warranted the finding of the value of the lumber at the time of the breach of the contract, although the witness did not expressly say the lumber was worth so much at that date. The fact that the evidence showed

only the value of lumber generally could not have prejudiced the defendant, because his contract called for first-class merchantable lumber. If lumber generally is worth \$10 per thousand feet, first-class lumber must be worth as much. The lumber having been paid for in advance, the plaintiffs were entitled to recover the highest market price of the lumber at any time from the demand to the day of the trial, but it may be not to interest from the date of the breach. *Masterson v. Goodlett*, 46 Tex. 403. But the judgment and findings of the court show that the court found the value of the property at the date when the lumber should have been delivered, and we think the facts and circumstances in evidence warranted the conclusion of value so found.

It is also complained that the court erred in its conclusion of law that the measure of plaintiff's damage was the value of the lumber, with interest from June 1, 1884. This is erroneous. But the error is evidently clerical. The judgment shows upon its face, that in computing the damages interest was allowed from the day on which the suit was brought. The evidence was that defendant was called upon for a settlement, and declined it, after the contract matured, and before the suit. The exact date was not fixed, and hence the court, construing the evidence upon this matter most favorably to the defendant, as it should, only allowed interest from the date of the institution of the suit.

This disposes of the material questions in the case. There are other assignments of error to the findings of the court, but they relate to matters which, in the view we take of the case, were not material to its proper disposition. There being no material error in the proceedings of the court below, the judgment is affirmed.

DRAPER v. HILLEN *et al.*

(Supreme Court of Texas. November 30, 1883.)

APPEAL—RECORD—WANT OF ASSIGNMENT OF ERRORS—AFFIRMANCE.

Where there is no bill of exceptions, statement of facts, nor assignment of errors in the record, judgment will be affirmed, under Rev. St. Tex. art. 1037, which provides that all errors not distinctly specified by an assignment of errors shall be considered by the supreme court as waived.

Appeal from district court, Rusk county; J. G. HAZLEWOOD, Judge.

S. G. Swan, for appellant. *J. H. Turner* and *Martin Casey*, for appellees.

WALKER, J. In this record there is no bill of exceptions, statement of facts, nor assignment of errors. Article 1037, Rev. St., provides that all errors not distinctly specified by an assignment of errors shall be considered by the supreme court as waived. In passing upon this provision of the law, the courts have held that, in absence of any assignment of errors, only an error in law apparent upon the face of the record will be considered. *Sayles*, Tex. Civil St., note to article 1037, where the cases are cited. In this case the judgment below is upon a restatement of the final account of the appellant as the administrator of the estate of John C. Dorsett. A motion for new trial was overruled, and complaint is made of omission of certain credits. In absence of a statement of facts, it cannot be known what testimony was passed upon by the court in reaching the judgment. The judgment is within the jurisdiction of the court, and one proper to be rendered upon testimony supporting it. The complaint as to the judgment for costs is not supported in the record. If improperly taxed, a motion in the district court to retax the costs is still open as a relief. The judgment must be affirmed.

WEAVER v. NUGENT *et al.*

(Supreme Court of Texas. December 11, 1888.)

1. TENDER—BY PLEADING—PAYMENT INTO COURT.

In an action to set aside an execution sale the tender of the purchase money in the pleadings, followed by a payment into court of the money bid at the sale, and paid by the purchaser, is a sufficient tender.

2. FRAUDULENT CONVEYANCES—KNOWLEDGE OF GRANTEE.

Where defendants testified that the sale of their real estate to their brother, taking his notes in payment, was for the purpose of paying their debts, an instruction that if the brother knew of a judgment against his sisters, and that it was unsatisfied, and that the purchase left his sisters insolvent, the sale was fraudulent in law, is not correct, as applied to the testimony.

3. SAME—EVIDENCE—QUESTION FOR JURY.

In such a case, where the execution debtors testify as to the honesty of their intentions in making the sale, the question of fraud is properly left to the jury.

4. SAME—CONSIDERATION—PROMISSORY NOTE.

A negotiable promissory note is a valuable consideration for a deed, especially where the insolvency of the maker is not shown.

5. EXECUTION—SALE—ACTION TO SET ASIDE—INADEQUACY OF PRICE.

In an action to set aside an execution sale for irregularities and inadequacy of price, a charge that if the inadequacy was caused by any act done by the execution debtors, or by their direction, it would be no ground for setting aside the sale, and that the irregularities must be shown, and also that they caused the inadequacy, and were not caused by the debtors, was proper.

6. SAME—IRREGULARITIES.

Judgment was rendered on a bail-bond in favor of the state without notice to the sureties. No levy was pointed out by the county attorney. The sureties did not know of the judgment. No demand was made on them for payment or a levy. They had personal property more than sufficient to pay the costs. Land valued at about \$7,000 was sold at execution sale for \$10. *Held*, that a verdict holding the sale invalid for irregularities and inadequacy of price will be affirmed.

7. TRIAL—INSTRUCTIONS.

Where the jury was charged as to the effect of irregularities at an execution sale, but not as to what irregularities are, the charge, while defective for want of fullness, is not erroneous, where the attention of the court is not called to the defect.

Appeal from district court, Red River county; E. D. McCLELLAN, Judge. *Sims & Wright*, for appellant. *Chambers & Doak* and *G. F. Burdett*, for appellees.

WALKER, J. September 21, 1886, appellant brought an action of trespass to try title against Emmett Nugent, Eliza Griffith, (unmarried while suit was pending to Higgins,) and Miss Comma Nugent, (married to Garen,) for certain lands described in the petition. Defendants pleaded not guilty; and, as to the land which had been levied on and sold to the plaintiff as the property of Comma Nugent, that it was exempt from execution as the homestead of herself and the defendant Emmett,—they owning an undivided interest in a tract of land which had been allotted to their mother during her life, and to certain of her children at her death; that the mother was dead, and the land had been occupied subsequently by them as their home, neither being married. The defendant Eliza Griffith alleged that the lots 14 and 15, of 34.53 acres each, were part of her homestead; she residing on a two-acre lot near,—she being a widow with a minor son. The sale was made August 3, 1886. The defendants further allege that no demand had been made upon the said Mrs. Griffith or Miss Comma Nugent for money or for a levy; that the levy was made for the purpose of breaking them up; that the property levied on was reasonably worth \$6,450, and the judgment \$350.; that the lands were sold at execution sale, and bought by the plaintiff at \$10, a grossly inadequate price,—being about one-fifth of 1 per cent. of its value; tender was made 31st March, 1887, and the money was brought into court; that the knowledge of the sale was designedly kept from the defendants, who did not know of the levy and

sale when made, etc. In supplemental answer defendants alleged that they, the said Mrs. Griffith and Miss Comma Nugent, had not sold the land to their brother, the co-defendant in this suit, in fraud, etc. Other allegations were made, which will be noticed hereafter.

The testimony showed that a judgment upon a forfeited bail-bond had been rendered in a justice's court against the defendants Mrs. Griffith and Miss Comma Nugent as sureties for their brother; that execution issued thereon, and came to the hands of the sheriff, July 9, 1886; that the deputy-sheriff never called upon the defendants for the money, or for a levy, nor was any levy pointed out by the county attorney, but he obtained the description of the lands from the county records; that defendants did not know of the issuance of the execution levy, or sale, until after the sale, which was made August 3d; that they had some \$50 or \$60 of personal property liable to execution. It further appeared that the defendants had executed warranty deeds for the lands levied upon to the defendant Emmett Nugent, a minor, then wanting a few weeks of majority; that his negotiable promissory notes had been executed in payment; and that Emmett Nugent, after his majority, retained the land, renting it, and receiving rents. These deeds were on record before the levy was made. At the sale notice of his claim was made by an attorney representing him. No one was present representing the county or state. It was shown that the lands were worth from \$3,000 to \$6,000, and that plaintiff bought them for \$10. The attorney who bought for plaintiff made out the sheriff's return at the sheriff's dictation, as testified to by him. The court charged upon the issues made in the pleadings and testimony. Many instructions were asked by the defendants. A verdict was rendered for the defendants for the land, and for the plaintiff for the \$10 deposited. Judgment was entered accordingly, and for plaintiff for costs of suit. The plaintiff appeals, and asks revision of the rulings of the court upon the pleadings of defendants, and the charge of the court, and the refusal of instructions asked by the plaintiff, as well as also of the verdict as not supported by the testimony.

The first assignment is not well taken. The purpose of the pleadings of the defendants attacked was to avoid the sheriff's sale. The sale was made August 3, deed made August 31, suit filed September 21, 1886, by the purchaser at the sale for the land. The judgment under which the execution was issued, under which the sale was made, was rendered in a justice's court. That court does not have jurisdiction, where the title to the land is put in litigation, to hear and determine the question. The tender of the purchase money obviates the necessity of the presence as a party of the state, the nominal plaintiff in execution. This is in accordance with the decision in *Miller v. Koertge*, 70 Tex. 162, 7 S. W. Rep. 691.

The ruling of the court upon the exceptions to so much of the answer as pleaded the homestead exemption was not important, taken in connection with the subsequent proceedings. The court in its charge informed the jury that to the extent of the interest of one-fourth of the tract No. 1, sold as the property of defendant Mrs. Garen, (*nee* Miss Comma Nugent,) such claim was not sufficient to exempt it from the sale. The allegations as to the lots 14 and 15, claimed by Mrs. Griffith, were sufficient, and to that extent the exceptions were not well taken. The actual residence upon the lot No. 2, and the cultivation of lots 14 and 15 by tenants in connection with the residence lot, and claim of it as homestead, she being a widow with a minor child, were sufficient facts to constitute a homestead exempt from execution.

The rulings upon the alleged acts of the county attorney were immaterial, but the charge eliminated all the testimony on that subject from the case submitted to the jury. That specific acts of fraud are necessary when a transaction is attacked as fraudulent is well recognized. The verdict was based upon another branch of the case, and on that account the ruling of the court ques-

tioned in the fourth assignment was not important. The tender of the purchase money made in the pleadings of defendants, followed by the payment into court of the money bid at the sale, and paid by the plaintiff, was sufficient as a tender. *Spann v. Sterns*, 18 Tex. 562.

The proposition in the first charge asked by the plaintiff, and refused, if Emmett Nugent, knowing of the judgment against his sisters, his vendors, and that it was unsatisfied, and that the purchase left his sisters insolvent, such sale would be fraud as matter of law, is not correct as applied to the testimony. If the sale was made, as testified by both his vendors, for the purpose of paying their debts, it was not fraudulent. The defendants had the right to have the jury pass upon the testimony upon that issue as in the others.

The second and third instructions asked by the plaintiff did not distinguish the acts of the defendants in the execution from those of Emmett Nugent and Stephens, and these latter were present or represented at the sheriff's sale, and the acts referred to in these instructions might have applied to them, but not to the two sisters, who were neither present nor represented at the sale. Besides, the substance of the two charges had already been given in the general instructions given by the court. The jury were told that if the "inadequacy was caused by any act done by defendants, or by their direction or authority, the same would not be ground for setting aside the sale," and that the irregularities must be shown, and that they tended to cause the inadequacy, and were not caused by the defendants.

The refused charge No. 4, to effect that Mrs. Griffith could not have the benefit of the homestead exemption upon the lots 14 and 15 until total abandonment of her former homestead was proven, was directing the attention of the jury to an issue not in the pleadings, and was upon the weight or effect to be given to certain parts of the testimony upon the issue. When a homestead is left, and another is acquired, the acquisition of the new is an abandonment of the old. *Slavin v. Wheeler*, 61 Tex. 654. Whether the new homestead be one is to be determined by the questions, is it the residence of the family? and the intent to occupy it as the home of the family? Besides, as the jury found for the defendants upon another issue, the refusal worked no harm to plaintiff.

It is insisted that, upon the uncontradicted testimony of the three defendants, the court should have held the sale from the defendants in the execution to Emmett Nugent fraudulent, and should not have submitted the issue to the jury. Fraud is a fact to be proven. It was the duty of the court to instruct the jury upon the subject, giving the law upon the issue, and no more. He could not deprive the defendants of the right of a jury trial in whole or in part, where facts evidenced by parol testimony were to be passed upon. The defendants distinctly affirmed the honesty, and therefore the validity, of the sale, and it was for the jury to find if the facts contradicted the oral testimony.

It was not error of the court to charge the jury that a negotiable promissory note was a valuable consideration. *Cameron v. Romele*, 53 Tex. 238; *Case v. Jennings*, 17 Tex. 673. Besides, the insolvency of the maker of the notes was not proven. The minor, ratifying his act after his majority, is bound by it.

Complaint is made that the court did not instruct the jury as to what irregularities were, when the jury was charged as to the effect of irregularities in the proceedings before and at the sale in the acts of the officers, etc., coupled with the inadequacy in the price paid. This was a defect, and, if it had been called to the attention of the court by an instruction supplying it, such explanation should have been given. *Miller v. Koertge*, 70 Tex. 162, 7 S. W. Rep. 691. The charge was not erroneous in terms, but deficient in fullness. It has been repeatedly held that a defective charge itself is not ground for reversal.

The complaint that it was error to submit the question of the homestead claim of Mrs. Griffith to the lots 14 and 15 is not sustained. She testified to facts which if believed constituted the property her homestead. It is complained that the answer contains no distinct allegation connecting the alleged inadequacy of price with the alleged irregularities, as caused thereby. But exceptions were not urged to this defect. Both were alleged in the answer, and testimony was introduced to sustain them. The natural connection can probably be presumed. It is not necessary to allege what the court would be presumed to know. *Railway Co. v. Curry*, 64 Tex. 88. The defendants in the execution had an interest in the sale. Their conveyances were with general warranty. Some interest in the lands would exist whether these sales to Emmett Nugent were fraudulent or honest. Holding the purchase money notes, they had a claim upon or interest in the lands which would be affected by the sale. If their conveyances were *bona fide*, the title in their vendee would not be affected, but the litigation likely to arise upon the execution sale ordinarily would result in delaying the payment of the purchase money. If the sales were not in good faith, they would be interested in the land discharging the judgment. It is not shown that these women knew of the sale until after it was made. They did not know of the levy. They had some personal property subject to execution, which reasonably would have brought several times as much money as was realized upon the sale of the land. They had the purchase-money notes, basis of credit upon which they could have raised the money to pay the execution, had they been called upon. If their testimony was true, that they sold the land to get means to pay their debts, it is reasonable that they might have utilized these notes in some way to raise money to satisfy the judgment. Execution had been withheld for a time by order of the county attorney. "He did not attend the sale, or authorize any one else to do so for the county." "He preferred holding the judgment to involving the county in a lawsuit for the land." The levy was not made at the instance of the county attorney, who controlled the judgment and the execution. The deputy-sheriff into whose hands the execution came took entire charge of the matter. He did not call upon the defendants for the money, or for a levy. He might have known of the existence of some personal property subject to the execution. He obtained the description of the lands from the county records. He received the execution July 9th, and made the sale August 3d. In all the subsequent proceedings, the deputy-sheriff followed the law. The lands were worth from \$3,000 to \$6,000, and were sold for \$10. The inadequacy of the price, being from one-fifth to one-third of 1 per cent. of the value of the land, is so great that it can be considered but nominal, not actual. No one but the purchasers, and the officers, to whom costs were owing, could be benefited. The means of satisfying the judgment were destroyed to defendants, and lost to the county, so far as the proceedings took effect. It is well settled that, "as to the failure of the sheriff to demand a levy of the defendant in execution before proceeding to sell the land, the statute on the subject is directory, and that the failure to comply with its requirements would not necessarily render the sale void." *Odle v. Frost*, 59 Tex. 689. So in *Donnebaum v. Tinsley*, 54 Tex. 366, "mere irregularities of this sort do not affect the title of the purchaser, who is not connected with them." This was in a case where there was no proof that the land did not sell for an adequate price; the value not being in proof. In *Taul v. Wright*, 45 Tex. 394, is given the views of Justice MOORE on the effect of irregularities when accompanied by inadequacy of price: "If the judgment is valid, though it may be impossible to determine the precise limit at which mere inadequacy in price alone will authorize the setting aside of a judicial sale, still it cannot be denied that there may be cases in which the price paid is so utterly insignificant and shockingly disproportionate to the value of the property that a court of equity cannot regard it as, in conscience, any consideration whatever, and the mere

fact of attempting to hold the property so purchased will be held conclusive evidence of fraud. Certainly, where there is an enormous inadequacy of price at a sheriff's sale, if there are but slight irregularities or other circumstances attending it calculated to prevent the property from bringing something like its reasonable value, it is regarded as unconscientious in the purchaser to hold the property so purchased, and his deed will be canceled." See, also, *Freem. Ex'ns*, § 309, and cases cited. Where, as in this case, there is a practical confiscation of the property under the guise of an execution sale, it is likely the jury would scrutinize the testimony in an effort to account for the cause of such a sacrifice. Naturally, before allowing the plaintiff to hold the property without the payment of more than a nominal consideration, they would under the charge consider all the circumstances preceding and at the sale; the fact that no levy was pointed out by the county attorney; the haste in making the levy; the failure to demand payment or a levy; the fact that the defendants in execution did have some personal property in the county liable to seizure,—much more than enough to satisfy the costs; the ignorance of the defendants in execution interested in the sale of the levy and of the sale; and the jury might reasonably have been satisfied, notwithstanding the deeds by the defendants in execution to their brother, that the gross inadequacy or absence of more than a nominal price was to a great extent occasioned by the irregularities. It may even be held that in such a case the party holding should show an exact compliance with the law; that is, not deciding that the mere assertion of the claim is unconscientious, we hold that, where there is practically no consideration, the proceedings must at least be regular in order to pass title. The verdict was upon this issue. Plaintiff recovered his purchase money and costs of suit, and the sale was annulled.

Finding no error, the judgment will be affirmed.

CLAPP v. ENGLEADOW *et al.*

(*Supreme Court of Texas*. December 11, 1883.)

1. EVIDENCE—DECLARATIONS AGAINST INTEREST.

The issues being as to the existence of a deed alleged to have been made by J. to B., a married woman, as her separate estate, the inventory of J.'s estate, filed and sworn to by B. and her husband, J.'s administrators, in which was included as property of the estate the same property conveyed by the alleged deed, was competent as a declaration against interest, but not conclusive as to B.'s claim.

2. WITNESS—IMPEACHMENT.

But it was not competent to impeach the testimony of B.'s husband, who was not examined on the subject.

3. SAME—REPUTATION.

Where the cross-examination of impeaching witnesses shows that they know nothing of the reputation for truth and veracity of the witness in the neighborhood in which he lives, their testimony should be excluded.

4. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where on a trial to the court incompetent evidence is admitted, and given great weight, and the finding is clearly against the preponderance of the evidence, and it also appears that the facts of the transaction in dispute were not fully developed, the case will be reversed and remanded.

Appeal from district court, Van Zandt county; **FELIX J. McCORD**, Judge. Action to establish a lost deed, brought by Sarah F. Clapp against Robert Engledow and others. Trial to the court, and judgment for defendants. Plaintiff appeals.

F. B. Sexton, for appellant. *Kilgore, Lively & Kilgore*, for appellees.

WALKER, J. The purpose of this suit was to establish the existence and contents of a lost deed alleged to have been executed by Amanda Johnson to Angeline M. Barrett in the latter part of the year 1872 or early in 1873. The

appellant, who was the plaintiff, claims under mesne conveyances from Mrs. Angeline Barrett and her husband to their son Ralph Barrett, and from him to the plaintiff. The defendants are the heirs at law of Amanda Johnson. The petition also alleged that by the loss of said deed a cloud was cast upon her title; that defendants are setting up claim to the land; prayer that a decree be rendered supplying said deed, perpetuating the testimony of its contents, quieting her title against the defendants in said land, and vesting title thereto in her, etc. The defendants pleaded general denial, stale demand, and certain acts of L. J. Barrett and his wife, the alleged grantee in the alleged lost deed. The rulings upon the pleadings are not material, as the main fact in issue was the execution of the deed as alleged in the petition. On the trial the plaintiff proved by the said L. J. Barrett, husband of Mrs. Angeline Barrett, that the deed had been made as alleged; that it had been lost. A witness, Hamlet, testified to having read over the deed to the grantor when she requested him to sign it as a witness, and that he did sign it as a witness. The deed gave to Mrs. Barrett all the grantor's property, real and personal. He also speaks of her executing the deed. The testimony of this witness is somewhat obscure, which may be attributable to its being given by depositions. Simpson, a witness, testified to seeing such a deed a short time after the death of the grantor. Witness read it. Thinks he would know the signature of the grantor, but would not swear to it. The defendants, over objections, read in evidence, from the records of the probate court of Nacogdoches county, the inventory of the estate of Mrs. Amanda Johnson, filed and sworn to by said L. J. Barrett and his wife, Angeline, in which was included, as property of the estate, the identical tract of land the subject of this contention, and two other tracts of land in the state; to which plaintiff objected, for the reasons (1) that it tends to prove no issue in the case, the issue being the existence, loss, and contents, not the effect, of a deed from Amanda Johnson to Angeline M. Barrett; (2) that, if offered to prove admissions by Barrett, as tending to show no claim of title by him, it is inadmissible, because the lost deed which plaintiff is endeavoring to establish is charged to have been made to, and carries title by gift to, Mrs. Barrett, and admissions of the husband cannot be used to impair the wife's title; (3) if offered to contradict Barrett's depositions, and thereby affect his credit, it is inadmissible, because Barrett was not (on cross-examination) asked about or allowed an opportunity to explain said statements. The objections were overruled.

Two of the defendants, brothers of the grantor, testified to conversations with L. J. Barrett about the estate of their sister, in which their right to share as heirs in property outside of Nacogdoches county was recognized. It was shown that a short time before the alleged execution of the lost deed the deceased, Mrs. Johnson, had, by deed of gift, conveyed all her property, real and personal, in Nacogdoches county, to Mrs. Barrett, who was a niece of the deceased, and had been raised by her. The brothers of deceased also testified that the character of L. J. Barrett for veracity was bad. In direct examination they qualified as to their knowledge of Barrett's character for truth, and, after testifying that it was bad, on cross-examination each was shown to know nothing on the subject. In the bill of exceptions to the admission of this testimony the judge adds that, while the witnesses qualified as to their capacity before testifying, yet its effect was destroyed by the cross-examination.

The assignments of error may be considered as attacking the rulings of the court in admitting the testimony objected to, and in finding for the defendants against the general preponderance of the testimony. The record of the administration of Mrs. Johnson by Barrett and wife was competent as declarations against interest by the parties in possession, as a circumstance following and attending the transaction. That this tract of land and other tracts

were upon the inventory was not conclusive against the claim of Mrs. Barrett. "The executor or administrator, in his individual capacity, is a stranger to the estate." *White v. Shepperd*, 16 Tex. 168. But naturally, from the insertion of the land upon the inventory, in absence of any explanation, a greater amount of testimony would be required to establish the adverse claim of the administrator. The inventory would be testimony. But as an admission by the husband, either by words or conduct, it could have no effect against the wife's separate estate if she had any. Whether she had any depended upon the existence of the deed. The issue was as to its existence, not as to what claim was or was not made while the administration was pending. Nor was the testimony competent to impeach Barrett, he not having been examined on the subject. It appears that much importance was attached to this testimony. The case is made to turn upon the presumption that Barrett, being a good business man, would not have neglected his wife's interest, if she had any, in the manner developed in the testimony. The inventory was but a fact to be considered with the other testimony. The plaintiff did not deraign title through L. J. Barrett. He only joined with his wife in the conveyance. Nor would the wife be further affected by the testimony to her own participation in the administration. If the deed from the deceased to her existed, the land was her separate property, and her estate in it could only be defeated or conveyed by her deed with privy acknowledgment, as provided in the statutes. The bill of exceptions to the admission of this testimony does not show for what purpose it was admitted, but that the objections were overruled. It clearly appears that, while admissible, it was given a controlling weight to which it was not entitled,

The impeaching testimony given by the witnesses Engledow and Engledow should have been excluded. The cross-examination developed the fact that they knew nothing of the reputation for truth and veracity of the witness in the neighborhood in which he lived. It would seem the better practice to allow cross-examination upon the capacity of impeaching witnesses before allowing them to testify to such character. *Johnson v. Brown*, 51 Tex. 77. It is not common to reverse on account of the admission of improper testimony when the case is tried without a jury. In this case the finding by the judge against the plaintiff was clearly against the preponderance in the testimony; and, as before stated, it is evident from the findings of the judge that great weight was given to the declarations and acts of the husband, both as admissions and as affecting his credibility as a witness. It is evident that the judgment was induced or based upon this testimony. This court is asked to reverse and render. It is manifest, upon an examination of the statement of facts, that the facts of the transaction were not fully developed. As before stated, the witness Hamlet leaves in doubt and a matter of controversy between the counsel whether he testified to the signing or execution of the deed by the grantor. The court below finds that Hamlet did not testify to its execution. This finding is inferential, rather than upon the meaning of the words used by the witness. The testimony having been by deposition, the same importance is not given to the action of the trial judge as if the witness had been examined in open court. His testimony would be more satisfactory if it had been more distinct in details of what must be within his knowledge, if what he has testified to is true.

It is deemed best to reverse and remand the case. The issue is upon the alleged fact of the execution of the deed. No acts or admissions of the husband could affect the deed, or preclude proof of its existence. Nor would the acts of the wife, so far as shown in the record, estop or conclude the plaintiff from proving the deed, if it ever existed. The suit in its effect is closely like an action to try title to the land, for a judgment establishing the deed would conclude the defendants as heirs at law of the grantor, Mrs. Amanda Johnson.

The judgment is reversed, and cause remanded.

HEBLICH v. JUDGE OF HANCOCK COUNTY COURT.

*(Court of Appeals of Kentucky. February 14, 1889.)***MANDAMUS—TO COUNTY JUDGE—ISSUANCE OF LIQUOR LICENSE.**

Under Gen. St. Ky. c. 106, art. 4, § 1, providing that the privilege to sell spirituous liquors shall not be implied or embraced in a license to keep a tavern or other place of entertainment, unless the county court, or the trustees or other authority of any town or city, "shall deem it expedient so to do," *mandamus* will not lie to compel a county judge to grant a license to sell liquor.

Appeal from circuit court, Hancock county; L. P. LITTLE, Judge.

Jacob Hebllich, by this proceeding, sought a *mandamus* to compel the judge of the county court of Hancock county to grant him a license to sell spirituous liquors in the town of Hawesville. Petitioner's application was dismissed, and he appeals.

Henry Mason, for appellant. W. S. Roberts, for appellee.

PRYOR, J. The writ of *mandamus* is sought in this case to compel the county judge to grant a license to the appellant to keep a saloon in the town of Hawesville, with the privilege of retailing spirituous liquors. It is not alleged that the judge refused to hear the application, but that he refused to grant the license. It is said by the appellee that the power to grant such a license is with the trustees of the town, and not with the county judge, but he has failed to call the attention of this court to the provisions of the town charter, or the act under which this power is conferred. It is immaterial, however, in determining the question presented here, where this power is lodged. The county judge nor the trustees are required to grant such a license, unless it shall be deemed expedient to do so. They are to judge of the necessity of such a grant, and not this court. Gen. St. c. 106, art. 4, § 1;¹ *Com. v. County Court*, 6 Ky. Law Rep. —.

The judgment below is affirmed.

STRICKLIN v. COMMONWEALTH.

*(Court of Appeals of Kentucky. January 24, 1889.)***CRIMINAL LAW—APPEAL—REVIEW.**

Where, in a criminal case, no exceptions were taken except to the instructions,¹ and they fully instructed the jury as to the offense, the verdict will be sustained.

Appeal from circuit court, Morgan county; JOHN E. COOPER, Judge.

Indictment against Isaac Stricklin for rape upon the body of an infant under 12 years of age. The accused was convicted of an attempt to commit such rape, and brings this appeal.

John P. Salyer, for appellant. P. W. Hardin, for the Commonwealth.

LEWIS, C. J. Under an indictment for rape upon the body of an infant¹ under twelve years of age appellant was convicted of an attempt to commit a rape upon such infant, provided against in section 4, art. 4, c. 29, Gen. St., and his punishment fixed at confinement in the penitentiary for the period of five years. No exception was made to any ruling of the court in this case,

¹Gen. St. c. 106, art. 4, § 1: "The privilege to sell spirituous liquors shall not be implied or embraced in any license to keep a tavern, as heretofore, nor in a license to keep any coffee-house, boarding-house, restaurant, or other place of entertainment, licensed by any court, or the trustees or other authority in any town or city, unless the said court, trustees, or other authority shall deem it expedient so to do, and shall specify said privilege in said license."

except to the instructions, and consequently the only question for us to consider is the one in regard thereto. The court fully and properly instructed the jury relative to the offense of which appellant was found guilty, and we do not perceive wherein there was a failure of the court, as stated in the grounds for a new trial, to give all the law of the case to the jury. We have made a careful examination of the record, and are not able to find any reversible error committed to the prejudice of the accused. Judgment affirmed.

GUDGELL et al. v. TYDINGS et al.

(Court of Appeals of Kentucky. January 22, 1889.)

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.

Land was conveyed to a husband in trust for his wife for life, with remainder to her children, which the husband and wife conveyed in fee to defendants' grantors. *Held*, that the grantors took but a life-estate, and, having entered under the deed, the statute of limitations did not begin to run against the children until the death of the wife.

2. COVENANTS—WARRANTY—LIABILITY OF HEIRS.

The conveyance to defendants' grantors being with a general warranty of title, the children are not entitled to oust the defendants of the lands in controversy until they have accounted for the value of lands descended to them, or received as gift or advancement from the vendor; Gen. St. Ky. c. 63, art. 1, § 18, providing that if the claimant has received any estate, real or personal, by gift, advancement, or descent from the vendor, he shall be barred of recovery to the extent of the value of the estate so derived.

3. EQUITY—ACCOUNTING.

Defendants alleged that the moneys received by the vendor had been invested in other lands, in trust for the wife and children, and prayed for discovery of property purchased by the vendor after the sale of the lands in question. Plaintiffs set forth the conveyances in trust, but alleged that the purchases were made with the proceeds of other property belonging to their mother, and that they never consented to any investments. *Held* that, whether the investments were made from the proceeds of the land in question or not, the pleadings were sufficient to require the plaintiffs to account for what they had received by descent or gift from their parents.

Appeal from circuit court, Bath county; ROBERT RIDDELL, Judge.

Ejectment by Richard M. Tydings and others, children and heirs of Elizabeth Adams Tydings and Richard Tydings, against Charles Gudgell and others. Plaintiffs claimed under the will of Charles Binns, Sr., devising the lands in controversy to Elizabeth Adams for life, with remainder to her children. Defendants claimed under a conveyance made by Elizabeth Adams Tydings and husband to Henry Moore. From a judgment for plaintiffs, defendants appeal.

W. P. D. Bush and *R. Gudgell & Son*, for appellants. *Rozel Weissinger* and *R. T. Colston*, for appellees.

PRYOR, J. It is manifest that by the will of Charles Binns, executed in the year 1800, his granddaughter Elizabeth Adams only acquired a life-estate in the land in controversy, with remainder to her children. Binns, the deviser, held the bond of Christopher Greenup, who was the original patentee, for 500 acres of land out of a patent boundary of 1,500 acres, and after the death of Binns, Sr., Greenup conveyed the land (500 acres) to Charles Binns, a son of the deviser, to be held in trust by him for his granddaughter and her children, as provided in the will of his father. Charles Binns, the trustee, desiring to relinquish the trust, and the granddaughter having in the mean time married Richard Tydings, he was permitted to resign, and Richard Tydings, the husband, was substituted as trustee by a regular proceeding in the Virginia county court. Charles Binns, Jr., then conveyed the land to Richard Tydings in trust for his wife, "to be held in accordance with the provisions and

under the trusts imposed by the will of Charles Binns, Sr." This deed was recorded in the county of Bath, where the land was located, and to which Tydings and his wife removed from Virginia, and lived upon for many years. The will of Binns, Sr., was of record in the Bullitt county court, but the title from the patentee, Greenup, down to the vendors of these appellants, is made perfect with the clause in the deed from Greenup to Charles Binns, Jr., showing title in him in trust for the wife of Tydings and her children, and from Binns, Jr., as trustee to Richard Tydings, as trustee, to be held by the latter in the same way. Richard Tydings and his wife sold this land, and made a general warranty deed to the vendors of those in possession, and they are claiming under that title, asserting the right of Tydings and wife to pass the absolute fee, when it is plain from their title they held for life only, with remainder to their children. All the title these purchasers from Tydings and wife obtained was the life-estate of Mrs. Tydings, and, having entered under them, they are in no condition to plead the statute of limitation as a defense to the action. If these appellees, who are the children and descendants of Mrs. Tydings, had brought an action prior to her death against the parties in possession, the fact that they owned by purchase the life-estate of Mrs. Tydings would have been a bar to the recovery. Mrs. Tydings died in 1865, and this suit was instituted in the year 1868. Those entitled in remainder could bring no action to recover the land until the life-estate terminated, and therefore the lapse of time is not a bar to the recovery.

Tydings and wife sold the land to Jones and Moore, separate parcels to each. Whether Jones obtained a general warranty deed or not for his land is immaterial. There was a conveyance made in the year 1836 by Tydings and wife to Henry Moore for his part of the land, with a general warranty of title, and the land in controversy was and is a part of this Moore tract. Tydings and wife, or their heirs, to the extent of assets descended to them from their ancestors, are liable on this warranty; and the right of recovery being established, and a judgment rendered for the land, then, under section 18, c. 63, Gen. St. art. 1, the children of Tydings and wife having received by descent from their parents certain lands, or an interest in certain lands, in the county of Bullitt, they must account to the purchaser from their ancestors for the value of the land thus descended before they are permitted to oust them of the possession of the land claimed in this action. That they did inherit land from their parents this record shews, but the extent and value is not certain, or, if they received title before the death of their parents, it was in the nature of a gift or advancement made after the sale to the vendors of these appellants, and must account for its value before a recovery is allowed.

The statute provides that if the claimant "has received any estate, real or personal, by gift, advancement, devise, descent, or distribution from the vendor, such claimant shall be barred of recovery to the extent of the value of the estate so derived." How much estate these appellees received does not distinctly appear or its value, but that they did receive an estate after the conveyance by their ancestors either of gift or descent is evident. Counsel for appellees maintains that there is no pleading alleging a state of facts showing that appellees had received property by descent or gift from their ancestors, and therefore it was not the duty of the chancellor to make the defense for him. This is really the only question in the case, for if the appellants have set up no such defense the case should not be reversed to enable them to assert this equity.

The appellants, as a defense to the action, allege in their response to the petition for the recovery of this land that the moneys received from the sale of it by the ancestors of the appellees have been invested in other lands for the wife and children of Tydings, upon the same trusts and conditions as the land sold was held by them, and there is much in the record to sustain this position. They claim that, the proceeds having been invested for the benefit of

these claimants, they are estopped, having received other lands in lieu of that sold, from asserting their claim. The appellees are also called on to show or state the property purchased by their ancestors after the sale of the Bath county land. These purchases are all set forth by the appellees, and the conveyances made are in trust to Mrs. Tydings and her children. Why this was done is explained, or attempted to be explained, by the appellees, upon the idea that this property was purchased by the proceeds or income of certain property belonging to their mother, and the conveyances made to her and her children. This applies to the Bullitt county land, which was secured to the appellees and their mother by a regular conveyance. The appellees say they never consented to any investment, and in fact that the investments were made out of moneys belonging to their mother, and the chancellor below, proceeding on this theory, which has much proof to sustain it, permitted the recovery.

Whether the investments were made out of the proceeds of the Bath county land or not, it is plain that their father and mother made the investments, and the children derived the benefit of them at the death of the mother, and to the extent of that benefit the appellees will be denied the right of recovery, and the pleadings were sufficient to authorize the chancellor to require these appellees to account for what they had received by descent or gift from their parents. The judgment is therefore reversed, and remanded, with directions to require the commissioner to ascertain the value of the property derived by these children either by gift or descent from their parents, and, if it exceeds in value or is equal in value to the land sought to be recovered, the recovery should be denied; the value to be fixed on the land at the time it was given or descended. If of less value, then to the extent of the value no recovery can be had.

HOLT, J., not sitting.

REINKE v. MORSE.

(Court of Appeals of Kentucky. January 31, 1889.)

1. JUDGMENT—SETTING ASIDE DEFAULT—NEW TRIAL.

Where the counsel for defendant was compelled to leave the city on the day of the trial, and gave his answer to another attorney, who was employed in the case, to file, and the latter was sick during the week when the case was heard, a judgment by default against defendant was properly set aside, and a new trial granted.

2. NEW TRIAL—APPLICATION—PROCEDURE.

But the relief asked in the petition for new trial being only for permission to file an answer in the original action, the court erred in passing on the merits on proofs submitted by the defendant alone, when there was no suggestion that such a course would then be pursued.

3. APPEAL—RIGHT TO SAME—MOTION FOR NEW TRIAL.

It was not essential to plaintiff's right of appeal from such action of the court that he should have made a motion for a new trial as in an ordinary action.

Appeal from chancery court, Kenton county; J. W. MENZIES, Chancellor.
Appeal from an order setting aside a default and granting a new trial.
Wm. Goebel, for appellant. Geo. R. McKee and Irving Halsey, for appellee.

PRYOR, J. A judgment by default had been rendered in favor of the appellant against the appellee, and the appellee, after the term at which the judgment was rendered, filed this petition, asking for a new trial on the ground that she had a valid defense to the action, and alleging facts that, if true, constituted such a defense as entitled her to a hearing in the original action. She asked that the judgment be set aside that had gone by default, and that she be permitted to answer. The grounds for the new trial were controverted by

the appellant, as well as the cause of defense. The deposition of the defendant (appellee) was taken, conducing to establish her defense, but no proof taken by the appellant. The case was submitted, and a judgment rendered, not only granting the new trial, but deciding the case on its merits for the appellee.

The case is brought to this court, and a reversal asked on two grounds: *First*, because the evidence did not authorize the granting of a new trial; *second*, the court abused its discretion in passing on the merits of the controversy when no proof had been taken by the appellant, and when the appellee only asked for a new trial, and that she be permitted to file her answer in the original action. The counsel for the appellee in the original action was compelled to leave the city of Covington on the day of the trial, and gave his answer to Judge McKee to file in the case, who was also employed, and the judge, being unwell, did not attend the court, and was physically unable to be present during the week when the case was heard and the judgment rendered. Under the circumstances, the court acted properly in granting a new trial, but erred in passing on the merits when the relief asked for was permission only to file an answer in the original action. While the court might have disposed of the whole case on its merits, where the parties had prepared the action for a new trial with that view, yet when the object of the petition is that the party be allowed to plead to the action in which the judgment by default was rendered, it would be misleading to the defendant in the petition for a new trial to submit on the original case also, when he had made no preparation, and in the absence of any suggestion by the plaintiff or the court that the case would be heard, not only on grounds for a new trial, but on the merits of the action in which the judgment by default had been rendered.

It is urged that before an appeal could be taken there should have been a motion for a new trial, as in an ordinary action. While this is a petition for a new trial of an ordinary action, we know of no rule of practice that requires, in an independent action of this character, a motion for a new trial at the instance of the party whose judgment has been set aside. It has always been treated as in the nature of an equitable action, by which causes are presented for granting the new trial that did not exist or were not known when the judgment that is set aside is rendered. The trial court alone can dispose of the question involved. It is not an issue of fact, the trial of which by a jury has been waived, but the judge alone has the power to dispose of the issue. Nor is this brought within the class of cases where the action does not stand regularly for trial, as in the case of a judgment prematurely rendered,—a motion to set aside the judgment before an appeal can be prosecuted. The action did stand for trial, and the court had the jurisdiction to render the judgment, but erred in rendering a judgment determining the merits of the controversy, instead of remanding the parties to the original action, and allowing the appellee to file her answer in the action for the recovery of the balance due on the note in controversy. This case comes from the superior court, and the reversal there concurred in for the reasons indicated.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

DIXON v. LYNE *et al.*

(Court of Appeals of Kentucky. January 31, 1889.)

1. JUDGMENT—VACATING—DISCRETION OF COURT.

Where, owing to a misunderstanding between a defendant and her attorney, attributable to the negligence of a third person, the real defense is not interposed, and she does not discover the fact until after judgment has been rendered against her, it is no abuse of discretion to set aside the judgment.

2. FRAUDULENT CONVEYANCES—CONSIDERATION.

A husband being insolvent, and having only the land in controversy to live on, his wife's brother advanced him various sums of money, to enable him to pay his debts and educate his children, in consideration of which advances the husband conveyed the land to the brother in trust for the wife. *Held*, that the deed was supported by a valid consideration.

Appeal from circuit court, Henderson county; BEN P. CISELL, Judge.

George L. Dixon brought this suit against Henry Lyne, Anna C. Lyne, his wife, *et al.*, to subject to the payment of a debt alleged to be due plaintiff by Mary B. Hopkins, deceased, certain lands that had descended to the defendants, her heirs at law. One of these tracts of land, it was alleged, had been voluntarily conveyed as a gift by Henry Lyne to John Kelley, as trustee for his wife, Anna C. Lyne. Lyne and wife traversed these allegations, and the trial court found in their favor, dismissing the plaintiff's petition as to Mrs. Lyne. Plaintiff appeals.

S. B. & R. D. Vance, for appellant. *Alvin Duvall*, for appellees.

PRYOR, J. The appellant is attempting to subject the land conveyed by the husband of Mrs. Lyne to John Kelley, as trustee for her, (she being his sister,) to the payment of a debt for which the land is liable, in the event the deed was voluntary, or without any other consideration than that of love and affection. A judgment was rendered after a defense had been made by Lyne and wife, and by others who were defendants, and resisting the recovery, but at the same term of the court set aside at the instance of Mrs. Lyne, on the ground that her real defense had not been interposed. The defense of the wife was that her brother John Kelley had purchased this land for \$3,000 in money actually paid by him, and the conveyance was then made to her brother as trustee for her benefit. Why this defense was not interposed when the case was originally heard is to be attributed to the neglect of the husband. The wife, on the motion to set aside the judgment, shows by the affidavit of her husband that she was sick, and unable to attend at the office of her lawyer, and intrusted her defense to her husband, who swears he understood that he had given the attorney the character of the defense his wife had, and there must have been some misunderstanding between himself and the attorney in regard to the matter. The attorney swears he never understood that he was to make a separate defense for Mrs. Lyne, but made a defense common to all the defendants attacking the validity of the note sued on, or the judgment obtained upon it. The affidavit of F. F. Cheaney was filed, who says that he was at the home of Lyne, and his wife then talked of her defense, and that was the purchase of the land by her brother for her; that he was an innocent purchaser, and she could hold the land, but would not make the defense, and intended to stand by the answer already filed in the case. This affidavit, or the facts contained in it, are contradicted by the affidavit of Mrs. Lyne, who denies the conversation, and says that her defense was the purchase by her brother of the land sought to be subjected, and the conveyance made for her benefit.

The conveyance by Lyne, the husband, to Kelley, as trustee for his wife, was executed and recorded on the 29th of August, in the year 1874, nearly 10 years before this action by the appellant was instituted, and it is singular that the defense was not made at the first hearing. We are satisfied the facts of the defense were not made known to the attorney, but equally well satisfied that the wife supposed the defense had been made and relied on it to defeat the recovery. The discretion of the trial court was not abused in setting aside the judgment.

The husband swears that the money constituting the consideration for the conveyance to the wife had been advanced to him and his wife by her brother, who lived in Nevada; that it was advanced is apparent from the statement made by the husband both as to the time and manner of receiving it; and, if

untrue, his statements could have been easily contradicted. Some of the money was sent to the husband or wife a few days before the conveyance was made, and there is but little doubt as to their having received this money.

It is urged that these various sums sent by the brother for the benefit of his sister were gifts from him, and that no consideration therefor was received or expected. Whether so or not, the land was conveyed in consideration of the money actually received, and long before this action was instituted. The husband was insolvent, and had nothing but this land to live on. The brother of the wife was aiding him to pay his debts and educate his children, and it is not unreasonable to suppose that the brother would secure in some way to his sister this money that he was constantly advancing to a thriftless husband. The best evidence of this fact is the conveyance itself, made many years prior to this litigation, sustained by the testimony of Lyne, and the fact that the money was actually advanced.

The judgment, in our opinion, was proper, and is now affirmed.

DAVIS v. CORNELIUS.

(Court of Appeals of Kentucky. February 5, 1889.)

DOWER—ALLOTMENT—EVIDENCE.

Plaintiff, a widow, resided with her daughter on land which had been conveyed to the daughter by plaintiff's husband during coverture, and in which conveyance plaintiff did not join. In an action for allotment of her dower, defendant, a purchaser from the daughter, relied upon statements which he and one witness testified were made by plaintiff before his purchase, and while she resided on the land, to the effect that she claimed no interest in the land, that it belonged to the daughter, and that plaintiff "had given her up the land." At the time these statements were made the deed to the daughter was on record. Plaintiff denied making any such statements. *Held*, that the proof was not sufficient to estop plaintiff to claim her dower.

Appeal from chancery court, Pendleton county; J. W. MENZIES, Chancellor.

This was a suit by Elvira Cornelius against Nathaniel Davis for allotment of her dower in a tract of land owned by defendant. There was a judgment for plaintiff, from which defendant appeals.

Clarke & Applegate, for appellant. *J. L. Dougherty*, for appellee.

PRYOR, J. The attempt in this case is to divest the widow of dower upon her representations to the purchaser that she had no interest in the land, but that it belonged to her daughter, who had married, and, together with her husband, sold the property. The appellant (the owner) says that the appellee told him she claimed no interest, and induced him to make the purchase. This is denied by the appellee, and, on the contrary, she says that she always asserted her right. Chiles says that long before he purchased for Davis, the appellee told him it belonged to her daughter, and she had given her up the land. The realty did in fact belong to her daughter. Her father, during his life, had made her a deed of record in the county where all these parties lived. He left his widow in the possession at his death where she continued to reside until this purchase was made. That the widow might be estopped, as others, from asserting a right of ownership in property left her by her husband, and purchased by those who relied on her statements that she had no interest, is well settled; but the proof should be more convincing than in this case before the chancellor would deprive her of dower in the realty sold by the heirs. She was in the possession, and had been for years, and, whether living with her daughter, or the daughter with the mother, is immaterial, as the claim of the one was not hostile to that of the other. The deed was of record under

which the daughter held. Her mother was not a party to it, and the purchaser must have known this when investigating the title. It was an easy matter to have had the mother unite in the conveyance by the daughter and her husband, and certainly much more secure than relying on conversations that are detailed by the appellant, and denied by the appellee, purporting to have occurred many years before this suit was instituted. The chancellor below knew these parties, the circumstances surrounding them, and was not satisfied that under the proof the widow should be deprived of her dower in the property. In this conclusion we concur.

Judgment affirmed.

LOUISVILLE & N. B. Co. v. BERRY.

(Court of Appeals of Kentucky. February 7, 1899.)

RAILROAD COMPANIES—DEFECTIVE PLATFORM—LIABILITY—EVIDENCE.

In an action against a railroad company for personal injuries, where it appears that plaintiff, a boy of 14, was sent to the depot with a lady passenger, and while there, by reason of the defective condition of the platform, he fell with one leg under the wheels of the train, whereby he was injured, evidence that he had been in the habit of jumping on the cars when they stopped, and had been warned of the danger, is inadmissible.

Appeal from court of common pleas, Jefferson county; H. J. STITES, Judge. Action by Lewis H. Berry, a minor, by next friend, against the Louisville & Nashville Railroad Company, for personal injuries. Judgment for plaintiff, and defendant appeals.

Barnett, Noble & Barnett and *Wm. Lindsay*, for appellant. *Baker, Kinney & Kinney*, *O'Neal*, *Jackson & Phelps*, and *Jas. W. Head*, for appellee.

PRYOR, J. The appellee, Berry, a boy about 14 years of age, at the instance of Mrs. McGee, with whom he lived, and by whom he was controlled, accompanied a lady and her child to the depot of the defendant, to aid her in boarding the train. It was after night, and dark, when the train approached. The platform from which passengers get on and off the train lies between the two tracks of the railway, and is about four feet wide, with the edge of the cars when they reach the platform extending over it some four or five inches. After the boy had reached the platform, and the lady had entered the car, the boy, on leaving the platform, stepped with one foot into a hole that had been caused by the rotting of the plank, causing the appellee to fall with one leg protruding under the wheels of the cars as they moved off, crushing his ankle and foot in such a manner as required his leg to be amputated. He claimed that the company knew of the defect in the platform, or by the exercise of ordinary care should have known it, and was awarded compensatory damages for the injury sustained. The case went to the superior court, and was there affirmed, and an appeal was then prayed and granted to this court.

The boy testifies as to the fall caused by the defect in the platform, and the injury received. The hole in the platform at the place where the boy says he was injured was visible, and caused by the decay of the timber. Blood was seen near the place where the injury occurred, and he was carried from the spot by those who heard his cry of distress in that direction. The foot or ankle was crushed as the train moved off. That the platform was much out of repair, and had been for a long time, is sustained by the weight of the testimony; and the injury to this boy was caused by this defect in the platform that should have been observed and remedied by the defendant's employees.

We are satisfied from the testimony that the injury resulted from the causes alleged in the petition, but the appellant, in making out its defense, insisted on proving by the appellee and others that he was in the habit of jumping on the cars when they stopped at the station, and had been warned of the danger, and hence the jury had the right to infer that it was the boy's own negligence

that caused the injury, and not the defect in the platform. If the habit of the boy had been established, as the appellant offered to prove, it would not have authorized the jury to say that he was stealing a ride on the cars, and in getting off caused the injury. It is shown that he was sent to the depot by the lady with whom he lived; that he accompanied the passenger to the train at her instance, and had the right to be on the platform at the place where he was injured. That he was at this particular spot, and was injured by reason of the defective and rotten plank, is sworn to positively by the boy, and his statement corroborated by circumstances that are convincing; and the mere fact that he had been in the habit of exposing himself to danger on former occasions, or had theretofore placed himself in positions where he might have been injured in the same manner, was not only insufficient to contradict the testimony on that subject offered by the plaintiff, but was incompetent for any purpose. Neither the boy's habits nor his bad character constituted a defense to the recovery.

The opinions of one or more witnesses for the appellant were permitted to go to the jury, to the effect that the boy was not injured in the manner stated by him; and an instruction given by the court to the effect that if the boy was stealing a ride on the train of appellant, and thereby caused the injury, the company was not responsible. Whether there was proof to authorize such an instruction it is not necessary to determine; but the fact that he had previously been guilty of such negligence threw no light on the issue made. Such misconduct on the part of the appellee did not prevent him from recovering, if injured by reason of this defect in the platform.

In *Gahagan v. Railroad Co.*, 1 Allen, 187, the issue presented was as to the negligence of the company in the use of the highway at the time the plaintiff's intestate received the injury for which the recovery was asked. The plaintiff offered to prove the habit of the company at other times in the use of the highway to show negligence, and the court held that it had no legitimate bearing on the issue, and was properly excluded.

There was evidence for both the appellant and the appellee showing the movements of the boy from the time he reached the depot until he was injured, and from that evidence the jury returned their verdict. "As a general rule, therefore, it is inadmissible, when the issue is whether A. did a particular thing, to put in evidence the fact that he did a similar thing at some other time. To admit evidence of such collateral acts would be to oppress the party implicated by trying him on a case as to which he has no notice to prepare, and sometimes by prejudicing the jury against him by publishing offenses of which, even if guilty, he may have long since repented, or may have long since been condoned." 1 Whart. Ev. § 29. The effect of such testimony as was excluded in this case, if permitted to go to the jury, would have been to prejudice the jury, or at least lead their minds to the conclusion that if a bad boy, although injured by the neglect of the company, his measure of compensation should be lessened by reason of his reckless or mischievous habits. We perceive no objection to the instructions; in fact, they were more favorable for the appellant than they should have been. Nor does the alleged misconduct of the juror or counsel for the plaintiff authorize a reversal.

The judgment below is therefore affirmed, with damages.

STATE *ex rel.* McGRATH v. WALKER, State Auditor.

(Supreme Court of Missouri. February 4, 1899.)

STATE AND STATE OFFICERS — SECRETARY OF STATE — COMPENSATION ON BOARD OF EQUALIZATION.

By Const. Mo. art. 5, § 24, the secretary of state shall receive for his services a salary to be established by law, and shall receive to his own use no fees or other compensation, but such fees shall be paid into the treasury. Article 10, § 18, pro-

vides for a state board of equalization, consisting of the governor, secretary of state, and others. *Held*, that the secretary of state is entitled to receive the compensation provided by law for services as a member of the board of equalization.

Application for *mandamus*.

M. K. McGrath seeks by this proceeding against John Walker, state auditor, compensation for services as a member of the state board of equalization.

M. K. McGrath, relator, pro se. The Attorney General, for respondent.

SHERWOOD, J. This, an original proceeding, is instituted by the relator to compel payment to him of a certain sum for services rendered by him as a member of the state board of equalization; he being secretary of state. It is admitted by respondent that an appropriation has been made, and that there is in the state treasury, and belonging to the proper fund, the necessary amount for the payment of such claims as that of relator; so that the only point presented in the present instance is whether relator is entitled to the relief he seeks, *i. e.*, to compensation for the services it is admitted he has rendered.

Section 24 of article 5 of our state constitution is the following: "Sec. 24. The officers named in this article shall receive for their services a salary to be established by law, which shall not be increased or diminished during their official terms; and they shall not, after the expiration of the terms of those in office at the adoption of this constitution, receive to their own use any fees, costs, perquisites of office, or other compensation. All fees that may hereafter be payable by law for any service performed by any officer provided for in this article shall be paid in advance into the state treasury."

Section 18 of article 10 of the same instrument provides that: "Sec. 18. There shall be a state board of equalization, consisting of the governor, state auditor, state treasurer, secretary of state, and attorney general. The duty of said board shall be to adjust and equalize the valuation of real and personal property among the several counties in the state, and it shall perform such other duties as are or may be prescribed by law."

It will thus be seen, from the provisions of the constitution just noted, that the state officers mentioned in section 24, *supra*, are not *ex officio* members of the state board of equalization; that is, their membership of that board is not the result of their holding certain state offices, but is the result of their appointment to such board by an independent and distinct provision of the constitution. 1 Burrill, Law Dict. tit. "Ex Officio." But for such independent provision, they would not have been members of such board. And, even if they were *ex officio* members of such board, it does not thence follow that relator is not entitled to maintain the present proceeding, because section 24, above quoted, makes special provision that the officers mentioned therein "shall receive for their services a salary to be established by law." Under the terms of so broad a grant of power, it was competent for the legislature to have trebled the salary of the officers mentioned, or to have placed it at whatsoever figure they wished. In any event, therefore, it was within the scope of power, in this behalf, granted the legislature, for them to have enacted that the officers referred to should receive certain sums resulting from the performance of certain duties imposed by the constitution, whether those duties be regarded as duties *ex officio* or not.

It is not thought, however, that section 24, in its subsequent provisions as to fees, costs, etc., was intended to treat of anything except fees, etc., that strictly pertained to the offices therein mentioned, at the time of the adoption of the present constitution. Thus the attorney general, state auditor, and secretary of state were entitled to certain fees, etc., which fees, etc., were abolished by the constitution of 1875, and are now paid directly into the state treasury. 2 Rev. St. 1879, §§ 5597, 5598, 5643. The framers of the consti-

tution must be presumed conversant with that fact, and to have had an intelligent purpose in so framing section 24. It is not thought that section was intended to be extended any further than above stated. It therefore should be limited to the mischiefs and evils it was specially designed to remedy, and should not be so applied as to prevent the payment of the proper compensation for services rendered in another and distinct department of public service. Besides, the legislature has taken the same view in amending the law of 1872, in conforming it to the constitutional provisions aforesaid, as shown by the Revision of 1879. 2 Rev. St. §§ 6666-6669, and note.

Taking the whole history of the equalization of taxation as shown by the statutory and constitutional provisions before mentioned, it may be safely assumed that the purpose of the framers of the constitution in ordaining section 18, *supra*, was simply to provide a smaller body of men to equalize taxation, and thus secure a more economic method of accomplishing the desired object; and, as the former board received compensation for their services, so, also, should the present one. In Illinois, from which state we derived section 24 of our constitution, (see Const. Ill. art. 5, § 23,) it has been the unquestioned practice for years to allow the state auditor compensation for his services on the state board of equalization. Laws Ill. 1888, § 116. A different conclusion from that above indicated was announced in *State v. Holladay*, 67 Mo. 64; but that ruling was not made by a full bench, and was by a divided court, and should no longer be received as authoritative.

We therefore award a peremptory writ.

All concur.

CITY OF ST. LOUIS v. LANIGAN *et al.*

(Supreme Court of Missouri. February 4, 1889.)

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE—EMINENT DOMAIN.

The report of commissioners in condemnation proceedings will not be set aside on the evidence, unless the court is clearly satisfied that they have erred in the principles upon which they have made their appraisal.

2. SAME—RECORD—PRESUMPTION OF JURISDICTION.

The record being silent, it will be presumed that a court of general jurisdiction in some way acquired jurisdiction of all the defendants against whom it rendered judgment.

3. SAME—DECISION—REVERSAL.

A judgment in condemnation proceedings will not be reversed because of failure to obtain jurisdiction of certain defendants whose lands and interests are separate and distinct from those of the defendant who appeals.

Appeal from St. Louis circuit court; L. B. VALLIANT, Judge.

Proceedings by the city of St. Louis against Michael Lanigan, Peter Ratz, and others, to condemn land for extending and opening a street. The commissioners' report was confirmed, and defendant Ratz appeals.

W. F. McEntire, for appellant. *Leverett Bell*, *W. F. Broadhead*, and *Alex. Martin*, for respondent.

SHERWOOD, J. This proceeding was instituted in the circuit court of St. Louis, for the purpose of extending and opening High street, which is numerically Twelfth street, from Lucas avenue to Franklin avenue. As might be readily suspected by those acquainted with the city of St. Louis in that locality, the opening of the street there involved the property rights and interests of a large number of defendant owners, and the record in consequence is very voluminous. On the coming in of the report of the commissioners three of the land-owners excepted. All of them, however, abandoned the contest as to the insufficiency of the damages awarded each of them, but Peter Ratz, who brings this cause here by appeal, alleging, as in the court below, the in-

sufficiency of the damages awarded him. The exceptions came on to be heard; the court heard testimony; and, after carefully considering the same, overruled the exceptions, and confirmed the report of the commissioners.

The complaint made here is that the order of the court overruling defendant's exceptions "is against the weight of evidence." It has been established by a long line of decisions, so numerous as not to require their citation, that in law cases, aside from those where mistake, fraud, prejudice, or passion manifest themselves in the rendition of a verdict, this court will not interfere by weighing the evidence on which the verdict is founded. Obviously, the same rule must obtain in all other law cases.

The court below has advantages which this court does not possess, and cannot possess, in relation to the demeanor of witnesses who testify respecting the litigated matter. Even in equity cases, we defer somewhat to the views of the trial court. Besides, in cases of the sort now under consideration, it is to be observed that the judgment of the commissioners is not formed exclusively upon evidence submitted to them. They are required to view the premises, and they have the advantage of an actual personal inspection, and they are to be guided to some extent by that. Selected because of their capacity and fitness for the position they are called upon to fill; required to be disinterested; sworn to a faithful discharge of the duties imposed upon them,—their report should not be set aside but upon satisfactory grounds. The testimony of witnesses as to value, whether heard before the commissioners or subsequently, by the court on exceptions filed, though entitled to due consideration, is not controlling; and, "unless the court is clearly satisfied that they have erred in the principles upon which they have made their appraisal, there is nothing for review and their report should not be disturbed." *Railroad Co. v. Richardson*, 45 Mo. 466; *Railroad Co. v. Campbell*, 62 Mo. 585. Reading the testimony in this cause in the light of the authorities cited, no reason is seen calling upon this court to differ from the conclusion reached by the trial court as to the merits.

2. But it is urged that the judgment herein should be reversed because rendered against Henry Leamed and Patrick McMahon, who were parties defendant, but who were not served with process nor by publication, nor did they enter appearance to the action; and the proceedings were never dismissed as to them; and that it should also be reversed because, though Anna M. O'Fallon was duly served with process, yet that she was described as the wife of James J. O'Fallon, and the latter was not made a party. In relation to Patrick McMahon, the record shows that "Mrs. P. McMahon" entered her voluntary appearance to the action, and, in absence of aught to the contrary in the record appearing, it must be taken for granted that she was the McMahon mentioned in the petition, writ, and judgment, and the real party in interest. Now, as to Henry Leamed, mentioned as the husband of Mary C. Leamed and James J. O'Fallon. Regularly, the husband of a wife, proceeded against in actions of this character, should be made party defendant, and should be served with process. Anna M. O'Fallon was served with process, and Mary C. Leamed by publication. Why it was James J. O'Fallon was not made party to the suit, and why Henry Leamed was not served by publication, is a matter on which the record is silent. In such circumstances it will be presumed that the circuit court obeyed the rules of law, had acquired jurisdiction as to Henry Leamed in some appropriate way, and had found it unnecessary to bring in James J. O'Fallon. If the latter was resident abroad, this fact would obviate any necessity for making him a party, and allow his wife to be proceeded against as a *feme sole*. *Musick v. Dodson*, 76 Mo. 624, and cases cited. No rule is better established than that, in order to convict a court of general jurisdiction of error, the error complained of must be made to appear, for it will not be presumed. Indeed, every presumption faces the other way. *Huxley v. Harrold*, 62 Mo. 516; *Gates v. Tusten*, 89 Mo. 13; *Schad v. Sharp*, 95 Mo.

573, 8 S. W. Rep. 549. "Nothing should be intended to be out of the jurisdiction of a superior court but that which specially appears to be so." *Id.* Such courts proceed by right, and not by wrong, and the presumption that they do so will attend their acts and doings even in causes coming up to this court on error or appeal. *Blair v. Railroad Co.*, 89 Mo. 383, 1 S. W. Rep. 350. But this court will not lend a very attentive ear to such complaints on the part of the present defendant. He is not injured by any of the matters mentioned, and he has no right to the reversal of a judgment for errors which do not affect him. *Papin v. Massey*, 27 Mo. 445; *Mead v. Brown*, 65 Mo. 552. Our statute forbids this court to "reverse the judgment of any court unless it shall believe that error was committed by such court against the appellant or plaintiff in error, and materially affecting the merits of the action." Another statute commands us to "disregard any error or defect in the pleadings and proceedings which shall not affect the substantial rights of the adverse party." Whatever wrongs Leamed, O'Fallon, and McMahon may suffer will not affect the rights of the complaining defendant in this cause. Moreover, those cases which hold that a judgment against several defendants for a sum of money is an entirety, and if erroneous as to one is erroneous as to all, have no applicability to cases where the judgment or decree is as to land. *Enos v. Capps*, 12 Ill. 255; *Dickerson v. Chrisman*, 28 Mo. 134. And, furthermore, this court will not reverse a judgment in a case of this kind on an empty technicality such as now urged here. *Copeland v. Yoakum*, 38 Mo. 349. Holding thus, we affirm the judgment.

All concur.

CITY OF ST. LOUIS v. EXCELSIOR BREWING CO.

(*Supreme Court of Missouri*. February 4, 1899.)

1. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENT—ASSESSMENTS—CONCLUSIVENESS.
The charter and ordinances of the city of St. Louis, relating to opening, etc., streets, provide for notice to the property owners of the time and place of making an assessment for benefits by the commissioners, and gives them the right to a hearing before the commissioners, and before the circuit court, on exceptions. *Held*, that in a suit on a tax-bill for the amount of an assessment for benefits derived from widening a street, the report of the commissioners is conclusive on the question of whether the property assessed is benefited, and as to the extent of such benefit. Following *City of St. Louis v. Rankin*, 9 S. W. Rep. 910.
2. SAME—COMMISSIONERS' REPORT.
Instructions given at the request of the city, based on the erroneous supposition that the jury can fix and assess the benefits, do not, as against the city, cure the error in an instruction to disregard the report.
3. APPEAL—REVIEW—OBJECTIONS NOT MADE BELOW.
Exceptions to the introduction of evidence, not made a ground of complaint in the motion for new trial, cannot be considered on appeal.
RAY, C. J., dissents.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

L. Bell and *T. H. Culver*, for appellant. *G. M. Stewart*, for respondent.

PER CURIAM. This is a suit on a special tax-bill issued by the comptroller of the city of St. Louis, because of benefits assessed against defendant's property by commissioners appointed in a proceeding in the St. Louis circuit court to condemn property for the purpose of widening Eighteenth street from Clark avenue northwardly for a distance of about 191 feet. The commissioners assessed the benefits at \$1,093, and the tax-bill is for that amount. There was a verdict and judgment for the plaintiff, but it is for \$300 only, and the plaintiff appealed.

Some exceptions were taken by the plaintiff to the introduction of evidence by the defendant, but, since these rulings are not made a ground of complaint in the motion for a new trial, we cannot consider them here.

The court, by the second instruction given at the request of defendant, told the jury that, in making up the amount of their verdict, they should disregard the report of the commissioners made in the suit to condemn property for widening Eighteenth street. In this the court erred. The questions whether the defendant's property was benefited, and to what extent it was benefited, by the widening of the street, are settled and determined by the report of the commissioners, and are not open to fresh inquiry in a suit on the special tax-bill. This we held in the recent case of *City of St. Louis v. Rankin*, 9 S. W. Rep. 910. The tax-bill sued on in that case and the one sued on in this case were issued on the same report. The report of the commissioners, instead of being disregarded by the jury, should have been taken as the only evidence of the amount of the benefits. This is so unless there is some provision which makes the tax-bill *prima facie* evidence of the matters stated therein, and of this we are not advised.

The instructions given at the request of the plaintiff seem to be based upon the erroneous supposition that the jury in this suit could fix and assess the benefits, but that does not cure the error in excluding the report.

With these conclusions we need not examine the fourth instruction given at the request of defendant, in which it would seem there must be some clerical error. The judgment is reversed and cause remanded.

RAY, C. J., dissents. The other judges concur.

ST. LOUIS & S. F. RY. CO. v. EPPERSON, Tax Collector.

(Supreme Court of Missouri. February 4, 1889.)

1. ELECTIONS AND VOTERS—NOTICE OF ELECTION—COUNTY INDEBTEDNESS—CONSTITUTIONAL LAW.

Under Const. Mo. art. 10, § 12, providing that any county incurring any indebtedness requiring the assent of two-thirds of the voters "shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof;" and under Rev. St. Mo. § 6309, and act 1883, amending sections 6508 and 6810, referring to notice of the election, and of the amount of the debt,—it is essential to the validity of the proceedings that the order or notice of election, or the ballots, shall specify, for the information of voters, the amount of the proposed indebtedness.

2. RAILROAD COMPANIES—TAXATION—LEVY.

Under Rev. St. Mo. § 6879, requiring the county court to levy taxes on railroad property within the county, a railroad tax-book, extended by the clerk, without any such levy having been made by the court, by means of the rates and *duties* obtained from an order of the court levying taxes on the general property of the county, is wholly unwarranted and void.

3. TAXATION—LEVY—CERTIFIED TAX-BOOK—TRESPASS.

A tax-book not authenticated by the county clerk and the seal of his office, as required by statute, affords the collector no authority or protection for his levy, and he must be regarded as a trespasser *ab initio*.

4. SAME—ESTOPPEL—IN PAIS—STATEMENTS OF ATTORNEY.

Where the collector is fully informed, before making a levy, that the tax is void, and that it will not be paid, he cannot rely upon previous statements of the owner's attorney (who was unaware of the illegality of the tax, and was only authorized to pay the legal taxes) in relation thereto as an estoppel.

5. SAME—VOID TAX—ENFORCEMENT—REMEDY BY INJUNCTION.

Where property has been levied on to enforce payment of a void tax, injunction is the proper remedy.

Appeal from circuit court, Laclede county; W. I. WALLACE, Judge.

John O'Day, for appellant. Nixon, Quinn & Bradfield, for respondent.

SHERWOOD, J. In September, 1883, the citizens of Laclede county, desiring to raise a fund with which to construct a court-house, presented to the

county court a petition asking for an election to be held for the purpose of voting upon a proposition to incur an indebtedness of the county for such purpose. The order was made in September, and the election held in November. The order for this election did not specify the amount of indebtedness which it was proposed to incur, nor was it specified in the notice thereof which was given as required by law, or in the ballots used by the electors participating in the election.

At the December term, 1883, of the county court, it was ordered by the court that a levy of 30 cents on the \$100 valuation be made for three successive years for the purpose of raising funds to erect a court-house; but no indebtedness therefor was ever incurred. On June 4, 1884, the county court of Laclede county made the regular annual order levying taxes upon all property other than railroads. In July, 1884, John Kellerman, who was a deputy in the county clerk's office, without any order or authorization by the county court, made out a pretended railroad tax-book, and extended thereon taxes against the property of appellant at such rate as he was assured by the county officers would be paid by it, and, after doing so, delivered the same to the collector.

In the following December, the representative of plaintiff, having gone to Laclede county for the purpose of paying such taxes as were due, discovered that no order of the county court levying taxes against its property had ever been made; whereupon a special session of the county court was called, which, on the 19th of December, levied taxes against the plaintiff for state, county, school, and municipal purposes, and among the other taxes levied was one of 30 cents on the \$100 valuation as a "court-house tax," and which was in addition to and in excess of the regular authorized levy of 50 cents on the \$100 valuation for county purposes. All taxes other than the one last named were paid by the company immediately after the levy was made, and payment of the latter was refused. The collector, defendant here, was repeatedly notified that the tax was unconstitutional, illegal, and void.

On the 16th day of July, 1885, the plaintiff owned in Laclede county more than 2,000 acres of land. It had piled upon its right of way through the county a great number of ties, was possessed of considerable personal property situated in said county, and had standing upon its side tracks at Lebanon empty cars worth from \$3,000 to \$10,000. Notwithstanding the presence of this property which could have been levied upon by defendant, he, by the order and direction of the county court and his attorneys herein, seized a freight train loaded with live-stock and perishable property, chained the same to the track, and detained it from 10 o'clock in the morning until 5 o'clock in the afternoon of the same day, causing the entire movement of trains on plaintiff's road to be demoralized, great loss to ensue to it and its patrons, and much business to be diverted from its road at competing points. Severe shrinkage in value of the live-stock in transit, and material injury to perishable property, was occasioned by reason of the unusual detention. Plaintiff wired the defendant that, if he would release the perishable property held by him, it would run to Lebanon, and turn over \$50,000 worth of empty cars in lieu thereof. This was refused; but at 5 o'clock in the afternoon of the seizure the defendant turned over to plaintiff the train in question, upon the latter giving to the former a delivery bond, by which it was agreed that the same should be restored before the day of sale, which had been fixed for the 21st day of July, 1885, and previous to which day the railway company, in compliance with its bond, did restore the train to the defendant; after which time, and on the 20th day of July following, it filed its petition herein asking for an injunction, that the tax be declared illegal, and that it have and recover all the damages which it had suffered by reason of the unlawful detention aforesaid. A temporary injunction was granted; and at the August term, 1887, the case was by agreement heard upon the motion to dis-

solve the temporary injunction, and also upon its merits, at the same time; when the court dissolved the temporary injunction, dismissed the bill, and rendered judgment against the company for costs, from which it has appealed to this court.

1. In the case at bar, as already stated, the plaintiff sought to enjoin the sale of its property, which the defendant had seized and levied on under and by virtue of the tax-book delivered to him as the collector of Laclede county. Such a tax-book, when properly authenticated, is the warrant under which the collector proceeds in the collection of taxes; but the tax-book in this instance was not authenticated by the signature of the county clerk and the seal of his court, and consequently afforded the defendant no authority or protection for his acts. 2 Rev. St. §§ 6723, 6744, 6754. Hence he must be regarded as a trespasser *ab initio*. *Howard v. Heck*, 88 Mo. 456; *Ewart v. Davis*, 76 Mo. 129; *State v. Cook*, 82 Mo. 185; *Warrensburg v. Miller*, 77 Mo. 56, and cases cited.

2. The admitted facts in this case show that the receipt from the auditor of the certificate of the action of the board of equalization, etc., under the provisions of section 6879, was received by the clerk July 28, 1884, and no levy of taxes was made by the county court, as required by that section; but the deputy county clerk, of his own head, in July or August, 1884, during vacation, made out the railroad tax-book already mentioned, and extended the taxes thereon, and this was the only book made out or delivered to the collector; the deputy county clerk, obtaining his rates and his *data*, for that purpose, from the order of the county court, made in June, 1884, levying taxes on the general property of the county. This action of the official mentioned, it is scarcely necessary to say, was wholly unwarranted, and at war with the plain provisions of sections 6879 and 6881 of the revenue law. Whenever, by legislative enactment, power is confided to a particular person or tribunal, to perform specified acts, especially acts relating to the exercise of the important power of taxation, such legislative enactment is mandatory in its nature. Its conditions must be strictly observed; and such power, in order to its validity, must be exercised and exercised only by the person or tribunal upon whom or on which it is in terms confided. This doctrine is recognized everywhere and disputed nowhere.

The ruling of this court made in a case virtually identical with that at bar is decisive of the question here at issue. Thus, in *City v. Railroad Co.*, 81 Mo. 285, it is said: "The clerk is not the county court; and when the county court is required, as a judicial tribunal, to do an act, the record must show that it was done by the court; and the clerk neither in term nor in vacation of court can perform it. 'The tax, of course, must be levied by the tribunal or person to whom the power is delegated.' Blackw. Tax Titles, (2d Ed.) 255; Dill. Mun. Corp. (2d Ed.) 610. 'The power to tax is a high governmental power; * * * and when the legislature grants that high power to another tribunal it can only be exercised in strict conformity to the terms in which the power is granted, and a departure in any material part will be fatal to the attempt to exercise it.' *County Court v. Taylor*, 8 Bush, 206, 208; *Westfull v. Preston*, 49 N. Y. 353; *Beckwith v. English*, 51 Ill. 147. In this case there was no levy of the tax whatever. The clerk certified the amount of taxes due, but it clearly appears—is conceded—that the county court made no levy of the taxes in question. * * * This is the testimony of the clerk of the county court of Jackson county. This is not a mere technical objection to the proceedings, but is substantial." To the same effect, see *Commissioners v. Barker*, 25 Kan. 258; *Cooley, Tax'n*, 292; *Warrensburg v. Miller*, 77 Mo. 56.

The tax-book, therefore, which was delivered to the collector, constituted no warrant for the seizure which he made, and he was informed of this before he assumed to act; and the manner of his action, as already detailed in

the foregoing statement of the case, smacks strongly of an oppressive exercise of official authority, even conceding such authority to be legitimate.

3. But an objection has been urged to the validity of the court-house tax, which is the only one remaining unpaid on plaintiff's list. Section 12 of article 10 of the constitution is as follows: "No county * * * shall be allowed to become indebted in any manner, or for any purpose, to an amount exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose; nor, in cases requiring such assent, shall any indebtedness be allowed to be incurred to an amount, including existing indebtedness, in the aggregate, exceeding five per centum on the value of the taxable property therein: * * * provided that, with such assent, any county may be allowed to become indebted to a larger amount for the erection of a court-house or jail: and provided, further, that any county * * * incurring any indebtedness requiring the assent of the voters, as aforesaid, shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years from the time of contracting the same."

It is quite plain from these organic provisions that, in order to obtain the necessary assent of the voters of a county to the incurring of an indebtedness they must be informed of the amount of such indebtedness, in order to vote intelligently upon the question presented; for otherwise they vote in the dark. In the present case, no such amount—no sum at all as requisite for the purpose of building a court-house—was proposed to or passed upon by the voters who voted at the election called. Without the amount of the debt were known, it would be impossible to designate the amount of the tax necessary to be raised by annual taxation "sufficient to pay the interest on such indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years from the time of contracting the same." The act of 1883, p. 147, which amends sections 6808, 6810, bears out the same idea of the necessity for specifying the amount of the debt to be incurred; and section 6809, which remains untouched by the act of 1883, requires 20 days' notice of the election to be held, under its terms, to be published, etc., and that "such notice shall specify the amount of the debt, the object and purposes thereof, the rate of the increase of the tax levy," etc. None of the conditions specified in the organic or statutory law before mentioned were observed or obeyed, neither in the order of the county court calling the election, the notice of the same, the ballots cast thereat, nor in the order of the county court made thereafter, in this: that the amount of the indebtedness to be incurred is nowhere specified.

The levying of a tax being the exercise of a high governmental power, there must be a distinct authority of law for every levy upon the people under that power. Taxes, therefore, cannot be levied by counties or municipalities, except for the very purpose prescribed by law, and in the manner and under the conditions prescribed by law. Cooley, Tax'n, (2d Ed.) 324, 348, and cases cited. There is no such thing as an implied power in a county court to levy a tax. Their authority to do this springs into being only upon a strict observance of the power expressly conferred upon them by existing laws. *State v. Shortridge*, 56 Mo. 126.

In *State v. Saline Co.*, 45 Mo. 242, under the provisions of a law allowing a subscription to the stock of a railroad company, where the amount to be subscribed was "specified," and this was not done at the time the subscription was voted, the vote was held invalid, and the county court, in consequence of such lack, powerless in the premises. So, also, in Indiana, under a similar statute, the petition did not "specify the amount to be appropriated," nor did the notice to the tax-payers do this; and, it was ruled that the

election was invalid, and conferred no power on the county commissioners to levy the tax, notwithstanding that the petition asked a certain per cent. to be levied on the taxable property of the township; the supreme court remarking, in substance, that the maxim *id certum*, etc., would not apply to such a case; that the legislature did not intend that the tax-payers before voting should have to go to the trouble of ascertaining the amount of the taxables, and then make a calculation to ascertain the amount to be assessed, but that the amount was imperatively required to be specified; that nothing short of this would answer, as the tax-payers were entitled to know the extent of the burden they were asked to assume. *Railroad Co. v. Bearss*, 39 Ind. 598; *Railroad Co. v. Wells*, Id. 539, and cases cited. And so the tax levied in those cases, and all the proceedings connected therewith, were adjudged void and of no effect.

Applying the authorities cited, and the reasons which they give, to the tax proceedings now under consideration, they must also be held fatally lacking in all those essentials necessary to the creation of a valid tax.

4. No estoppel can be invoked against the plaintiff in this cause. The attorney employed to go out to Lebanon had no authority but to pay the legal and valid taxes of the company, and therefore could not bind his employer beyond the power which had been conferred upon him. And it was clearly shown that, at the time the statement was made to the collector about paying the taxes of the company, the attorney was unaware of the illegality of the court-house tax. Besides, the collector shortly thereafter was fully informed of the true situation of affairs, and of the company's intention not to pay the tax; and his situation was not altered in consequence of anything said to him. *Bigelow, Estop.* 438, and cases cited.

5. Now, as to the remedy. Numerous decisions of this court attest that the remedy plaintiff asks is the proper one in cases of this sort. *Valle v. Ziegler*, 84 Mo. 214, and cases cited; *Book v. Earl*, 87 Mo. 246; *Cooley, Tax'n*, (2d Ed.) 763, and cases cited.

The judgment will be reversed, and the cause remanded, with directions to proceed in conformity with this opinion. All concur.

POSTLETHWAITE v. GHISELIN.

(Supreme Court of Missouri. February 4, 1892.)

1. JUDGMENT—COLLATERAL ATTACK—REVIVAL OF ACTION.

Though more than the three regular terms of court allowed by law for the revival of causes against the personal representatives of deceased defendants elapse after the suggestion of the death of a defendant, before steps are taken to revive the action against his executor, when the latter appears and pleads to the merits without objecting on the ground of the delay in the revival, a judgment rendered against the latter is not therefore void, so as to be liable to collateral attack.

2. SAME—FAILURE TO PLEAD STATUTE OF LIMITATIONS.

Nor would the failure of the executor to plead the general statute of limitations to the action invalidate the judgment.

Appeal from St. Louis circuit court.

This is a suit in equity by J. H. Postlethwaite against Horace Ghiselin, administrator, etc., of William F. Ferguson, deceased, to enjoin the enforcement of a demand allowed and classified in the probate court. The facts disclosed by the petition (so far as need be recited for the purposes of the decision) are as follows: An action was brought in 1863 in the St. Louis circuit court by Robert Ober and others against John B. Carson, to recover the price of 34 bales of cotton alleged to have been sold and delivered to said Carson. The action was pending and undetermined when said Carson died. His death was suggested at the October term, 1866. No steps were taken to revive the

cause until February, 1868, during which time six regular terms of the circuit court elapsed. Summons to show cause against revival was then issued and served on the executor, who, at the April term, 1868, appeared and filed an answer to the merits of the action, denying the plaintiff's allegations, but not pleading the statute of limitations or other affirmative defense. The litigation resulted in a judgment against the executor of Carson for a large sum, which was affirmed on appeal by the supreme courts of Missouri and the United States. That judgment (having been allowed and classified in the probate court against said estate) was assigned to one of the present defendants. It is now sought in this proceeding to enjoin its enforcement on the ground that, as the original action was not revived against the executor within three terms after the suggestion of death, the circuit court had no jurisdiction over the executor, and that it was his duty to plead such abatement of the action, as well as the bar of limitation, to the plaintiff's demand therein. The circuit court in the present cause overruled a demurrer to the petition. Defendant declining to plead further, a perpetual injunction against the enforcement of the probate allowance and demand in question was decreed. Defendant appealed.

Given Campbell, for appellant. *H. A. Haeussler, Leonard Wilcox, and E. T. Parrish*, for respondent.

BARCLAY, J., (*after stating the facts substantially as above.*) 1. The principal question here presented is whether the lapse of three court terms after the suggestion of defendant Carson's death deprived the circuit court of jurisdiction to proceed further with the cause, in view of the subsequent appearance of the executor to the merits of the action. The cause of action in the original case was an ordinary one upon contract for the purchase and sale of cotton. It was such as by its nature survived against the executor under our laws. Rev. St. §§ 96, 97. Had there been no action pending when Carson died, it would have been clearly within the power of his executor to enter his appearance voluntarily to a new action of the same nature as the old, at the date when his appearance was actually entered in the pending action. At the date when he filed his answer as executor two years had not elapsed since the death of Carson, as the petition in this case shows. Hence the special administration limitation would then have been no bar to an ordinary presentation of plaintiff's demand to the executor.

The circuit court at that time certainly had jurisdiction of the subject-matter of the pending action, by which is meant that that court had jurisdiction by law of causes of the general class to which that action belonged. Having jurisdiction of the subject-matter, all that was further necessary to complete the court's jurisdiction in the particular case was to obtain jurisdiction over the parties to it. This it did when the executor filed his answer to the merits therein. No valid reason has been suggested why the executor might not as lawfully give the court jurisdiction of the parties by his voluntary appearance in the pending action, after the time for its regular revival had expired, as he might have done by his entry of appearance to a new action of the same nature. The latter step he undoubtedly might properly have taken. Rev. St. §§ 186, 191, 3485.

We regard the course actually adopted by him, and here in question, as of the same effect. *Roberts v. Marsen*, 23 Hun, 486; *Greenlee's Adm'r v. Bailey*, 9 Leigh, 526. The facts of the present case clearly distinguish it from *Rutherford v. Williams*, 62 Mo. 252, where the right to revive a pending action after the lapse of the statutory period was denied. There the objection to such revival was made in the original cause. It was a sound objection so made. Here the objection was not suggested in the original proceeding at any time. It was first made in the present suit, which is a collateral proceeding to the former one. Hence the decision in *Rutherford v. Williams* is

not to the point in this case. Here a state of facts is disclosed more nearly resembling that reviewed in *Tippack v. Briant*, 63 Mo. 580. There a cause over which the court originally had no jurisdiction, but which was brought within it by legislation pending the action, was dismissed by the court, but afterwards reinstated by consent of parties. The judgment was challenged in the same proceeding on appeal, and this court met the objection of want of jurisdiction thus: "After the cause was out of court it was, by the action of the parties and the court, restored to the docket at a time when the court possessed full and complete jurisdiction over all the matters in controversy. This action, we think, was equivalent to a voluntary appearance of the parties, and a submission by them anew of their dispute to the court. By law the court had acquired jurisdiction of the amount in controversy, and, in order to complete its jurisdiction over the particular cause, it was only necessary that the parties should submit to its jurisdiction, and this they did."

The same principles applied here, we think, dispose of the objection to the jurisdiction of the court in the original action. That objection could have no force now unless the consequence of such lapse of time in the revival of the action was to render all subsequent proceedings therein void. We do not think that consequence results for the reasons already outlined, and in view of previous decisions bearing incidentally on the conclusion we announce. *Fine v. Gray*, 19 Mo. 33; *Coleman v. McAnulty*, 16 Mo. 178; *Thompson's Adm'r v. Williams*, 4 S. W. Rep. 914; *Bentley v. Gregory*, 7 T. B. Mon. 368; *Mosman v. Bender*, 80 Mo. 579.

2. The omission of the executor to plead the general statute of limitations to the plaintiff's demand in the original action, or, indeed, to make any particular defenses in that case, cannot impair the validity of the judgment rendered therein. The present is not an action on the executor's bond. The propriety of his conduct of the defense in that cause is immaterial upon any theory which has been suggested to support the supposed cause of action stated in the petition. If the judgment complained of was not void for want of jurisdiction, (as we have already ruled,) the executor's failure to make any special defenses in that action furnishes no reason, on the facts here disclosed, to enjoin its enforcement in this suit, as against an assignee of the judgment.

We are of opinion that the petition in this suit entirely fails to state a cause of action, and accordingly the judgment is reversed, and the cause is remanded, with the direction to sustain the demurrer thereto.

All the judges concur.

DURBANT v. LEXINGTON COAL MIN. CO.

(Supreme Court of Missouri. February 4, 1889.)

1. MINES AND MINING—INJURY TO MINERS—LIABILITY OF OWNERS.

Act Mo. March 28, 1881, (Acts Mo. 1881, p. 165,) provides that "the owner, agent, or operator of every coal mine operated by shaft * * * shall provide safe means of hoisting and lowering persons in a cage covered with boiler-iron, so as to keep safe * * * persons descending into and ascending out of said shaft," etc., and gives any one injured by willful failure to comply with its provisions a right of action therefor. *Held*, that one employed at the bottom of a shaft, who was injured by a lump of coal which fell from a car, and which would not have fallen had the car been covered as provided by the statute, could recover therefor under the act.

2. SAME—VIOLATION OF STATUTE—KNOWLEDGE OF EMPLOYE.

Knowledge by plaintiff of defendant's failure to comply with the statute will not defeat the action.

3. TRIAL—RECEPTION OF IMPROPER EVIDENCE—EXCLUSION.

Where illegal evidence is admitted over defendant's objection, and is subsequently expressly excluded at plaintiff's request, defendant has no ground for complaint.

Appeal from circuit court, Lafayette county; JOHN P. STROTHER, Judge.

Action by Charles P. Durrant against the Lexington Coal Mining Company. Judgment for plaintiff, and defendant appeals.

Wallace & Chiles, for appellant. *Graces & Aull*, for respondent.

BLACK, J. This is an action for personal damages sustained by the plaintiff while in the employ of the defendant, a corporation engaged in mining coal. The action is founded upon the act of March 23, 1881, (Acts 1881, p. 165.) The act, among other things, provides: "The owner, agent or operator of every coal mine operated by shaft, shall provide suitable means of signaling between the bottom and the top thereof; and shall also provide safe means of hoisting and lowering persons in a cage covered with boiler-iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." "The top of each and every shaft, and the entrance to each and every intermediate working vein, shall be securely fenced by gates properly covering and protecting such shaft and entrance thereto." Section 14 enacts: "For any injury to persons or property, occasioned by any willful violation of this act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby."

The evidence shows, without any dispute, that defendant failed to cover its cages with iron or other material; that the top of the shaft had no gates or other protection; and the only means of communicating from the top to the bottom of the shaft was by the human voice. It is in these respects that the petition charges a willful failure to comply with the statute, and upon these issues the case went to the jury.

The evidence also shows that plaintiff was employed as cager at the bottom of the shaft; his duty being to put the pit cars on the cage, so that they could be hoisted to the surface. As one cage, with its loaded car, would go up, another one, with an empty car, would come down. The plaintiff was endeavoring to get a loaded car on the down cage, and, the car being off its track, he stepped into the cage to pull it on. While he was doing this a large lump of coal fell from the car which had reached the top of the shaft, and broke and fractured the bones of one leg. Had the cage been covered, it is quite clear that he would not have been injured.

Since the plaintiff was not going up or down the shaft, and did not go into the lower cage for that purpose, the defendant insists that, as to him, there was no violation of that clause of the statute which makes it the duty of defendant to "provide safe means of hoisting and lowering persons in a cage covered with boiler-iron, so as to keep safe, as far as possible, persons descending into and ascending out of said shaft." If we stick to the letter of this clause, the point must be sustained. But we think it may receive a construction broad enough to include the present case.

When the meaning of the statute is clear, courts have no power to make qualifications or additions to cover seemingly omitted cases. It is, however, a familiar rule that a thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. This intention must, of course, be gathered from the statute itself; not from detached portions, but from the whole statute, taken in its general scope and purpose. Now, the statute in question, in its many provisions, seeks to protect the health and safety of persons employed in and about mines, and while going in and out of them. This is its general scope and purpose, and to that end many detailed provisions and regulations are made. Among others, the cage must be furnished with guides to conduct it on slides, and with spring-catches, and there must be a brake on every drum. These regulations are for the protection of persons while at work in the shaft as well as when going up and down. The statute does not contemplate two sets of cages,—one with iron covers for persons to use in going up and down, and the other without

covering to use in hoisting coal. The same cage is used for both purposes, and it must have the covering of iron. The employe, when at work in the cage at the bottom of the shaft, is as much within the reason and intention of the statute as when going in and out of the mine, and we conclude is entitled to the protection of the covering.

The next contention of the appellant is that knowledge on the part of the plaintiff that the cage was not covered with iron, and that no contrivance had been provided for signaling from top to bottom of the shaft, and that the top of the shaft had no gates or other protection, should defeat the action. Such a declaration of law would in effect nullify the statute. Knowledge only by the plaintiff of the failure of defendant to have the mine provided with these protections will not defeat the action. It must be remembered that the plaintiff, to prevail, must show a willful violation or failure to comply with the statutory regulations. Our statute seems to be the same as that of Illinois, and it has been held there that, though the injured person may have not been entirely free from fault, still, if the jury found that the willful conduct of defendant resulted in injury, the verdict would be justified. *Coal Co. v. Taylor*, 81 Ill. 590. But we do not say in this case that plaintiff could recover if guilty of negligence himself.

There is evidence in this case that plaintiff was out of his place when in the cage, and that he should have pushed the pit car into the cage. On the other hand, there is evidence that he had directions from the pit boss to pull the car in, and that he had been provided with hooks to do the work as he did, and that he was not negligent. Whether he was guilty of negligence contributing to the injury was submitted to the jury on various instructions favorable to defendant. A mass of lengthy instructions were given on both sides, and to which objections were made, but what has been said will dispose of such objections as we deem worthy of special notice.

During the trial some evidence was received, over the objections of the defendant, that the cages of defendant were, at the time of the trial, covered with iron, and that a gate had been attached to one of the openings in the shaft. This evidence was in express terms excluded by an instruction given at the request of the plaintiff. The point of defendant's objection to this instruction seems to be that a party offering illegal evidence cannot have it excluded, and thereby avoid a new trial or reversal, and that the party against whom it is offered can alone have it excluded. An error in the admission of evidence will be cured by an instruction which is clear, and in express terms withdraws it from the consideration of the jury. *Griffith v. Hanks*, 91 Mo. 109, 4 S. W. Rep. 508; *Stephens v. Railroad Co.*, 9 S. W. Rep. 589. The court could of its own motion withdraw or exclude such evidence, and, this being so, we do not see that it can make any difference at whose request the evidence is withdrawn or excluded. We cannot follow out the other numerous objections to the introduction of evidence. Some of them are without a particle of merit; and there is nothing in the others to justify a reversal.

The judgment is affirmed. The other judges concur, except BARCLAY, J., who concurs in the result.

WAGNER v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. February 4, 1889.)

1. CARRIERS OF PASSENGERS—INJURY TO PASSENGERS—NEGLIGENCE.

Plaintiff's husband was killed by the derailment of defendant's train, which was a special freight, consisting of an engine, tender, one box, and several flat cars. Deceased and others were riding on a flat car next to the engine, sitting on an improvised seat. The conductor and brakemen knew they were there, and did not warn them that it was dangerous; nor was there danger if the train had not been derailed. Both the conductor and a brakeman told them it was more comfortable in

the box car, but they preferred to ride on the flat car. The road was rough, and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety, from which facts the accident resulted. Deceased was thrown on the track and killed; no one being injured except those on the flat car. *Held*, that plaintiff was entitled to go to the jury on the questions of defendant's negligence, and the absence of contributory negligence on the part of deceased.¹

2. SAME—SPECIAL TRAIN—RIGHTS AS PASSENGER.

Though the train, which ran regularly on week days as a mixed freight and passenger, was running specially on the Sunday of the accident, in charge of the usual conductor, and deceased could not of right have demanded to be carried as a passenger on that day, and neither paid nor was asked to pay fare, if the defendant, through its conductor, permitted deceased to ride, it assumed the same duties towards him as if he had been a regular passenger on a train of that character.²

3. PLEADING—COMPLAINT—DEFECT—WAIVER BY ANSWER.

Where a petition, in such an action, fails to state whether the deceased was a passenger at the time of the injury, the defect is waived if defendant, by its answer, puts that question directly in issue, without making any objection to the petition on that ground.

RAY, C. J., and SHERWOOD, J., dissenting

Error to circuit court, Calloway county; G. H. BUCKHARTT, Judge.

Action by Elizabeth Wagner against the Missouri Pacific Railway Company, to recover for the death of her husband, alleged to have resulted from the negligence of defendant's servants. Verdict for defendant under the instruction of the court, and judgment thereon. Plaintiff brings error.

Edwin Silver and *J. W. Boulware*, for plaintiff in error. *T. J. Portis* and *Smith & Krauthoff*, for defendant in error.

BRUCE, J. In this action the plaintiff seeks to recover \$5,000 damages for the negligent killing of her husband, Christopher Wagner, by defendant's servants. The petition charges that her husband, on the 18th day of December, 1881, being on defendant's train of cars between the town of Russellville and the city of Jefferson, was injured and did die, and said injury and death resulted from and was occasioned by the negligence of the defendant, its agents and servants, in running and operating its engine and train of cars on which said deceased was, in this, to-wit: That said agents and servants of defendant did negligently, improperly, carelessly, and recklessly operate and run said train, with its engine and tender reversed, over a newly-constructed road-bed at a highly improper, too great, and injurious rate of speed, and did otherwise so carelessly and negligently run and manage said train that part thereof was thrown from the track, and said train was wrecked, in consequence of which negligent, careless, and improper conduct of defendant, its servants and agents, said Christopher Wagner was on said December 18, 1881, injured, and from said injury did on said day die.

The answer to plaintiff's petition was a general denial, and also set up "that deceased was not a passenger on said train of cars, but was wrongfully and unlawfully on said train, and a trespasser thereon; and, further, that said de-

¹As to the duty which a common carrier owes to a passenger riding in a dangerous place, see *Torrey v. Railroad Co.*, (Mass.) 18 N. E. Rep. 213; *Coke Co. v. Madison*, (Pa.) 2 Atl. Rep. 39, and note 2; *Dewire v. Railroad Co.*, (Mass.) 19 N. E. Rep. 523. In general, respecting the degree of care and skill required of common carriers of passengers, see *Anderson v. Scholey*, (Ind.) 17 N. E. Rep. 125, and note. As to what is contributory negligence on the part of the passenger, see *Quinn v. Railway Co.*, (S. C.) 7 S. E. Rep. 614, and note.

²Though a train is not operated for the purpose of carrying passengers, yet, if those in control thereof assume to carry a passenger, they are bound to operate the train in such a manner as due care and attention for the safety of the passenger would suggest. *Railroad Co. v. Brown*, (Ill.) 14 N. E. Rep. 198; *Smith v. Banking Co.*, (Ga.) 5 S. E. Rep. 772. A passenger on a freight train assumes the ordinary risk and discomfort incident thereto, and is held to be correspondingly careful in guarding against injury by reason of the risk incidental to such mode of travel. *Wallace v. Railroad Co.*, (N. C.) 4 S. E. Rep. 508; *Rosenbaum v. Railway Co.*, (Minn.) 36 N. W. Rep. 447.

ceased was guilty of negligence, contributing, in whole or in part, to his injuries or death," in this: that he wrongfully got upon the flat car next to the locomotive, which was a dangerous place, and refused to leave the same when requested so to do by the conductor. The replication denied the new matter set up in the answer.

At the conclusion of the plaintiff's evidence, the court sustained an instruction in the nature of a demurrer to the evidence, and the jury returned a verdict for the defendant. Plaintiff's motion for a new trial having been overruled, the case is brought here by writ of error.

The evidence offered by plaintiff went to show that for some time prior to the accident, which occurred on Sunday, December 18, 1881, the defendant had been operating the Jefferson City, Lebanon & Southwestern Railway, between Jefferson City and the town of Russellville; that during this time it ran, Sunday excepted, a daily mixed train,—that is, one carrying both freight and passengers; that on the Sunday of the accident the same train, made up in the usual manner, having same combination or passenger coach, and with the same conductor and crew, as on the week days, was ordered by the defendant to proceed from Jefferson City to Russellville as a special or extra, to take supplies, consisting of iron rails, spike, and the like, for the track-layers engaged south of Russellville in laying track; that about 9 o'clock A. M. it left the depot at Jefferson City, having iron rails, etc., in the freight cars, and a number of persons in its passenger coach, among whom was the deceased. The train proceeded a short distance from the depot in Jefferson City, when its further progress was interrupted by one of the freight cars running off the track. Thereupon the conductor returned to the depot, and while there the persons in the passenger coach got out, and a number of them—among them the deceased—went to the freight car next to the locomotive, which was ahead of the break in the train. This was a box car, loaded with rails, and was the only car taken out by the engine. It had no seats or accommodations for passengers; the combination car and the balance of the train being left at Jefferson City. When the conductor returned from the depot, he told those who had gone to the freight car that they had better not go; that he would not have any cars for them to come back in, and they would have to stay out there. They said they would take the chances of getting back, got in the car, and went to Russellville in it, using the rails in the cars for seats. Of the number who thus boarded this car, the deceased and three others, Berry, Zuendt, and Monning, were killed in the accident which occurred on the return trip. There was no evidence tending to show that the deceased, or any of the party with whom he was, paid or offered to pay fare, or that any fare was demanded of them going or returning. The train, consisting of the locomotive, tender, and the box car, with Wagner, Zuendt, Berry, and others in it, proceeded in safety to Russellville. After the arrival at Russellville, and dinner there, the conductor proceeded to make up the train for the return trip to Jefferson City. He made it up as follows: First, the tender and locomotive, reversed, tender being in lead of locomotive; a flat car next to engine; then a box car; and then several other flat cars.

The evidence shows that the deceased, and the three others who were likewise killed in the accident, took their places on an improvised seat on the flat car next to the engine. The seat was made by those on the car putting the ends of a plank upon two empty spike kegs. The plank was put up to them by the conductor, who requested them, however, to go into the box car, telling them it would be a better place for them to ride. They said they wanted to ride on the flat car to see the country. They made the same reply to the brakeman, who told them that the box car was a better and more comfortable place to ride. The conductor said nothing more, got into the box car, and the train started, and was running at a rate of speed variously estimated at from 15 to 20 miles an hour, when, at a distance of about one mile and a half

from Russellville, on a down grade, the train jumped the track. The jarring of the flat car on which the deceased and his companions were, caused by the jerking of the engine after its derailment, hurled them from the car underneath the trucks of the engine, and in the wreck the deceased and another were killed, and two others so injured that they afterwards died. There were no guards or side-boards around the flat car, nothing by which those on it could catch hold, and no one was injured on the train except those on the flat car. The evidence further tended to show the grades, curves, newness, and unsettled condition of the road-bed at the place where the wreck occurred, and the liability of a train, with engine and tender reversed, and moving as this was, to be derailed when moving at a high rate of speed; and tended to prove that the servants of the defendant were guilty of negligence in running this train, made up as it was, over this road, in the condition it then was, at the rate of speed it was being run at the time the wreck occurred.

1. Section 2121, Rev. St. 1879, under which this action is brought, gives to the widow of any person who shall die from an injury resulting from the negligence of a servant, while running a train of cars, a right of action against the master of such servant, whether a passenger on such train of cars or not. A right of action against the master, however, for an injury resulting from any defect in the railroad, or in the cars, or machinery being run on it, is limited to the widow, etc., of one who, as a passenger, receives such an injury. It clearly appears from the petition in this case that the injury complained of was one resulting from the neglect of the defendant's servants to discharge the master's duty to one who was on the master's train of cars while it was being run by his servants. Inasmuch, however, as it did not state in what relation to the defendant the deceased was so upon the cars, it failed to show the measure of the duty of the defendant to him, and would, in this respect, have for its uncertainty been obnoxious to a timely objection for that reason; but as the defendant did not see proper to raise the objection before the trial, but in its answer tendered the issue "that he was not a passenger on its train, and that it did not owe him the duty of a passenger," which issue the plaintiff accepted and joined, and both parties went to trial upon it, that objection was waived, and afforded no ground for a new trial, and cannot be considered on writ of error.

2. The train upon which the deceased was killed being a special one, running at the time for the particular purposes of the road, and not for the convenience of the traveling public, for whom trains were provided only on week days, the defendant was under no obligation to receive or transport passengers upon it. It was its privilege to do so, however; and if it did receive a person on its special train as a passenger for the purpose of being transported from one place to another, it assumed towards him the same duties as if he had been a passenger traveling on the same train on its regular trips; the passenger assuming no risks on this trip other than on a regular one, except such as were necessarily incident to the character of the train, and the purposes for which it was being run. *McGee v. Railroad Co.*, 92 Mo. 208, 4 S. W. Rep. 739.

This train was ordered out on this trip by dispatch from Sedalia. What instructions, if any, were given to the conductor in regard to passengers, does not appear. The evidence does not show any regulation of the company prohibiting passengers from being carried on this train when making such a trip, or that the deceased was or could have been informed that his going upon this train as a passenger was contrary to any regulation of the company, or to any instruction to the conductor, who was the officer of the company present at the time deceased proposed to take passage, having control and management thereof, and having apparent authority to determine whether he could travel on such train as a passenger or not. On other days of the week, this train, under the command of this conductor, was regularly used for the purpose of

transporting passengers. On this day he was exercising the same control over it, apparently, that he usually did. He was the officer, and the only one, present, in absolute control of its movement, with the apparent right to say who if any one should travel on it; and when he permitted the deceased to take passage on it, as may be fairly inferred from the evidence of the plaintiff that he did, the deceased, without notice of any want of authority in the conductor to grant such permission, in the absence of collusion between him and the conductor to defraud the company of its fare, whether he paid fare or not, became a passenger of the defendant, and, as such, entitled to have the train on which he traveled managed with the care that is due from a common carrier to its passengers on a train of the character that this was. 2 Wood, Ry. Law, 1039, note 3; *Creed v. Railway Co.*, 86 Pa. St. 139; *Railroad Co. v. Wheeler*, 35 Kan. 185, 10 Pac. Rep. 461; *Dunn v. Railroad Co.*, 58 Me. 187; *Wilton v. Railroad Co.*, 107 Mass. 108; *Railroad Co. v. Muhling*, 30 Ill. 9; *Sherman v. Railroad Co.*, 72 Mo. 63; *Muelhausen v. Railroad Co.*, 91 Mo. 344, 2 S. W. Rep. 315; *Jacobus v. Railway Co.*, 20 Minn. 125, (Gil. 110.) On the evidence, the plaintiff was entitled to go to the jury on the issue "that her husband was lawfully on defendant's train as a passenger at the time he was killed."

3. The plaintiff's husband was killed by being thrown from the position he took at Russellville on the flat car. That car was located between the locomotive, on which was the defendant's engineer, and the box car, in which was its conductor; both of which were in juxtaposition to the flat car. The evidence tends to show that he was there in the view and with the knowledge of both engineer and conductor. The result of the accident proved his position to be one of danger to him, when the engine and tender were derailed, and that the derailment of the tender and engine was the proximate cause of the injury.

The evidence tended to show that the derailment was the result of the manner in which the train was made up, and the speed at which it was being run on the road in its condition at the time the accident occurred. That there was no connection between the presence of the deceased on the flat car and the derailment of the engine and tender, and that the deceased's position on the flat car became a place of danger only because of the derailment, is evident. His taking that position at Russellville is the only act of the deceased that could, on the evidence, be claimed as contributing to the injury he received; and that act, in itself, was not such a direct, evident, and necessary exposure to danger from the injury he received as to warrant the court in declaring, as matter of law, that it contributed directly to or was the proximate cause thereof, and in taking the case from the jury. "Negligence is an inference from facts. * * * If it is not shown by some definite and positive fact, the effect of which is not open to reasonable question, but depends on inferences from facts, in making which sensible and impartial men may well disagree, the question is for the jury." *Pierce, R. R.* 317.

It does not follow from the fact that, if the deceased had been in the box car, he would not have been hurt, that he was guilty of negligence in taking a position on the flat car, unless he was there in disregard of some monition of danger, or in disobedience of some rule or order forbidding him that position, of which he had notice; in the absence of which, the question was one for the jury to determine whether, under all the facts and circumstances, an ordinarily prudent man could have reasonably anticipated that by taking that position he was exposing himself to the injury he received. The evidence fails to show any such order, rule, or monition, but, on the contrary, a reasonable inference might be drawn therefrom that he was on the flat car with the consent of the conductor, as he certainly was with his knowledge, and with the knowledge of the other servants of defendant who were operating the train from the time it started until it was wrecked. And the further

question for the jury to determine, on the evidence, was presented, whether the defendant's servants, knowing his situation on the train, if it was one of peril, managed the train with care and caution commensurate with his risk, as was their duty to him in that situation; and whether his injury was or was not the direct and immediate result of their failure to discharge that duty.

The defendant's demurrer to the evidence ought to have been overruled and, under proper instructions, the case ought to have been submitted to the jury; and for the error of the court in sustaining the demurrer the judgment of the circuit court is reversed, and the cause remanded for new trial.

BLACK and BARCLAY, JJ., concurring; BARCLAY, J., in the result. RAY, C. J., and SHERWOOD, J., dissent.

ZUENDT v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. February 4, 1889.)

Error to circuit court, Calloway county; G. H. BURCKHART, Judge.

Edwin Silver and J. W. Boulware, for plaintiff in error. *T. J. Portis and Smith & Krauthoff*, for defendant in error.

BRACE, J. The husband of the plaintiff was killed in the same wreck on the Jefferson City, Lebanon & Southwestern Railway, in which the husband of Mrs. Wagner was killed, whose case (*Wagner v. Railway Co.*, ante, 486,) was decided at this term; and the record in this being the same as in that case, in all essential particulars, the judgment of the circuit court herein, for like reasons, is reversed, and the cause remanded for new trial.

BLACK and BARCLAY, JJ., concur; BARCLAY, J., in the result. RAY and SHERWOOD, JJ., dissent.

WILSON v. STATE, to Use of ST. FRANCIS COUNTY.

(Supreme Court of Arkansas. February 9, 1889.)

1. COUNTIES—REVENUE COLLECTORS—COMPENSATION.

Mansf. Dig. § 5749, providing that the collector of revenue shall be allowed commissions for collecting revenue, as follows: "For the first ten thousand dollars collected, five per cent. in kind,"—only means that the commissions shall be paid out of the same fund in which the tax was collected, and does not authorize a further computation of commissions at that rate when the amount of the items collected, upon which the 5 per cent. has been computed, aggregates more than \$10,000.

2. SAME—READJUSTMENT OF ACCOUNTS.

By section 5851, the county court, when an error is discovered, may, at any time within two years from the settlement, readjust the accounts of the collector, and correct the error. By section 5850, when any balance is found due from the collector, which is not paid within a specified time, the county court may proceed to render judgment against him and his sureties. *Held*, that where the county court has approved, through mistake or inadvertence, the collector's account, in which he has credited himself with excessive commissions, it is competent to readjust the account within the two years, and, upon his failure to refund the excess, proceed against him, as provided for in section 5850, for the balance and penalties.

3. APPEAL—REVIEW—OBJECTIONS NOT MADE BELOW.

No objection having been made in the court below, that it was improper to impose penalties for delinquency in the payment of the excess, it will not be considered on appeal.

Appeal from circuit court, Benton county; H. N. HUTTON, Special Judge. Proceedings by the state, to the use of St. Francis county, to collect excessive commissions retained by Wilson, revenue collector, commenced in the county court, and appealed by defendant to the circuit court, where the judgment of the county court was confirmed, and defendant appeals.

N. W. Norton, for appellant.

COCKRILL, C. J. A collector of revenue is entitled to receive as commission 5 per cent. upon the first \$10,000 of the aggregate amount of taxes collected by him, 3 per cent. upon the next \$10,000, and 2 per cent. upon excess over \$20,000. Mansf. Dig. § 5749. The commissions are payable, as the statute expresses it, "in kind," but that only means that they shall be paid in the same fund in which the tax was collected, thereby making each fund bear its proportion of the expense of collection. When the aggregate amount of the items upon which the 5 per cent. rate has been computed reaches \$10,000, there is no authority for further computation at that rate, and so of the 3 per cent. rate. Where a county court, through inadvertence or mistake, approves the account of a collector in which he has credited himself with 5 per cent. commissions on each item, the aggregate of which exceeds \$10,000, it is competent for the court at any time within two years from such approval to restate the account and correct the error. Mansf. Dig. § 5851; *White Co. v. Key*, 30 Ark. 603. When the account is thus readjusted, and the charge against the collector has not been paid within the time prescribed by statute for the payment of other balances, the penalties prescribed by the statute are incurred, and he and his sureties may be proceeded against in the county court, as prescribed in section 5850, Mansf. Dig.

In this case the collector had taken credit for 5 per cent. commissions on more than \$20,000, and the county court, within two years of auditing the account, set aside the allowance, and corrected the error. Aside from the construction of the statute fixing the collector's fees, the only contention in the circuit court on appeal, where the action of the county court was confirmed, seems to have been that it was error to set aside the order approving the account. Now, it is insisted that the penalties prescribed by the statute should not have been imposed upon the collector without giving him a day to pay off the corrected statement of the account. But the transcript shows that a day was given, and it fails to show that any complaint was made in the circuit court because the judgment was for too much. If the appellant conceived that error had been committed in that regard, he should have directed the attention of the circuit court to it, and made it a ground for new trial. Mansf. Dig. § 1310; *Railway v. Branch*, 45 Ark. 524.

Affirmed.

In re BARNETT.

(*Supreme Court of Arkansas. February 9, 1889.*)

HABEAS CORPUS—HEARING AND DETERMINATION.

Where a defendant entered a plea of guilty to an indictment, and the court assessed his punishment, and remanded him to await sentence, but on the next day, concluding that the indictment charged only a misdemeanor, caused the defendant's plea of guilty to be withdrawn, the indictment quashed, and the cause held for the action of the grand jury, no inquiry can be had under the writ of *habeas corpus* as to whether or not the court erred in its action.

Certiorari to circuit court, Pope county; G. S. CUNNINGHAM, Judge.

D. B. Granger and G. W. Shinn, for petitioner. W. E. Atkinson, Atty. Gen., for the State.

COCKRILL, C. J. This is a petition to review by *certiorari* the refusal of the judge of the Pope circuit court to discharge the petitioner upon *habeas corpus*. It appears from the record, which has been certified to us in the usual way in such cases, (see *Industrial Co. v. Neel*, 48 Ark. 283, 8 S. W. Rep. 631; *Ex parte Jackson*, 45 Ark. 158,) that an indictment was returned by the grand jury against the petitioner for "criminal abortion," and that he entered a plea of guilty to the indictment, whereupon the court assessed his punish-

ment at one year's imprisonment in the penitentiary, and a fine of \$50, and remanded him to custody, to await sentence. On the next day, the court, concluding that the indictment charged only a misdemeanor, caused the defendant's plea of guilty to be withdrawn; the indictment was quashed, and the cause was held for the action of the grand jury; the amount of bail required of the prisoner being fixed by the court. He remained in jail, and, after the court had adjourned for the term, presented his petition to the judge at chambers, to be discharged. It is the action of the judge in this behalf we are called upon to review.

The argument is that the indictment charges a misdemeanor, and that the petitioner, having been convicted of that offense, cannot longer be held in custody for any grade of offense growing out of the same transaction. The indictment is not set forth in the record, and we cannot determine whether it charged a felony, a misdemeanor, or no offense at all. But in no event could the question whether the court erred in causing the defendant's plea of guilty to be withdrawn be determined in this proceeding without making the writ of *habeas corpus* serve the office of an appeal or writ of error, which is wholly beyond its function. If the facts entitled the petitioner to be discharged from further prosecution, (as to which the parties may profitably consult *Ex parte Lange*, 18 Wall. 163,) he might have obtained his discharge upon motion in the same cause, (*Atkins v. State*, 16 Ark. 574, 575,) or he may do so by special plea to the new indictment for the same offense. He cannot raise the question by *habeas corpus*. Whart. Pl. & Pr. §§ 477, 996; 1 Bish. Crim. Proc. § 821; Church, Hab. Corp. §§ 253, 255; Hurd, Hab. Corp. bk. 2, c. 6, § 1; *Pitner v. State*, 44 Tex. 578; *Wentworth v. Alexander*, 66 Ind. 39; *State v. Sheriff*, 24 Minn. 87; *Com. v. Deacon*, 8 Serg. & R. 71; *Ex parte Hartman*, 44 Cal. 32; *In re Semler*, 41 Wis. 517; *Ex parte Ruthven*, 17 Mo. 541. The order on which he is held is regular on its face, and one which the court had power to make. Mansf. Dig. §§ 2158, 2169; *Hortsell v. State*, 45 Ark. 59; *Gooden v. State*, 35 Ala. 430. We extend the inquiry no further. *Ex parte Brandon*, 49 Ark. 143, 4 S. W. Rep. 452.

In the case of *Ex parte Jackson*, 45 Ark. 158, where the petitioner was released on *habeas corpus* after conviction before a justice of the peace, it clearly appeared that the fact for which he was committed was not a crime for which he could be punished in any tribunal, and we proceeded only in accordance with the practice of the court of king's bench at common law in directing his discharge. Hurd, Hab. Corp., *supra*.

The action of the circuit judge in refusing the prayer of the petitioner is affirmed.

WATSON v. PUGH.

(Supreme Court of Arkansas. February 16, 1889.)

1. LANDLORD AND TENANT—WHEN RELATION EXISTS—CONTRACT.

One B. executed to S. a bond to convey certain land when the price should be paid. S. went into possession, and made a small payment. After the last installment became due, B. conveyed his interest to defendant. There was no written agreement canceling the contract between B. and S. The latter's notes were transferred to defendant. S. remained in possession as before, without any claim upon him to pay rent. The land was assessed to and the taxes paid by him. Defendant notified him that he had purchased the land from B., and would enter into a new contract of purchase. None was made, but S. held the land for several years after the conveyance from B. Subsequently defendant took a note from S., specifying that it was for rent of the land. It was for about twice as much as the land would rent for, and S. testified that he understood that when he paid it was to be credited on his purchase. Held, that the contract for purchase had not been rescinded, and that the relation of landlord and tenant did not exist between defendant and S.

2. CHATTEL MORTGAGES—DESCRIPTION.

A mortgage describing the mortgaged property as "8 bales of cotton, weighing 500 lbs. each, of the crop" which the mortgagor should raise in a designated locality, is not void for uncertainty, when in fact the mortgagor's whole crop did not amount to as much as 8 bales of the specified weight.¹

Appeal from circuit court, Ashley county; C. D. Wood, Judge.

J. W. Van Gilder, for appellant. *M. L. Hawkins and Jones & Martin*, for appellee.

COCKRILL, C. J. This is an action by Pugh, the mortgagee of one Simmes, to recover of Watson the value of six bales and a fraction of the mortgaged cotton, which Watson had converted to his own use. Watson claimed to be the landlord of Simmes, and to have received the cotton from him in discharge of his landlord's superior lien for rent. The facts in relation to this claim are as follows: One Bell, while the owner of the land, executed to Simmes a bond, covenanting to make him a deed when the purchase price agreed upon should be paid. Simmes was let into possession under his contract to purchase. He made a small payment of purchase money, built houses, and cleared 75 or 80 acres of land, all of which was wild and unimproved when he purchased. After the last installment of purchase money became due, Bell conveyed his interest in the land to Watson. Bell testifies in general terms, without giving any particulars of the transaction, that there was an understanding between him and Simmes at that time that their contract was canceled. There was no written agreement to that effect. Simmes' notes for the purchase money were not surrendered to him, but were transferred to Watson; the bond for title was not taken up; Simmes was permitted to remain in possession as before, without any claim upon him to pay rent; the lands were assessed to and the taxes paid by him; and he testified that the contract to purchase had never been rescinded, and that he had always held possession as owner. In the mean time Watson notified him that he had purchased the land from Bell, and would enter into a new contract of purchase on better terms than the one he held. No new contract was made, but Watson permitted him to hold the land for several years after the conveyance from Bell, as purchaser, and with the sole expectation of collecting the purchase money. At this juncture Simmes executed the mortgage to Pugh, covering the cotton in dispute. A few weeks thereafter Watson took a note from Simmes for \$400, payable in the fall of the same year. It specified that it was for rent of the land which Simmes was holding. It was for about twice as much as any witness who testified to the point thought the land would rent for. Simmes, who is an unlettered man, testified that it was the understanding between him and Watson that the amount to be paid on his note should be credited on his purchase, and that he made the suggestion about calling it a rent note under the impression that Watson would more surely get the money, and so aid him in paying for the land. The court found, in effect, that the contract for purchase had not been rescinded, and that the relation of landlord and tenant did not exist between Watson and Simmes. The conclusion is sustained by the rule controlling the decisions of *Mason v. Delaney*, 44 Ark. 444, and *Ish v. Morgan*, 48 Ark. 413, 3 S. W. Rep. 440. The fact that the note executed by Simmes to Watson recited that it was given for rent did not preclude Pugh from proving that it was not in fact given for that purpose. The case is analogous in that respect to *Roth v. Williams*, 45 Ark. 447.

2. It is argued that Pugh's mortgage is void as to the cotton for uncertainty of description. It is described as "8 bales of cotton, weighing 500 lbs. each, of the crop" which the mortgagor should raise in a designated locality. In a

¹ Concerning the validity of mortgages of crops to be grown, and what is a sufficient description of such crops in the mortgage, see *McCown v. Mayer*, (Miss.) 5 South. Rep. 98, and note; *Strolberg v. Brandenburg*, (Minn.) 40 N. W. Rep. 856, and note.

contest between a mortgagee, and one who has acquired a right adverse to the mortgagee, a description in the instrument of a given number of articles out of a larger number is no description, where the means are not given for ascertaining what is intended. *Dodds v. Neel*, 41 Ark. 70; *Krone v. Phelps*, 49 Ark. 350. But where the number specified is more than the whole number of such articles, there is no other property of the same kind from which a selection is to be made, and therefore no uncertainty in the description. *Jones, Chat. Mortg.* § 659; *Washington v. Love*, 34 Ark. 93; *Crosswell v. Allis*, 25 Conn. 301; *Kelly v. Reid*, 57 Miss. 89; *Draper v. Perkins*, Id. 277. Here the description was of eight bales of cotton of the mortgagor's crop, when in fact his whole crop did not amount to so much. If the proof had shown that the crop amounted to more than eight bales, and no particular bales had been appropriated to the mortgage, the result might have been otherwise.

Affirmed.

MORROW v. NASHVILLE IRON & STEEL CO. *et al.*

(*Supreme Court of Tennessee.* February 5, 1889.)

1. CORPORATIONS—SUBSCRIPTION TO STOCK—CONDITIONS—VALIDITY.

A contract with a subscriber to organization stock of a corporation, that for every share subscribed for he shall receive interest-bearing bonds to an equal amount, secured by mortgage on the company's plant, is void, not only as against creditors, but also between the subscriber and the corporation.

2. SAME—VALIDITY OF SUBSCRIPTION—CONDITION PRECEDENT.

The bonds agreed to be issued being secured by mortgage on the plant, which could only be obtained by payment of the capital stock, and the subscriber having become a director without receiving his bonds, the agreement to issue bonds is not a condition precedent, and the stock subscription stands absolute, though the agreement be void.

Appeal from chancery court, Davidson county; ANDREW ALLISON, Chancellor.

Vertrees & Vertrees, for complainant. *T. M. Steger*, for Nashville Iron & Steel Company, defendant. *Champion & Head*, for Commercial Bank, defendant.

LURTON, J. The Nashville Iron, Steel & Charcoal Company is a manufacturing corporation, organized in 1887, under the general incorporation law of this state. Complainant's bill charges that it was organized upon the following scheme or basis, namely: "The capital stock was fixed at \$350,000, in shares of \$100 each. The company was also to issue \$350,000 of \$1,000 negotiable interest-bearing coupon bonds, to run twenty years, secured, principal and interest, by first mortgage, in the usual form, upon the company's plant. Every subscriber was to have bonds and also stock of the company, each to the amount of the subscription. That is to say, a subscriber to the amount, say of \$1,000, was to pay \$1,000, and therefor was entitled to and was to receive \$1,000 of said bonds and \$1,000 of said stock of the company." Complainant alleges that "upon this basis and plan of operations, as the defendant company well knew, your orator subscribed for \$10,000 of said stock and bonds each; that is, he took an interest to the extent of and subscribed \$10,000, and he was to pay the said \$10,000 upon calls to be made." Upon this subscription he afterwards paid \$1,000, and executed his three negotiable notes, each for \$3,000, and payable in March, April, and May, 1888. Subsequently the corporation refused to carry out the scheme by which subscribers were to receive bonds to an amount equal to their stock, and instead resolved to mortgage their property only to the extent of \$100,000, and these bonds

they resolved to sell upon the market, applying the proceeds to corporate purposes strictly. This change in the plan of operations seems to have been assented to by all of the subscribers save complainant, who caused his protest to be entered. The bill alleges that the notes executed by complainant have been transferred to the Commercial National Bank, in payment of a pre-existing debt, with notice of the considerations upon which they were executed. This charge, the case being heard upon demurrer, together with the fact that the insolvency of the iron company does not appear, justifies us, for the purposes of this case, in treating the bank, as the holder of these stock notes, as standing upon no higher ground than the assignor. The complainant seeks to be relieved from his subscriptions upon the ground that the company has refused to carry out its agreement concerning its bonds; that his notes be canceled; and that he have a decree for the money paid in on his subscriptions. He further prays that in the event he be held liable upon his subscriptions that the contract by which he was to receive bonds be specifically performed. The bank and the iron company join in a demurrer which questions the validity and legality of the contract by which the complainant was to receive the bonds of the company. This demurrer was sustained by the learned chancellor, and the bill of complainant dismissed.

In considering the meaning and legal effect of the contract set up by the complainant, it is important at the outset to observe that this is not the case of a purchase of stock and bonds, or either, in an organized and going corporation. Upon the contrary, the bill states that the contract into which complainant entered was that upon which all shares were to be issued, and that the contract between himself and the corporation constituted what the pleader properly designates the "basis of organization."

Whether this "basis of organization" be construed to be a contract whereby each subscriber to the stock was to be given a bond as a bonus, or each subscriber to the bonds was to be given paid-up stock as a bonus, or as an agreement by which each contributor to the capital stock was to receive the obligation of the company, secured by a primary mortgage, that he should be repaid the amount of his subscription, with interest, such an agreement would clearly be illegal and ineffective as to existing or subsequent creditors of the corporation, upon the ground that the payment for the stock was unreal and simulated, or that the bond had been issued upon no consideration. 2 Mor. Priv. Corp. § 824; *Sawyer v. Hoag*, 17 Wall. 610; *Scott v. Thayer*, 105 U. S. 148.

The learned counsel for complainant has very ably and earnestly presented the well-understood distinction between contracts which are invalid as to creditors, and yet are legal and binding upon the corporation,—a distinction well illustrated by the cases just cited from the supreme court of the United States; and he insists upon the doctrine of these cases, that, however invalid such an agreement may be as against creditors, inasmuch as all the subscribers to shares were parties to the same agreement with the corporation, the arrangement and contract cannot be questioned by such stockholders or by the corporation, and that as between the subscriber and the company the agreement is legal and binding.

This presents a question of great importance, and one which is entitled to receive grave consideration at our hands. There are undoubtedly a class of cases where subscriptions to initiatory stock upon special terms, not prohibited by the charter, and not in contravention of any clearly-defined public policy, have been upon sound principles held valid as between the subscribers and the corporation, and yet invalid in so far as the rights of creditors were affected upon a condition of corporate insolvency ensuing. To this class of cases belong the cases of *Sawyer v. Hoag* and *Scott v. Thayer*. The invalidity of the special terms upon which the contract of subscription rested in these two cases arose from the well-settled doctrine that unpaid stock subscriptions

constitute a trust fund for the benefit of general creditors, and that any arrangement or device by which a payment of a stock subscription is simulated or released, is void, in so far as it operates to discharge a liability in favor of creditors by a subscriber to capital stock. In the first of these cases there was a contract whereby the stock was nominally paid in full, but immediately taken back as a loan to the subscriber. Now, the only effect of this arrangement was to work a change in the character of the debt, whereby a debt due, as for unpaid stock, was to become a debt due as for a loan. The debt in the latter case was one which was subject to offsets in the hands of the borrower, while so long as it was a stock debt it was a trust fund, and the debtor could not apply it exclusively upon his own claim against the insolvent corporation.

Concerning the validity of such an arrangement as between the subscriber and the corporation, Mr. Justice MILLER said: "Undoubtedly this transaction, if nothing unfair was intended, was one which the parties could do effectually, so far as they alone were concerned. Two private persons could thus change the nature of the indebtedness of one to the other, if it was found to be mutually convenient to do so; and in any controversy which might or could grow out of the matter between the insurance company and the appellant we are not prepared to say that the company, as a corporate body, could deny that the stock was paid in full." The court, however, held that, upon a suit by the assignee in bankruptcy of the corporation, the stock had not in fact been paid in such manner as to prevent a recovery for benefit of creditors, and the defendant was not allowed to offset his liability upon his notes given for the alleged loan to him by the company by a claim he held against the corporation.

Concerning this case, it is enough to say that the validity of the arrangement as against the company could very well be rested upon the fact that such a lending of money to the share subscriber was not prohibited by the charter of the corporation; and no public policy was violated, in that the corporation had only taken the secured notes of the subscriber in place and stead of his unsecured liability as a shareholder; or these notes stood for and represented an investment of the capital of the company, and, being an insurance company expressly permitted to lend out or otherwise invest its funds, no reason occurs why the company should not be regarded as bound by such a change in the character of the debt. The case, however, would be different if such loans, or any other, had been made by a manufacturing corporation under the general incorporation laws of this state; the lending of money to stockholders being expressly prohibited by such corporations.

In the case of *Scovill v. Thayer* the stock was subscribed upon an agreement that, upon the payment of 20 per cent., paid-up non-assessable certificates of stock should be issued to the nominal amount of the subscription. Mr. Justice WOODS, speaking for the court, said, concerning this contract, "that as between them and the company this was a perfectly valid agreement. It was not forbidden by the charter, or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter."

When he came to consider the matter as it affected creditors, he said: "But the doctrine of this court is that such a contract, though binding on the company, is a fraud in law on its creditors, which they can set aside; that when their rights intervene, and their claims are to be satisfied, the stockholders can be required to pay their stock in full. The reason is that the stock subscribed is considered in equity as a trust fund for the payment of creditors. It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has therefore the right to presume that the stock subscribed has been, or will be, paid up, and if it is not, a court of equity will, at his instance, require it to be paid." 105 U. S. 154.

This case is differentiated from the one now under consideration in several important particulars. First, it is important to notice that the question did not arise between the corporation and the subscriber. The controversy was between subscribers and the creditors of an insolvent corporation. The point only arose because it became necessary to determine when the right of action in favor of the creditor accrued with reference to the statute of limitations, which was pleaded by the stockholder. In order to defeat this defense, the court held that the arrangement was valid as to the corporation; that in equity the meaning and effect of the agreement was this, namely: "That the stockholders should pay, say, for example, \$20 per share on their stock, and no more, unless it became necessary to pay more to satisfy the creditors of the company; and when the necessity arose, and the amount required was ascertained, then to make such additional payment on the stock as the satisfaction of the claims of creditors required." The court, upon this construction of this agreement, held that the statute had not begun to run until the assets of the company proved insufficient to pay debts.

Again, the contract as between the company and the subscriber was an executed one, while here we have one executory, and which the corporation has refused to carry out.

In the third place, the court found that the charter did not prohibit such an agreement, nor was it contrary to any law or public policy of the state of Kansas, where the corporation resided and where the contract was made. But the broadest and most obvious distinction between this case and that will be observed when we analyze the contract set up by complainant, and ascertain its legal effects, and then see wherein such a contract is prohibited by the charter of the defendant corporation, and to what extent it may controvert the public policy of this state.

The scheme proposed, upon which this corporation was to be organized, fixed the capital stock at \$350,000. The public has a right to presume that this stock has been in good faith subscribed, and that it will be paid. They have also the right to presume that the fund thus subscribed and paid in will in good faith be retained in the business of the company, and that it, or the plant and property represented by it, will in good faith be held and preserved as a capital and basis of credit and confidence. This much is held out to the public by the representation that its capital stock is \$350,000. But running along with this proposition that there shall be a capital stock of \$350,000 is the additional stipulation that the property of the company, which is to be procured by means of this capital stock, is to be mortgaged to secure bonds, in amount precisely equal to the whole capital stock, and the bonds, instead of being sold for their market value, and the proceeds applied to corporate uses, are to be divided out among the stockholders. Says complainant in his bill: "Every subscriber was to have bonds, and also stock of the company, each to the amount of the subscription." The result of this scheme, if it had been carried out, would have been that each subscriber would have received the obligation of the company to repay to him, with interest, his contribution to the capital stock of the company, and this obligation would have been secured by a first mortgage upon all the company's property.

It was an arrangement whereby the franchise was to be secured, and at the same time deprive the public of the security which by law they are entitled to have, and upon which the grant of the franchise depends. Whatever the real motive and purpose of the promoters of this arrangement may have been, its legal effect, if valid, would have been to have thrown all the risks and hazards of the business upon the public who should deal with it, while the contributors were to reap all possible gains, and should be secured against loss in the event the enterprise prove unprofitable. Is a contract by which a corporation agrees to repay to the contributors of its capital stock their several contributions, and whereby such contributions are converted into corpo-

rate debts, valid even as against the corporation? Upon what consideration does such an agreement rest? and what power has a corporation to bind itself by such a contract?

It is true, creditors out of the way, that the assets of a private business, corporation belong in the last analysis to the stockholders, and that they may by consent cease business, and divide the property among themselves. But this ownership of assets is subject to the higher and superior rights of creditors, and as against them shareholders have no rights in these assets. No consent of the corporation or of its shareholders can effectually defeat the prior and superior claims of creditors to the corporation property. Upon the winding up of such a corporation, creditors must first be paid. The surplus belongs to the stockholders, and this the corporation is bound to divide among them. But by this contract the corporation in effect binds itself to return the capital stock to the stockholders at a fixed time; that is, when the bonds mature, regardless of the rights of creditors, and without winding up the business.

More than this, the charter expressly forbids the payment of any dividend which impairs capital stock; yet by this arrangement dividends are to be paid under the guise of interest, regardless of its effect upon the capital stock of the company.

It is no answer to say that the invalidity of such bonds as to creditors saves all their rights, and that, therefore, the corporation ought to be suffered to make such contract with its shareholders as it pleases. This argument ignores two very plain considerations: *First*, the fact that a defense could not be made by creditors against these bonds if they should pass into the hands of innocent purchasers for value; *second*, the public policy of this state, as evident from its legislation concerning such corporations, forbids the recognition of such an agreement.

The theory upon which the state has rendered the acquirement of the franchise to be a corporation so speedy and inexpensive is based upon the assumption that the capital stock which the company holds itself out as having will be in fact paid in, and will stand as a basis of credit, instead of individual liability of those associated in business. To secure a corporate capital which shall be a just substitute for personal liability, the law requires in explicit terms that nothing shall be received in payment of the capital stock of a manufacturing corporation but cash or lands, or patent rights at a fair and agreed valuation. The charter further prevents the creation of debts beyond the capital stock. It prohibits the lending of money to shareholders, or the payment of dividends in excess of actual profits. The plain and obvious meaning of all these requirements, in the light of the substitution of corporate liability in the place of personal liability beyond the amount of stock subscription, implies that the organization stock shall be paid up in full at its par value. The courts have not hesitated, either in this state or elsewhere, to denounce every stratagem and device by which the payment of stock subscriptions is sought to be avoided.

The facility with which charters are now obtained, the wonderful increase in the number and power of such organizations, the facilities afforded by the assumption of corporate powers and franchises to bad and designing men to carry out evil and fraudulent schemes whereby the public are to suffer, the plainest principles of common honesty and of business integrity, demand that these business corporations shall be held to the utmost good faith in this matter of capital stock, and that all such arrangements as that proposed by this "plan of organization" shall be held void and illegal, in that it is prohibited by any fair construction of the corporate powers, and in contravention of the plainest and most obvious principles of public policy concerning such companies. Such a contract, being prohibited by law, is therefore beyond the power of the corporation, and is void as to the company, being *ultra vires*.

What we have said as to the construction and legal effect of the subscriptions involved in the case is not intended to apply to sales of, or subscriptions to, the stock of an organized and going corporation, or the sale of the bonds of a going corporation. The necessities of the business of an organized company might demand an increase of capital stock, and, if such stock is lawfully issued, it may very well be offered upon special terms. In such case, if the market price was less than par, it is clear that a purchaser or subscriber for such stock at its market value would, in the absence of fraud, be liable only for his contract price. So a case might arise where the stock of a going concern was much depreciated, and where its bonds were likewise below par, and there was lawful authority to issue additional stock and bonds. Now, in such case, the real market value of an equal amount of stock and bonds might not exceed, or even equal, the par value of either. In such cases, all questions of fraud aside, a purchaser would only be held for his contract price. The case we have been considering is that of the issue of the initiatory or organization stock,—that class of stock which is to constitute the capital stock upon which the grant of the franchise depends.

Says Mr. Morawetz: "It is evident, therefore, that the issue of certificates for paid-up shares to a shareholder whose shares have not in fact been paid up is unauthorized. It would be a direct infringement of the rights of all existing shareholders in the company, and a source of fraud upon persons giving the company credit, or dealing in its shares thereafter.

However, after the capital of a corporation has been reduced by losses, it would not be a wrong against the existing shareholders to issue certificates for paid-up shares on payment of less than their par value. Under these circumstances fairness and equality would merely require that the new shares be issued at their actual or market value. If shares in a corporation could in no case be issued at less than their face value, it would be practically impossible to increase the capital of a corporation by the sale of new shares after the value of its shares had fallen below par." 1 Mor. Priv. Corp. § 306.

The corporation having refused to execute this agreement, requiring it to issue its bonds to the subscribers for stock, and having determined that such a contract was void and illegal, as beyond the power of the corporation, it cannot, therefore, be specifically executed. This brings us to a consideration of the question as to whether the refusal of the corporation to execute this illegal agreement relieves complainant from his liability as a subscriber to the capital stock of this company. His subscription cannot be regarded as one upon a condition precedent. He subscribed, not upon condition that, before he should be required to pay, the shares and bonds should be delivered to him. On the contrary, his bill shows that he has already paid \$1,000 upon his liability, and executed his negotiable notes for the remainder, and he states that he was to pay his subscription "as calls" should be made. He clearly contemplated that his subscription should be paid before any bonds were to be issued; for the bonds were to be secured by a mortgage of the company's plant, and this could not be created, except upon the supposition that the capital stock should be paid in, and then invested in a plant, which was to be mortgaged to secure the bonds. When a subscription is taken distinctly upon the condition that it is not to be binding until a stipulated thing is done, then such a subscriber does not become a stockholder, and is not entitled to the rights, or charged with the burdens, of a stockholder until the condition has been complied with. This court said concerning conditional subscriptions: "The capital of stock companies consists of their stock subscriptions. This is the basis of credit, and an essential to organization. This is a trust fund for the benefit of creditors in case of insolvency. Conditional subscriptions to the stock of corporations are unusual, and often operate to defeat subscribers who become such absolutely, and upon the faith that all the stock is equally bound to contribute to the hazards of the enterprise. It

misleads creditors, and is the fruitful source of litigation and disaster. Tending to the ensnarement of creditors, and contrary to a sound public policy, conditional subscriptions to corporate shares ought not to be encouraged." *Railroad v. Parks*, 2 Pickle, 560, 8 S. W. Rep. 842.

In that case the subscription was payable, one-fourth when the railway was completed to the county line, remainder in four equal installments as the work progressed through the county, upon the proviso that the company established a depot at Newbern. The company failed before a depot was established at Newbern, and it was insisted that the subscription was thereby avoided. This court held that the subscription became absolute upon completion of the road to the county line; that the proviso that a depot should be established at Newbern was not a condition precedent, but an independent stipulation; that the acts to be done were to be done at different times, and hence were independent stipulations, and the remedy of the subscriber was for a breach of the stipulation in his favor.

A condition subsequent is thus defined by Mr. Cook in his work on Stockholders: "A subscription on a condition subsequent contains a contract between the corporation and the subscriber whereby the corporation agrees to do some act, thereby combining two contracts,—one, the contract of subscription; the other, an ordinary contract of the corporation to perform certain specified acts." The subscription is valid and enforceable whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy." Cook, Stocks, § 78.

That Dr. Morrow's purpose was to become a shareholder cannot be doubted. The company regarded him as such, and he so regarded himself, for he not only acted as a stockholder, but became a director of the corporation. Says Mr. Morawetz: "If it appears that the subscriber intended to become a member of the corporation, and as such entitled to vote at meetings, and otherwise enjoy the privileges of membership, it is clear that the subscription cannot be deemed a subscription upon condition precedent." 1 Mor. Priv. Corp. § 89.

It follows from all that we have said that the stipulations concerning the issuance of bonds to subscribers for capital stock was not a condition precedent to liability upon the subscription. It was nothing more than an independent stipulation, for the breach of which the remedy would be in damages. The failure of the company to carry out this collateral agreement does not defeat liability upon the subscription. This breached covenant or independent contract was, however, illegal and void, whether regarded as a condition precedent or subsequent, and for such breach no action would lie. It follows that, inasmuch as complainant is liable in equity and at law upon his subscription, there is no equity whatever in his bill, and the decree dismissing it, with costs, is affirmed.

WHITE *et al.* v. FULGHUM *et al.*

(Supreme Court of Tennessee. February 8, 1889.)

1. HOMESTEAD—WAIVER IN MORTGAGE—FORECLOSURE—RIGHTS IN SURPLUS.

A foreclosure sale under a mortgage waiving homestead does not extinguish the mortgagor's right of homestead in the surplus proceeds, after payment of the mortgage debt.

2. EQUITY—MARSHALING ASSETS—WAIVER OF HOMESTEAD.

The equitable doctrine of marshaling assets will not be enforced so as to require a creditor whose mortgage contains a waiver of homestead to first resort to that portion of the proceeds of sale representing the homestead, so as to allow other

creditors not having such a waiver to satisfy their claims out of the residue; thus destroying the debtor's right to set apart \$1,000 from the residue for the purchase of another homestead.

Appeal from chancery court, Cheatham county; GEORGE E. SEAY, Chancellor.

Bill by White, Hadley & Co. and others against J. H. Fulghum, William Greer, and others, to have certain proceeds of the sale of land of defendant Fulghum applied to the discharge of their debts. Bill dismissed, and complainants appeal.

J. J. Lennox and Albert D. & Albert S. Marks, for appellants. *J. P. Helms, A. E. Garner, and R. S. Turner*, for appellees.

CALDWELL, J. This is a bill to marshal securities. Defendant I. H. Fulghum and his wife executed a mortgage upon a tract of land on which they resided, to secure a debt of \$1,500 to the mortgagee, William Green. Thereafter other creditors of Fulghum, with judgments before justices of the peace, and executions thereon returned *nulla bona*, filed their bill in chancery to foreclose the mortgage by a sale of the land, and to subject the surplus proceeds to the payment of their debts. Foreclosure was refused, because the mortgage had not matured, and the mortgagee refused to consent to a sale; but the chancellor allowed recoveries in favor of complainants for the amount of their debts, respectively, and decreed a sale of the land, subject alone to the rights of the mortgagee, and barring the mortgagor's claim to homestead. On appeal, this court held that the mortgage was a waiver of the homestead exemption as to the mortgagee only, and not as to other creditors, and modified the decree of the chancellor so as to direct a sale of the land subject to the mortgage of Green and the homestead of Fulghum. *Hall v. Fulghum*, 2 Pickle, 451, 7 S. W. Rep. 121. But no sale was made under that decree.

Pending the appeal in that cause, and before the rendition of the decree, Green's debt matured, and his administrator, widow, and heirs filed their bill to foreclose the mortgage by sale of the land. That relief was granted, and the master sold the land, on time, to the complainants in the first cause, taking their notes for the purchase price. The amount of the decree in favor of Green's estate was \$2,035.50, and the price for which the master sold the land was \$3,565. As these notes matured, the purchasers paid into court a sum sufficient to discharge the mortgage debt, interest, and costs. When they had done this, they filed the present bill in the same court, to have the balance due from them on their purchase-money notes applied to the payment of their decree against Fulghum. The chancellor dismissed the bill for want of equity on its face, thereby sustaining the motion of Fulghum and wife, and the demurrer of Green's administrator, and the complainants have appealed.

The theory of the bill is twofold: *First*, that the foreclosure proceedings extinguished Fulghum's right of homestead, and left the surplus of the fund subject to the debts of the complainants, as non-exempt property; *secondly*, that by his mortgage "Green had a lien on the whole of the land, including all exemptions," while the decree of the complainants constituted "a lien on the land subject to the homestead right," and that under such a state of facts, a court of equity will compel Green's administrator to first exhaust that part of the fund which represents the right of homestead.

The first proposition is true in part, but it is not true as a whole. Though the sale of the land, absolutely and without reservation, must of necessity have extinguished Fulghum's right of homestead in the land itself, it by no means follows that it extinguished his right of homestead in the proceeds of the land. The mere fact that the land has been converted into money, and that money as such cannot be enjoyed as a homestead, cannot destroy the right of homestead after it has once attached to the land. The homestead ex-

emption is a favorite in this country, and all laws concerning it are by the courts liberally construed in favor of the claimant. *Thomp. Homest. & Ex.* §§ 4, 7, 731; *Dickinson v. Mayer*, 11 Heisk. 520; *Arnold v. Jones*, 9 Lea, 548.

The fund realized from the sale of the land represents the land itself, and is subject to the same liens and rights. It stands in the place of the land, and those having an interest in the latter have the same measure of interest in the former. The right of homestead existed in the land, and was subordinate alone to the incumbrance of the mortgage. So it exists on the fund, subject alone to the prior satisfaction of the mortgage debt. Upon the same principle, in cases where the land has been sold to enforce the lien of the vendor, (against which lien the claim of homestead can never prevail. *Const. art. 11, § 11, Mill. & V. Code, § 2935*.) this court has more than once held that the vendee is entitled to an exemption in the residue of the proceeds of sale, and that \$1,000 of such residue will be invested, under the directions of the court, in other real estate, as a homestead for the vendee. *Bentley v. Jordan*, 3 Lea, 353-368; *Fauver v. Fleenor*, 13 Lea, 624.

This mode of investment in a new homestead is in accordance with the policy of the statute, which contains a similar provision for cases where sale under execution or attachment becomes necessary because the property levied on is worth more than \$1,000, and is not divisible, (*Code, § 2941*;) and for other cases, where a widow is entitled to both homestead and dower, and they cannot be assigned to her in kind, (*Id. § 2944*.)

The second proposition advanced in the bill, and urged in argument by counsel for the complainant, rests upon the equitable doctrine of marshaling securities, and its soundness depends upon the applicability of that doctrine to the facts of this case. The doctrine invoked is well established, both in England and America. It may be briefly stated as follows: Where one creditor has a lien upon two funds, or two parcels of other property, and another creditor has a lien upon but one of them, the former creditor will, in equity, be required to seek satisfaction first out of that fund or property upon which the other creditor has no lien. 1 *Story, Eq. Jur. § 638*; 3 *Pom. Eq. Jur. § 1414*.

Treating the gross fund involved in this case as properly divisible into two parts,—one representing the homestead, and the other the balance of the fund,—and agreeing that Green's mortgage is a lien upon both of them, and that the complainants have a lien upon the latter part only, we have a plain case for the application of the doctrine mentioned: provided, it should be further agreed that the whole of the fund is subject to the debts of Fulghum as non-exempt property would be.

But it is not all to be treated as non-exempt property. It has already been seen that Fulghum's right of homestead extends to so much of the fund as may be in excess of the mortgage debt, and that \$1,000 of such excess is to be regarded as exempt. Then the question is whether or not the doctrine mentioned will defeat the right of homestead in that excess. While that doctrine is well recognized and far-reaching in its effects, it has distinct and plain limitations. It will not be enforced to the prejudice of any creditor or third person, or in such a manner as to do injustice to the debtor himself. 2 *White & T. Lead. Cas. Eq. (4th Amer. Ed.) pt. 1, p. 205*; *Dickson v. Chorn*, 6 Iowa, 19; *Gilliam v. McCormack*, 1 *Pickle*, 611, 4 *S. W. Rep.* 521.

Now, would it result in injustice to the debtor to apply the doctrine in this case? Most manifestly it would. The land has been sold for enough to pay off the mortgage debt, and leave \$1,000 to buy him another homestead. He has done nothing to waive his interest in that surplus,—nothing to mislead the complainants, or impair their rights. As against them, he had a homestead in the land when sold; as against them, he has an exemption in the fund, unless they may defeat it by this bill.

Again, the right of a creditor to have the assets of his debtor marshaled is

but an equity. It is inferior to the lien of a subsequent registered mortgage, and may be defeated by alienation of the land before bill filed to enforce it. 1 Pickle, 602, 607, 4 S. W. Rep. 521.

Can an equity of this kind stand against the prior vested homestead right of the debtor? Will it be enforced in this case, to the entire destruction of a favored constitutional right, long before acquired, and never waived or abandoned by the debtor? Certainly not. When the homestead is once acquired, it can be lost only by some act of the claimant which in and of itself will work its destruction. No independent act of a creditor can have that effect. If he cannot subject the homestead or its proceeds directly, he cannot do so indirectly, by forcing another to take it. A court of equity will never destroy the right of homestead for the sake of enforcing the equity here contended for.

In *Gwynne v. Estes* this court refused to apply the doctrine of marshaling securities so as to defeat the widow's right of dower. 14 Lea, 673. On principle, that case is precisely in point. The widow, in the life-time of her husband, had joined him in a mortgage or deed of trust upon his land, waiving her right of dower. After his death, and the foreclosure of the mortgage by sale of the land, she set up a claim to dower in the proceeds. She was held to have waived her right of dower as to the particular debt secured by the conveyance, but not as to the debts of other creditors of her husband. To meet that aspect of the case, those other creditors asserted their right to have the securities marshaled, and thereby sought to circumvent the claim of dower. The court said this could not be done, though the land had been sold and converted into money; that the widow, being dowable, under the statute, (Mill. & V. Code, § 3244,) in the equitable interest of her husband in the land, was entitled to dower in the surplus proceeds of the sale; and that her right to be so endowed was superior to the equity of creditors sought to be enforced against her.

The same reasoning applies in this case, with the same force and justice. The interest of the debtor in the surplus proceeds of the land sold is the same in each case; and while the widow may, by statute, have dower in an equitable interest in land, so may the debtor, by similar authority, have homestead in the same character of interest. Code, § 2937. The right of dower and the right of homestead are cherished rights. They are alike superior to, and will alike prevail against, the equitable right of creditors under consideration in this case.

In several cases where the doctrine of marshaling securities was fully recognized, and would otherwise have been administered in all its force, its application has been refused by the courts of other states, because to apply it would be to destroy the right of homestead. *Dickson v. Chorn*, 6 Iowa, 19; *Marr v. Lewis*, 31 Ark. 203; *McArthur v. Martin*, 23 Minn. 75.

We have not overlooked our own case of *Parr v. Fumbanks*, 11 Lea, 392, nor are we unmindful of the fact that it is in direct conflict with this opinion. In that case the question was fairly presented, and the doctrine here invoked by the complainants was enforced to the destruction of the debtor's right of homestead. But we regard the decision in that case as unsound, upon the point just stated, and overrule it to that extent. It has never been followed, so far as we are advised. The holding in the case of *Gwynne v. Estes*, 14 Lea, 673, where the claim of dower was allowed to prevail against the efforts of creditors to marshal securities, was necessarily a departure in principle from the *Fumbanks Case*. So was the reasoning in the still later case of *Gilliam v. McCormack*, 1 Pickle, 598, 4 S. W. Rep. 521, though neither of the two referred to the *Fumbanks Case*. The fact is that the opinion in the *Gilliam Case* cites approvingly the above Arkansas and Minnesota cases, and upon them, in connection with other authorities, rests the decision of that case. 1 Pickle, 609, 4 S. W. Rep. 521.

After payment of the mortgage debt and interest and costs of foreclosure,

Fulghum is entitled to have \$1,000 of the residue of the fund invested in a new homestead for himself and family. From the amounts stated in the bill, it appears that there will still be something left. The bill may be entertained to subject this balance, and to that extent the decree dismissing the bill will be modified. According to the prayer, the bill may be treated as a petition in the cause wherein the mortgage was foreclosed.

Remand for further proceedings. Two-thirds of accrued costs will be paid by complainants, and one-third by Fulghum.

QUARLES v. CLAYTON.

(*Supreme Court of Tennessee. February 12, 1889.*)

1. ESTATES—NATURE OF ESTATE—TITLE BY PURCHASE.

A wife who, by marriage contract, has waived all her rights of dower and homestead, and in lieu thereof is to have a life-estate, from the death of her husband, in a tract of land, with a dwelling-house thereon, is not entitled, on a loss occurring after his death, to the proceeds of a fire policy on the house, issued to the husband, payable to himself, his executors or administrators, and to be void "in case any change shall take place in title or possession, except by succession by reason of the death of the assured." Her title to the insured premises is not by succession, but by purchase.

2. INSURANCE—EQUITABLE INTEREST.

Nor, in the absence of any covenant by the husband to insure the house for the wife's benefit, has she any equitable interest in a life-estate in the insurance money, by reason of her right to occupy the house during her life.

3. SAME—INTEREST THROUGH TERMS OF POLICY.

That the insurance company had the option to rebuild does not give her any rights on account of its election to pay instead.

Appeal from chancery court, Rutherford county; W. S. BEARDON, Chancellor.

Agreed case between Nancy M. Quarles and J. A. Clayton, administrator of her deceased husband's estate, to determine the rights of the parties to the proceeds of a policy of fire insurance issued to the deceased. Decree for the administrator, and Mrs. Quarles appeals.

J. E. Richardson, for appellant. Palmer & Palmer, for appellee.

LURTON, J. The deceased husband of appellant took out a policy of fire insurance upon his dwelling; loss payable to the assured, his executors or administrators. Before the expiration of the policy by time, but after the death of the assured, the house was accidentally burned. The insurance company, by consent of the claimants, paid the loss into the hands of the defendant, under an agreement that the fund should be held subject to the legal rights of complainant, if any she had, to be thereafter determined by the courts. An agreed case was made up, and submitted to the chancery court, and from the decree of the chancellor Mrs. Quarles has appealed.

Appellant is the widow of the assured, and claims a life-estate in the fund, upon the following state of facts: Before her marriage to the assured, a marriage contract was entered into, and duly executed, and registered in the county of their residence, by which, among other things not material to be here mentioned, it was agreed "that all the property and estate, both real and personal, now owned or hereafter acquired by said John W. Quarles, shall continue to be his, and shall remain wholly unaffected by said contemplated marriage with said Mrs. Nancy M. Kirk, in favor of whom no marital or other rights on his said property and estate shall attach or inure by reason of said contemplated marriage relation, further, or otherwise, than is expressed and provided in this instrument; and he hereby reserves the right and privilege of making such suitable provision for her out of his estate as he

may at any time desire, either by deed of gift, last will and testament, or otherwise. If he die without making any such provision for her, then she shall out of his real estate, if she survive him, have a comfortable home, to consist of, say, about one hundred and forty acres of his lands, in which will be included his dwelling and outhouses; the same to be surveyed and laid off to her by proper metes and bounds, and in such manner as will be most useful and convenient to her, and with least injury to his estate. This home, so laid off to her, to be and remain to her own proper use, support, and benefit for and during the term of her natural life, and, after her death, to take such directions as he may give to it by his last will and testament, or other proper mode of disposing of real estate; and if he die without any will, and without disposing of the remainder interest in said 'Home,' as above provided for and described, then the same shall descend to his proper heirs and distributees according to the laws of the state of Tennessee." After the marriage, the dwelling-house above described, which was then and after the residence of Mr. Quarles and his wife, was insured under a contract, as before stated, that the loss should be paid to the assured, the husband of appellant, his executors or administrators. Mr. Quarles died intestate, and without having, by deed or otherwise, made any provision for his widow other than that contained in the marriage contract. The widow continued to occupy the dwelling as her residence until it was destroyed by fire. The portion of the farm of the decedent which was to be assigned to her under the marriage agreement had not, at the time of the fire, been laid off by metes and bounds; but it was subsequently done to the satisfaction of all concerned. This estate was so laid off, as required by the contract, as to include the outhouses of the assured, and likewise the site of the burned mansion-house. The insurance policy was not taken out upon any agreement or contract, express or implied, with appellant, that she was to have any interest whatever therein.

Under this state of facts, has appellant any equitable or legal interest in the proceeds of this fire policy? That the precise boundaries of the 140 acres to be laid off to her had not been ascertained by survey at the time of the fire can cut no figure, because it was to be laid off, in all events, so as to include the mansion-house and the outhouses. It seems equally clear that she cannot hold the estate of her husband responsible for the value of the house, because, at his death, her contingent right to the house for her life ripened, and became a vested interest for her life; and at the moment her husband died intestate, and without having made any other provision for her, the house was standing, and her right to the use and possession at once accrued. Her interest became at once an insurable interest; and the destruction of the house by any means after her husband's death was not an injury for which his estate or his heirs would be responsible. Whatever right she has to any interest in this fund must arise from the contract of insurance. The person assured against loss in the policy issued upon the premises of Mr. Quarles was the owner himself. By all the authorities, a contract of fire insurance is a personal contract, and assures the interest alone of the assured in the property, in the absence of some agreement or trust to the contrary.

The policy taken out by Mr. Quarles contained the usual provision prohibiting any assignment of the policy without the consent of the insurer. It also contained the further stipulation that the policy should become void "in case any change shall take place in title or possession, except by succession by reason of the death of the assured." These provisions have been upheld by the courts as reasonable conditions, limiting and restricting the liability of the insured. That they are reasonable is obvious, when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one, by the destruc-

tion of property owned by him, while he would be altogether unwilling to insure the same property if owned by another. Again, the contract undertakes to make good any loss which the assured may sustain; and from this it follows that, if the assured has parted with his interest before the loss, he cannot ask to be indemnified, because he has sustained no loss. The provision against the change of title is therefore in precise harmony with the personal character of the contract. In some fire insurance contracts the stipulation against change of title extends so far as to make the policy void should such change of title be brought about by the death of the assured. The title, in such case, is no longer in the assured, but has by law passed to his heirs, or by will to his devisees; and a change of title so occurring has been held to defeat an action for a loss occurring after the death of the assured. *Sherwood v. Insurance Co.*, 73 N. Y. 447; *Hine v. Woolworth*, 93 N. Y. 75. The contract is not, therefore, one which attaches to or follows the property, being one for the personal indemnity of the assured; and, where the insurer does not assent to the assignment of the policy to a grantee of the property, neither the assured nor his assignee of the property can recover upon the policy. *Hobbs v. Insurance Co.*, 1 Sneed, 444.

But this policy was not avoided by the death of the assured. It expressly provides that a change of title shall defeat the policy, except when it occurs "by succession by reason of the death of the assured." The legal effect of this exception is to continue and extend the policy notwithstanding the change of title by death of the assured. In whose favor is this continuance? It has been ably argued that the effect of this continuance is in favor of those who by "succession" take the property covered by the risk, and that, though it may be payable to the executor or administrator of the assured, yet he will, in case the risk was upon real estate, take and hold in trust for those who by "succession" have taken the property, and who are therefore the persons damaged by the loss. This word "succession," in the connection in which it appears, is a word of technical meaning, and refers to those who by descent or will take the property of a decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any form of purchase or contract. This meaning is made most obvious when we consider that the contract provided against any change of title except by "succession;" and, to more directly affix a limited and technical meaning, the explanatory words are added, "by reason of the death of the assured."

There is much plausibility in the argument that, inasmuch as the policy is continued notwithstanding a change of title has occurred, in case the risk is upon real estate, the extension is, by intendment of the contract, to operate as an indemnity to those who by "succession" have become the owners of the property. In such a case, neither the administrator nor the distributee would have any interest to be insured, while the heir or devisee upon whom the title has been cast would be the legal and equitable owner, and the person to suffer by the loss. The root principle of insurance, that the loss is payable only to the extent that the assured has an insurable interest, would seem to preclude the administrator in such a case from any recovery, or make him a trustee for the heir of what he should recover when the loss occurred after the property had passed by "succession" to the heir. This seems to be the holding of the courts, when the question has arisen, although the text-book writers seem not to have seized upon the distinction. *Wyman v. Wyman*, 26 N. Y. 253; *Culbertson v. Cox*, 29 Minn. 309, 13 N. W. Rep. 177. But does the appellant take any interest in the insured property by succession? If she had taken as devisee or under the homestead law, she would be within the principle just discussed, and would be within the express holding of the two cases last cited. Unfortunately for her, appellant takes whatever interest she has in the property under the fire policy by virtue of her marriage contract. She is not entitled to homestead or dower, for she expressly agreed to take, in

lieu of all right which the law would have given her, the provision which she covenanted for by marriage contract. This interest was a contingent one. It depended upon two events: *First*, that she should survive her husband; and, *second*, that he should not by deed or will make any other provision for her. Both of these events occurred; and, instantly upon the death of her husband, she became seised of an estate for her life in the insured premises. She therefore took this mansion-house as the grantee of her husband, and did not take it by "succession."

But it is insisted that, however she acquired the estate, she has an equitable interest in a life-estate in this fund, because it represents the premises which she had a right to occupy and enjoy during her life. This presents a strong case in morals, but her legal rights are not so clear. The rule is well settled that no equity attaches upon the proceeds of a fire policy in favor of third persons who, in the character of grantee, mortgagee, or creditor, may have sustained loss, in the absence of some trust or contract to that effect. *May, Ins. § 456; 8 Kent, Comm. (10th Ed.) 499.* This rule applies as well to vendors and lienors of every class as to mortgagees who may have had their security impaired by a loss by fire. This court, in a well-considered case, held that the holder of a mechanic's lien upon a building had no equitable lien in a fire policy effected by the owner, and assigned to a mortgagee. *Galyon v. Ketchen*, 1 Pickle, 55, 1 S. W. Rep. 508. An equity will attach when the vendee or mortgagor was, by covenant or otherwise, bound to insure the property, for the better security of the creditor or vendor. In such a case the latter would have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken by the mortgagor or vendee or other debtor who had given a security upon the insured property; and this would be so, even though the policy stand in the name of the debtor, vendee, or mortgagor. But, in the absence of some such agreement, the mortgagor or vendee or grantor, having an insurable interest, might insure such interest for his own benefit; and no lien would attach thereto in favor of his creditor, secured by lien or mortgage or otherwise upon the insured property. *Carter v. Rockett*, 8 Paige, 436; *Wheeler v. Insurance Co.*, 101 U. S. 439; *Nordyke v. Gery*, 112 Ind. 535, 13 N. E. Rep. 683; *Sheld. Subr. §§ 233, 235.* The agreed state of facts upon which this case is submitted fails to show any covenant, contract, agreement, or understanding that Mr. Quarles should insure this property for the benefit of appellant. The interest of appellant, after the death of her husband, was an insurable one; so was the remainder interest of the heirs. The decedent having left no debts, and the distributees being the same persons who take the real estate as heirs, no controversy arises as between the administrator and the remainder-men.

That the insurance company had the option to rebuild is urged as a reason why the insurer's election to pay, instead of rebuilding, ought not to operate to the disadvantage of complainant. This option is one common to all contracts of fire insurance; and the argument, if good in this case, would operate to overturn the well-settled rule that no equity attaches to the proceeds of a fire policy in favor of third persons who have suffered loss, in the absence of some agreement to that effect. If this option to pay or rebuild should be regarded as sufficient to found an equity upon in favor of third persons disappointed by the election of the insurer, the law of insurance would have to be rewritten. There is no privity between appellant and the insurer, and no action of his can be ground to give her an interest which she would not otherwise have.

The decree of the chancellor will be affirmed.

KING v. STATE.

(Supreme Court of Tennessee. February 9, 1889.)

CRIMINAL LAW—CONTROL OF JURY—CONSTITUTIONAL LAW.

Acts Tenn. 1887, c. 158, providing that in all criminal trials, when the minimum punishment is not above one year in the penitentiary, the presiding judge need not place the jury in charge of an officer, but the jury may, in the discretion of the court, disperse as in other cases, is an unconstitutional delegation of the legislative power to suspend the general law, which requires juries to be kept together in felony cases, and which it does not in terms or by implication repeal.

Appeal from circuit court, Wilson county; ROBERT CANTRELL, Judge.

Indictment of George King for assault with a knife, with intent (1) to commit murder in the second degree; (2) to commit manslaughter. The trial judge refused to put the jury in charge of an officer, and defendant excepted. Motions for new trial and in arrest of judgment being overruled, defendant appeals.

R. E. Thompson and *J. J. Turner*, for appellant. *G. W. Pickle*, Atty. Gen., for the State.

TURNER, C. J. Chapter 158 of the Acts of 1887, passed March 21, 1887, is entitled "An act to change the practice in the circuit and criminal courts of the state in regard to putting criminal juries under the rule," and provides "that in all criminal trials, when the minimum degree of punishment for the crime charged in the indictment is not above one year in the penitentiary, it shall not be necessary for the presiding judge to place the jury in charge of an officer, but the jury may, in the discretion of the court, disperse as in other cases, and the state shall not be chargeable for their board." This statute does not, in terms or by implication, repeal the general law requiring juries in felony cases to be placed in charge of an officer, and kept apart from other citizens. It undertakes to confer upon each judge of the criminal and circuit courts the power to suspend the general law; the judge's discretion being the only rule for his conduct. The statute before us permits the judge to have one rule in one case, and the opposite rule in another case, in the same county, and at the same term of the court. Under it he may have a discretion to be exercised in one county, and the reverse of that discretion in another county. There is nothing in the act defining, controlling, or limiting that discretion. He is not required to give or have a reason for its exercise the one way or the other; and therefore, when he says the jury in this criminal case may disperse, and the jury in that criminal case shall go, under the rule, the question is settled. Whether he is influenced in the one case by personal considerations for one or more of the jury, or in the other by motives of public policy, can make no difference. He is the sole judge of the question, and his reasons are his own, and there is no authority anywhere to inquire into them.

The statute is a broad conference of legislative power to abolish, suspend, modify, or enforce a general law. Acting under the authority of this statute, we will necessarily have different rules in different circuits, and in different counties of the same circuit. A statute that cannot be reduced to a general rule, to operate in all parts of the state alike, is not a general law. To make a general law, it must be so drawn as to be susceptible of one construction as applicable to the entire state. The discretion, as already said, is for the judge alone. His determination is the law of the particular case in which he has exercised it, and is not subject to review or revision. The inducement to his action is his individual secret. Suppose, however, it shall be conceded that he may be reviewed, we ask how are we to inaugurate the proceedings of review? Nothing has happened at the trial to show an improper exercise of discretion, and therefore no record of the trial can put him in error. Then the question must arise on motion for new trial, supported by affidavits or

other testimony of witnesses with counter-testimony, which would make the trial in this court a departure from the trial in the inferior court; the only question here being, was the discretion properly exercised? in which it would often be attempted to inquire into and impugn the motive of the judge.

It is the duty of the legislature to make the law, and of the courts to enforce. The legislature cannot say to the courts: "You may enforce the law or not in your discretion, or you may suspend it or not in your discretion." The general law remaining, it must be enforced in all cases, unless the judge shall by this statute be permitted to say, "I suspend it." When he makes the order on his minutes to that end, he has performed a legislative, and not a judicial, act; an act the law has not commanded; an act that was not the law until he saw proper to declare it so; an act that he may do and undo at will. He may disperse the jury to-day, and put the same jury under rule to-morrow. He is bound to no rule of action, and accountable to no one for his actions. He is a legislative and a judicial compound,—something not recognized in our institutions. If this had been a general law, authorizing the court to disperse juries in the character of cases mentioned, except upon cause shown for the rule, or even without qualification, the question would have been different.

Other objections taken to action of the court are not sustained.

The statute being unconstitutional, it was error to permit the jury to disperse, and the judgment is reversed.

LEBANON & S. TURNPIKE CO. v. HEARN.

(*Supreme Court of Tennessee. February 8, 1889.*)

TURNPIKES AND TOLL-ROADS—DEFECTIVE ROAD—EVIDENCE.

In an action for injuries sustained by plaintiff on account of the balking of his horse while driving on the defendant's turnpike, where evidence is given that prior to the accident the horse had been unmanageable or vicious, evidence is also admissible to show such disposition subsequent to the accident; any objection to such evidence going merely to its weight.

Error from circuit court, Wilson county; ROBERT CANTRELL, Judge.

R. E. Thompson and Jordan Stokes, for plaintiff in error. *Lillard Thompson and Gribble & McMillan*, for defendant in error.

SNODGRASS, J. Hearn sued the plaintiff in error for damages for an injury sustained by him in consequence of being thrown from a buggy while attempting to drive along a small bridge on the Lebanon & Sparta Turnpike. The accident was occasioned by the balking of the horse which he was driving. Among other defenses, the company insisted that the accident resulted from the negligence of Hearn in driving improperly an unmanageable horse, or one difficult of control. It offered evidence tending to show that the horse was of such disposition before and after the accident. The evidence as to the conduct and character of the horse before the accident was admitted, and rejected as to that after the accident, and for this error is assigned. We are of opinion that the evidence rejected was admissible. The objection that, being afterwards, the vicious or unmanageable or timid conduct of the horse may have been occasioned by this fright, and that, therefore, the evidence must be rejected, is not sound. It assumes that the fright was the necessary provoking cause, which it may or may not have been. This affects the weight, not the admissibility, of the evidence. It should have been admitted, and considered for what it was worth. In a well-considered case, decided by the supreme judicial court of Massachusetts, it was held that evidence relating to the habits of a horse, subsequent to the accident, (where the question involved was the same as here,) was admissible, and objection to it went to its weight, rather than to its competency. That the habit of an animal is in its

nature a continuous fact, to be shown by proof of successive acts of a similar kind, and evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident. *Todd v. Inhabitants of Rowley*, 8 Allen, 51.

Let the judgment be reversed, and the case remanded for a new trial.

CHAPMAN v. STATE.

(*Supreme Court of Tennessee. February 7, 1889.*)

PARDON—RECOMMENDATION TO EXECUTIVE CLEMENCY—STATE'S EVIDENCE.

Where one indicted jointly with others for murder testifies for the state on the trial of his co-defendants, and afterwards pleads guilty of murder in the second degree, and the trial court is not requested to recommend executive clemency, the supreme court will not make such recommendation, as defendant may have received all the favor to which he was entitled by the reduction of the grade of his offense.

Error to criminal court, Rutherford county; G. S. RIDLEY, Judge.

A. S. Marks, for plaintiff in error. *Atty. Gen. Pickle* and *J. B. Palmer*, for the State.

TURNER, C. J. Jointly with S. T. Lands and C. B. Center the plaintiff in error was indicted in the criminal court for Rutherford county for the murder of J. M. Bynum. On the trial of Lands and Center plaintiff in error was introduced by the state as a witness. At a subsequent term of the court, Chapman, being arraigned, pleaded "guilty of murder in the second degree." There were verdict and judgment for 15 years in the penitentiary, and appeal to this court, after motions in arrest of judgment and for a new trial were overruled. The entire bill of exceptions is as follows: "Upon the submission of the cause by the defendant, Chapman, it was admitted by the state that defendant, Chapman, was jointly indicted with Lands and Center, and that the cause, as to him, was continued at the last term of this court, and at that term Lands and Center were put upon their trial, and that defendant, Chapman, was introduced by the attorney general as a witness for the state, and that defendant, Chapman, as such witness, detailed all the facts and circumstances of the crime, fairly and fully; and that in his interview with the attorney general, before he was put upon the stand as a witness, nothing was said to him by the attorney general as to whether it would be better or worse for him if he became a witness for the state." In the conclusion of the judgment and prayer for appeal is the recital: "The defendant insisted that by pleading guilty he did not intend to waive his equitable right to a pardon from the governor." It is now argued that, while this court must affirm the judgment, it is nevertheless its duty, under the law, to recommend to the executive for pardon. In support of this insistence, various authorities are cited and relied on. They are to the effect that an accomplice who is introduced as a witness, and testifies to the facts within his knowledge, withholding nothing because of its tendency to self-crimination, has an equitable claim to executive clemency, or the solicitor may enter a *nolle prosequi*, but the fact does not constitute a legal defense to a prosecution against him for the same offense. From this rule it seems the prosecuting attorney may, in his discretion, under the facts of the case, enter a *nolle prosequi*, or he may prosecute to the extent allowable under the indictment.

The indictment is for a capital offense. The submission was for one punishable by imprisonment. What the facts were is not disclosed by this record, and it may be the convict has received all the equity he is entitled to in

the reduction of the grade of offense, and the character of the punishment. We are to presume the attorney general of the criminal court, knowing the law, and being not forbidden to prosecute for the highest crime, has exercised a sound discretion and equitable leniency in accepting a submission for murder in the second degree. Upon what principle can this court hold that full and complete justice has not been done, in view of the strongest equity the convict can claim? We know nothing, and can know nothing, of the facts. They may show him to be the only guilty agent in the perpetration of the murder. The judge of the criminal court who heard the trial of his accomplices, and afterwards of himself, makes no recommendation for executive clemency, nor is he asked to do so; and it is beyond the power of this court to put him in error, on a question not made before him. The only questions that can be raised on this record are those in arrest of judgment and on motion for a new trial. If the facts had been brought to us with a motion to recommend overruled, the result might have been otherwise. We decline to recommend. Whatever claim there may be to executive clemency still rests in the facts, unembarrassed by this opinion.

Affirm the judgment.

COLLINS v. BAYTT *et al.*

(*Supreme Court of Tennessee. February 16, 1889.*)

1. HOMESTEAD—CONVEYANCE—VERBAL ASSENT OF WIFE.

Under Code Tenn. § 2114a, providing that a homestead "shall not be alienated without the joint consent of the husband and wife, when that relation exists, to be evidenced by conveyance duly executed as required by law for married women," a conveyance by the husband in which the wife does not join, but to which she assents verbally, will not deprive the wife of her homestead right.¹

2. SAME—REMOVAL—ABANDONMENT.

Nor is the removal of the wife with her husband from the homestead after such conveyance an abandonment of her right.² Overruling *Leitson v. Abrahams*, 14 Lea, 336.

Appeal from chancery court, Marshall county; W. S. FLEMING, Chancellor. Bill in equity by Mary W. Collins, by her next friend, against James E. Baytt and others for an assignment of homestead in certain land. There was a decree for defendants, and complainant appeals.

W. W. Walker and Jones & Murray, for appellant. James H. Lewis, for appellees.

TURNER, C. J. Section 11, art. 11, of the constitution, ordains: "A homestead in the possession of each head of a family, and the improvements thereon, to the value, in all, of one thousand dollars, shall be exempt from sale under legal process during the life of such head of a family, to inure to the benefit of the widow, and shall be exempt during the minority of their children occupying the same. Nor shall said property be alienated without the joint consent of husband and wife, when that relation exists." Section 2114a, Code, after providing the homestead, enacts "that said real estate shall not be alienated without the joint consent of the husband and wife, where that relation exists, to be evidenced by conveyance duly executed as required by law for married women."

¹ Concerning the necessity for the wife to join the husband in a conveyance of a homestead in order to pass title, see *Coker v. Roberts*, (Tex.) 9 S. W. Rep. 665, and note; *Betts v. Sims*, (Neb.) 41 N. W. Rep. 117, and note; *Conway v. Elgin*, (Minn.) 38 N. W. Rep. 370, and note.

² As to what constitutes an abandonment of a homestead, see *Gates v. Steele*, (Ark.) 4 S. W. Rep. 53, and note; *Lumber Co. v. Clay*, (Tex.) 10 S. W. Rep. 293, and cases cited; *Dennis v. Bank*, (Neb.) 28 N. W. Rep. 512, and note.

In this case the land was sold by the husband in 1873, the bill filed by the wife for homestead in April, 1883. At the end of 12 months after the sale husband and wife removed from the premises, and have owned no other homestead. The proof is conflicting as to whether the wife gave her oral consent to the sale; the parties affirming and denying supporting their theories with equal vigor. In our opinion it is immaterial which is right as to the fact. The wife not having signed the deed and been privily examined, no other consent will deprive her of her homestead.

It is argued that the removal of the wife with her husband was an abandonment of the right, and in support of this *Levison v. Abrahams*, 14 Lea, 386, is relied on. That case does sustain the contention; but it is unsound, and not in accord with reported decisions of this court. The wife cannot be thus compelled to elect between her husband and homestead. It cites several cases to fortify it. The first is *Henry v. Wilson*, 9 Lea, 178. In that case the husband left the wife, and went to Kentucky, declaring his intention never to live with his wife again, and filed a petition in Kentucky for a divorce. About a year after his desertion the wife removed to Dyer county, leaving the homestead vacant. This was a voluntary abandonment, uninfluenced by a purpose to be with her husband. In *Roach v. Hacker*, 2 Lea, 634, the wife left the homestead after the husband had gone to Kentucky, and her bill to recover homestead "goes upon the idea that the husband deserted his wife, and does not intend to return." In *Jarman v. Jarman*, 4 Lea, 675, it is said: "By our law the homestead vests in the husband and wife jointly, and is a life-estate. Upon the death of either it vests in the survivor. Neither has the right to dispose of it except with the consent of the other by will or otherwise, and then only in the mode prescribed by statute. The right of the wife is fixed during coverture, and is only lost by her voluntary alienation or abandonment, or by her death." There was nothing in the case calling for the use of the words "voluntary abandonment," and therefore they were not defined. *Wade v. Wade*, 2 Leg. Rep. 10, simply holds that the land claimed as a homestead was not used or occupied as such,—had no dwelling-house upon it,—and therefore there was no right of homestead in it. So that the case of *Levison v. Abrahams* is not sustained in any particular by the cases it cites.

In *Williams v. Williams*, 7 Baxt. 118, Chief Justice NICHOLSON says: "It is now a rule of property made permanent by the fundamental law that every head of a family is deprived of the right to alienate the homestead unless his wife joins in the conveyance. It follows that such conveyance is absolutely void, and communicates no title to the purchaser, so far as it abridges or interferes with the wife's homestead right; and the wife, by her next friend, has such an interest in the preservation of the homestead as entitles her to invoke the protection of a court of chancery by bill *quia timet* to have the cloud upon her rights removed and her homestead rights declared."

In *Neam v. Campbell*, 2 Leg. Rep. 29, Judge MCFARLAND said: "We have held that a wife is not to be deprived of this right, [homestead,] although the husband during his life moved away from the land with her and his family. She may afterwards assert her right, and be restored to possession." Citing *Carter v. Natham*, and *Williamson v. Wood*, MSS. He proceeds: "The homestead exemption is not an estate in the land, but a mere exemption; and when the widow voluntarily abandons the possession, her right is gone, (*Heck v. Pepper*, MSS.) but not so when she was removed from the premises by her husband."

In *Mash v. Russell*, 1 Lea, 544, Judge COOPER says: "The land being in the actual occupancy of the husband and wife as a homestead at the date of the conveyances, those conveyances did not carry the homestead right secured by the constitution and the act of the legislature to carry it into effect. That right could only be alienated under such circumstances by the joint con-

sent of the husband and wife, 'evidenced by conveyance duly executed as required by law for married women;' that is, by privy examination of the *feme.*"

In an unpublished opinion of Special Judge E. H. EWING, in *Richards v. Smith*, found in Opinion-Book 63 of 1881, at page 318, it is said: "'Homestead,' as above defined, is property, and must be passed as provided by the constitution and statutes, and but one mode is allowed. * * * There must be a writing to pass a man's lands, signed by him. Nothing else will pass his lands." The wife's "disabilities which restricted her are equally a shield for her protection. The makers of the constitution doubtless looked well in this provision to the peculiar relation of husband and wife. They could well foresee that many cases would arise when, where the conduct of a reckless and besotted or tyrannical husband might drive a woman to shifts and concealments even that would not bear the scrutiny of a strict morality and thought, that at least she should have that protection which comes from the solemnities of a deed and privy examination." "The husband undertook to sell the homestead, the wife not joining. He removed after the alienation, and took the wife with him. The deed as to her right of homestead was void." There was no break in this line of decisions till *Levitson v. Abrahams* appeared. If it is to stand, it overrules quite a number of well-considered cases adhering to the constitution and statute, from both of which it is a departure. It is therefore overruled.

The decree of the chancellor is reversed, and the cause remanded for assignment of homestead, and an account for rents from the filing of the bill. Defendants will pay the costs.

RUBY *et al.* v. VON VOLKENBERG.

(*Supreme Court of Texas. January 18, 1889.*)

1. EXECUTION—SALE—SHERIFF'S DEED—DESCRIPTION OF LAND.

A sheriff's deed, duly executed and recorded, which properly recites a judgment ordering the sale of the land described in plaintiff's petition, and describes the land by adjoiners, with the number of varas and acres therein contained, sufficiently describes the land, and, at a distance in time of 40 years, will be presumed to cover the proper land, the petition being lost.

2. EVIDENCE—DOCUMENTARY—ANCIENT INSTRUMENTS.

Testimony of an attorney of the court that he and the clerk have searched the records with diligence, and cannot find the papers in question, together with evidence that they were withdrawn by a firm of lawyers, one of whom moved away years ago, and the other disclaims all knowledge of them, warrants the court to whose records said papers belong in admitting the sheriff's deed in the case, as an ancient instrument, without further proof of the sheriff's authority to make it.¹

3. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS.

When the motion for new trial presents 12 different grounds, an assignment of error that the court erred in overruling said motion will not be considered.

Appeal from district court, Harris county; JAMES MASTERSON, Judge.

Trespass to try title, by D. C. Ruby and others, appellants, against John H. Von Volkenberg, appellee.

W. P. Hamblen, for appellants. Brady & Ring and Jones & Garnett, for appellee.

HENRY, J. This is an action of trespass to try title, instituted in the district court of Harris county by appellee against appellants. There was a verdict and a judgment for the plaintiff, from which defendants prosecute this appeal.

¹ On the general subject of admitting ancient documents in evidence without preliminary proof of their execution, see *Prigden v. Green*, (Ga.) 7 S. E. Rep. 97, and note; *Allison v. Little*, (Ala.) 5 South. Rep. 221, and cases cited.

The land in controversy was patented to James Wells, and he, in the year 1838, deeded it to Girard, Heddenberg, and Vedder, under whom defendants claim. In 1848, James Wells conveyed the land to plaintiff. Over the objections of defendants, plaintiff read in evidence a judgment rendered in 1847 by the district court of Harris county in favor of James Wells and against Girard, Heddenberg and Vedder, and certain entries in the execution docket of said court, and a sheriff's deed to James Wells for the land in controversy. The character of these proceedings is shown by defendants' bill of exceptions, which reads as follows:

"John H. Von Volkenberg vs. D. C. Ruby et al. No. 11,632.

"Be it remembered that on the trial of the above cause the plaintiff offered to read in evidence from the minutes of the district court of Harris county, Book E, p. 285, a judgment and foreclosure rendered in said court on the 25th day of May, 1847, in favor of James Wells against Girard, Heddenberg, and Vedder, No. 1,563, a copy whereof is as follows:

"James Wells vs. A. Girard, Chas. J. Heddenberg, & Jacob Vedder. No. 1,563.

"This day came the parties by their attorney, and the demurrers filed by defendants Heddenberg and Vedder having been overruled, and defendant Girard having been duly notified by publication, and a jury being waived, the cause was heard upon the pleadings and proofs; and it appearing to the court that the defendants did make the contract described in plaintiff's petition, and that there is due and owing the sum of \$1,594.58; and it furthermore appearing that the deed executed in pursuance of said contract, and set forth in said plaintiff's petition, was made and delivered, and that the same specially reserved in plaintiff's favor a lien on the land conveyed; and it also further appearing that said defendants are bound jointly, and not *in solido*, to-wit, for one-third part of said sum of \$1,594.58; and it appearing manifestly just and equitable that said plaintiffs should take and recover of said defendants said sum, and that the land in plaintiff's petition described should be subjected to its payment: Now, therefore, it is ordered, adjudged, and decreed, and the court doth order, and adjudge, and decree, that plaintiff have and recover of defendants, severally and respectively, the sum of \$531.53, the equal and several portions of said first-named sum of \$1,594.58, and for the payment of which it is ordered, adjudged, and decreed that the property conveyed by plaintiff and his wife by deed, of which plaintiff has incorporated a copy into his petition, and which is made part of this decree, as also the patents, or so much thereof as may be necessary, be declared, and is hereby so decreed, subjected to the payment of said sum, and that an order of sale issue herein to the sheriff of Harris county to sell the same, as under execution for cash, without appraisement; also that plaintiff recover of defendants, by equal one-third parts, his costs in this suit expended. And it also appearing to the court that, for a valuable consideration paid plaintiff, plaintiff has agreed and contracted not to hold defendants Heddenberg and Vedder liable, should said property not satisfy this decree; and the balance of the purchase money originally agreed to be paid by said sale, or any future sale, said defendants Heddenberg and Vedder are hereby understood to be released and discharged and as wholly and justly exempted from execution therefor."

"To the reading and introduction of which the defendants Ruby and Hall, by their counsel, objected, on the ground that the said judgment and foreclosure did not describe any land upon which said foreclosure was had, and referred only to the land described in the petition, when no petition was produced in connection with such judgment to identify the land that should be sold under any order of sale; which objection, after argument, was overruled by

the court, and said judgment was read to the jury, to go to them so as to submit the question of description and foreclosure to them.

"Be it further remembered that then the plaintiff offered to read to the jury from the execution docket, Book B, of Harris county district court, page 228, the docketing and memorandum from said docket of the issuance of an order of sale in said suit of James Wells to Girard, Heddenberg, and Vedder, No. 1,563, on the docket of said court, which is as follows, to-wit:

"*James Wells vs. A. Girard, Chas. J. Heddenberg, & Jacob N. Vedder, (Henderson, Attorney.)* No. 1,563.

"Decree May 25, 1887.

Debt and damages,	-	-	-	-	-	-	-	\$1,594	58
Clerk Lubbock,	-	-	-	-	-	-	-	29	50
County tax,	-	-	-	-	-	-	-	3	00
Sheriff Russell,	-	-	-	-	-	-	-	2	30
Publication notice,	-	-	-	-	-	-	-	55	00

"Sheriff Harris County.

"*July 1, 1847.*"

"Without appraisement and costs to the use of the officers, the property described in the within orders of sale was sold on the 3d day of August, 1847, to James Wells for \$72.60, costs paid.

"To the reading of which the defendants Ruby and Hall objected, on the grounds: (1) Because the execution should be produced as the best evidence, or its loss should be shown, and the contents proved. (2) Because the said memorandum of the docket does not show that the land in controversy was sold thereunder, or that any particular land was sold, and the said memorandum contains nothing to identify the land sued for. (3) Because the loss of the execution and return was not proved, and no evidence was introduced to show such loss; nor was affidavit made of such loss, or parties defendant put upon any notice of such loss; nor was any proper inquiry shown to have been made for said execution. Which objections, after argument, were overruled by the court, and the said memorandum and docketing were read to the jury.

"Be it further remembered that then the said plaintiff offered to read as evidence to the jury a deed from Auguste Girard, Chas. J. Heddenberg, and Jacob N. Vedder, by sheriff of Harris county, D. L. Russell, to James Wells, dated 3d day of August, 1847, purporting to have been made in pursuance of a sale made under said judgment, and order of sale as therein appears, and which said copy of the deed is as follows, to-wit:

"*The State of Texas, County of Harris:*

"Know all men by these presents that whereas, at a term of the district court begun and held in and for the county of Harris on the second Monday after the fourth Monday in April, in the year 1847, to-wit, on the 25th day of May, in the same year, there came on to be heard and determined a cause then pending, wherein James Wells was plaintiff, and Auguste Girard, Chas. J. Heddenberg, and James N. Vedder were defendants; and on hearing thereof the said district court, on the day aforesaid, adjudged and decreed as follows, to-wit: [Here follows decree in the bill same as copied in first part of all, down to word "expended," and is not again copied here to save repetition.] Upon which said judgment, and decree, as aforesaid, an order of sale was issued from the clerk's office of the district court aforesaid, bearing date the 8th day of July, 1847, and directed to the sheriff of Harris county, commanding him to proceed and sell the land described in plaintiff's petition, in satisfaction of the debt and damages and costs aforesaid, which amount to the sum of \$89.80, as under execution; which said land is described as follows, to-wit: Bounded on the north by the league of land granted to Samuel

M. Williams, on the south by a quarter of a league of land granted to Henry Tienvester, and on the west by land occupied by Holman; containing 2,049, 290 square varas, or three hundred and sixty-three acres, as will more fully be seen by reference to the patent issued to the plaintiff, and delivered to him on the 20th day of January, A. D. 1846, (patent No. 548, vol. 4.) That in accordance with said decree, and the command therein, I, the said sheriff, proceeded to advertise for sale the foregoing described three hundred and sixty-three acres of land, lying, being, and situated in the vicinity of the city of Houston, county of Harris, and state aforesaid, at three public places in the county, one of which was posted at the court-house door of the county of Harris, for more than twenty days previous to the day of sale. I, the sheriff aforesaid, afterwards, to-wit, on Tuesday, the 3d day of August, instant, at the court-house of the county as specified, and so publicly declared in notice given as aforesaid, proceeded to sell to the highest bidder for cash without appraisement, as expressed in the decree aforesaid, and so indorsed on the order of sale by the clerk of the district court of Harris county, in accordance with the statutes in such cases made and provided; whereupon Jas. Wells, on Tuesday, the 3d day of August, A. D. 1847, being the first Tuesday in the month, and a judicial day of sale, in front of the court-house door, and within the hours prescribed by law, and at public outcry, offered the sum of twenty-five cents per acre for said three hundred and sixty-three acres of land above described, amounting to the sum of seventy-two dollars and sixty cents for the said three hundred and sixty-three acres, being sold without appraisement, as per the indorsement as aforesaid, and being the highest and best bidder, and more than was offered by anybody else, he, the said James Wells, was declared the purchaser. Now, therefore, I, David Russell, sheriff of the county of Harris, acting in my official capacity, and by virtue of the powers in me by law vested, and the judgment and decree as aforesaid, and the order of sale to sell the tract of land described as aforesaid to me directed, and the sum of seventy-two dollars and sixty cents to me in hand paid, the receipt of which is hereby acknowledged and confessed, and an acquittance therefor given, have this day granted, bargained, and sold, and do by these presents grant, bargain, sell, and convey, unto the said James Wells, his heirs and assigns, the above-described property, together with all the rights, members, and appurtenances thereto belonging. To have and to hold the same to himself, his heirs and assigns, forever, in as full, good, and perfect manner and estate as the said Charles J. Heddenberg, Jacob N. Vedder, and August Girard, above mentioned, or either of them, had in and to said land since their purchase from James Wells and wife, as will the rendition of the above-cited judgment and decree in said premises become liable to satisfy the same, with damages and costs of court.

"In testimony whereof I have hereunto set my hand and scroll, in place of a seal, in my official capacity, at my office, in the city of Houston, this 3d day of August, A. D. 1847.

"D. RUSSELL, Sheriff of Harris County. [Seal.]'

"Here follows the proof of deed, and certificate of clerk that the same is a copy, which is not necessary to copy.

"To the reading and introduction of which, the defendants, Ruby and Hall, by their counsel, objected, upon the grounds—*First*. That the said deed is not supported by any judgment or foreclosure, nor by any execution or order of sale of the land in controversy, or of any land that can be determined. *Second*. That said deed shows no order of sale was issued to sell any particular land, nor has any proof been made of the description called for in the judgment, nor any basis been laid to admit said deed. *Third*. That the recitals of said deed of description are the ministerial acts of the sheriff, and are no proof of his authority to sell the land sued for, or any other land. *Fourth*.

That the recitals in said deed show that the quantity of land sold is not the quantity upon which the vendor's lien was retained. *Fifth.* That there is nothing in the judgment of foreclosure, nor in the memorandum of the execution docket, which this bill of exception referred to, that can authorize a deed to be made by the sheriff to any land, and particularly the land in controversy, nor to affect the defendants, or either of them, or their vendors. *Sixth.* That to permit said deed to be read, is to permit the plaintiff to sustain his title by evidence made exclusively by the sheriff to sustain his authority to sell. Which objection, after argument, was overruled by the court.

"To all of which rulings of the court in this bill hereinbefore set forth the defendants Ruby and Hall, by their counsel, excepted, and prayed that their said exceptions may be allowed, and made part of the record, which is accordingly done.

"Witness my hand and seal this ——— day of ———, 1887.

"ADDENDA BY THE COURT.

"Before the sheriff's deed was offered in evidence, H. F. Ring, Esq., plaintiff's attorney, testified that the papers in said cause, No. 1,563, had been lost; that he searched, and caused the clerk of the district court of Harris county to search, for the same in this office of said clerk with diligence; and that said papers, including said execution, order of sale, and petition, could not be found, nor could any trace of the same be found, except the receipt of Crank and Webb, attorneys, given many years before; that witness had called on Major Crank, of said firm, and asked him about the papers, but that he had denied having knowledge or recollection of the same, or of the contents of the same; that witness was unable to see Mr. Webb, the other partner of said firm, on account of his absence from Harris county, he having moved away some years before, and is now, he is informed, in the state of California. With the above explanation, I now sign this bill of exceptions in open court, this 31st of October, 1887.

"JAMES MASTERSON, Judge Eleventh District."

The first four assignments of error are to the effect that the court erred in admitting the evidence specified in said bill of exceptions. The law, as it stood at the date when this judgment was rendered, allowed the petition to be referred to in actions of trespass to try title, as well as in other suits, to aid the description furnished by the judgment. In *Freem. Judgm. § 50c*, it is said: "The property which is the subject of a judgment or decree must also be described with sufficient certainty to leave its identity free from doubt; but the bill or complaint may be referred to in the judgment for the purposes of description." See *Hurt v. Moore*, 19 Tex. 270. The foreclosure part of this judgment depends entirely upon the petition. If the petition is lost or destroyed, it is equivalent, in this particular, to the loss of the judgment; and it becomes proper to supply it by proof or presumption, just as it would be the entire judgment if lost. If this was a recent transaction, in which it became necessary to prove the existence of a judgment and order of sale to support the sheriff's deed, then, leaving out of view the question of the sufficiency in other respects of the predicate laid by the evidence offered for that purpose, the sheriff's deed would have to be held improperly admitted, because no sufficient evidence of the contents of the lost instruments was produced. In this case the sheriff's deed was dated and properly recorded in 1847. Its recitals of the authority under which it was executed are in all respects full and complete. As far as the record now exists, it verifies these recitals. The description in the deed of the land conveyed by it is sufficient.

It could not have properly been admitted in evidence without a satisfactory reason for the non-production of the records under authority of which it was executed. It is so held in the case of *Tucker v. Murphy*, 66 Tex. 360, 1 S. W. Rep. 76. When the loss of a public record is in question, it is usually

more satisfactory for the proof to be made by the keeper of the record. No inflexible rule on this subject has been established. In the case of *Mays v. Moore*, 13 Tex. 88, the court says: "It is always a question addressed to the discretion of the court, to determine whether the basis has been laid by proving the loss or destruction of a record, to let in proof that such record once did exist." In this case an attorney of the court testified that both himself and the clerk had searched for the records with diligence, and that they could not be found. The evidence goes further, and shows that there was evidence in the office of the clerk that the papers had been withdrawn by a firm of lawyers, one of whom had moved away years before, and the other, on being applied to, declared that he had no knowledge of them. We attach importance, too, to the fact that the missing records belonged to the court in which the trial was being conducted. We think it was a proper exercise of the discretion of the court to hold that the absence of the records was sufficiently accounted for, and that the sheriff's deed was admissible in evidence as an ancient instrument.

The fifth and sixth assignments of error both relate to charges of the court, and complain that the charges excepted to submitted to the jury questions of law which ought to have been decided by the court. We do not think the charges referred to are subject to this criticism. They, we think, announce the law, and submit for the finding of the jury nothing but issues of fact.

The only remaining assignment of error is that "the court erred in overruling said defendant's motion for a new trial." As 12 different grounds are found in the motion, we cannot consider this assignment.

The judgment is affirmed.

CHERRY *et al.* v. OWSLEY *et al.*

(Supreme Court of Texas. December 7, 1888.)

PARTNERSHIP—LIABILITY AS PARTNER—COMMERCIAL REPORTS.

W. furnished to the defendant firm a stock of goods on consignment, the latter to receive for their services in making sales a share of the profits. In other business of the firm W. had no interest whatever. Held, that he could not be made liable as a member of the firm by a creditor who acted solely upon commercial reports, based upon a newspaper statement of which W. was ignorant.

Appeal from district court, Ellis county; ANSON RAINY, Judge.

S. H. Watson agreed to furnish O. N. Owsley & Co., on consignment, a stock of pumps; the contract between them providing that "commissions of one-half profit on retail sales and one-third profit on wholesale sales are to be compensation to said C. N. Owsley & Co. for their services in storing and selling said pumps," etc. In the general business of C. N. Owsley & Co., aside from the pump business, Watson had no interest whatever. See *Brown v. Watson*, ante, 395.

Lancaster & Maxwell and *G. C. Grace*, for appellants. *J. W. Ferris* and *M. B. Templeton*, for appellees.

WALKER, J. This is an appeal from a judgment in favor of S. H. Watson, who was sued by appellants as a member of the firm of C. N. Owsley & Co. on an account. Watson denied, under oath, the alleged partnership. The testimony was the same as in the case of *Brown v. Watson*, ante, 395, as to Watson's dealings with C. N. Owsley & Co., save that the plaintiffs acted solely upon reports from the mercantile agency of R. G. Dunn & Co. The information upon which the local agent reported Watson's connection with the Owsleys, as stated by him, is: "He thought his report to Dunn & Co. was based on the newspaper statement of the partnership." Of this Watson testified he was ignorant. For the reasons given in the former case, upon the same facts, the case is affirmed.

HOUSTON et al. v. BLYTHE et al.¹

(Supreme Court of Texas. November 13, 1888.)

1. PARTITION—DIVISION INTO SHARES—CONTIGUOUS PARCELS.

Rev. St. Tex. arts. 3475, 3476, provides that commissioners in partition, when necessary, may cause the real estate to be surveyed into several tracts or parcels, and shall divide it into as many shares as there are coparceners, each of which shall contain one or more tracts or parcels, as the commissioners shall deem proper, so that the shares may be equal in value. *Held*, that a share may consist of tracts not contiguous, and it is not error to direct the partition to be thus made, if the commissioners deem it expedient.

2. SAME—DECREE—DIRECTIONS TO COMMISSIONERS.

It is not a modification of a judgment of partition, directing the commissioners to proceed generally according to law, to give, in a subsequent order appointing new commissioners, specific instructions following the statute governing partitions, as every judgment of partition contains the statutory directions by implication, if not expressed.

3. APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY.

An assignment of error, simply stating that the judgment is contrary to the law and evidence of the case, is too indefinite to be noticed.

Appeal from district court, Hopkins county; J. A. B. PUTNAM, Judge.

Action for partition. C. M. Houston and Nancy Houston appeal from the decree confirming the report of the commissioners.

Harris & Milam, for appellants. *John L. Henry*, for appellees.

STAYTON, C. J. This action had its beginning in an action of trespass to try title, begun in the year 1859, but all questions of title were finally settled by a judgment rendered on April 11, 1887. The suit, as to the persons who were adjudged to own undivided interests in the land, was also for partition. By the judgment entered on April 11, 1887, the respective interests of those persons were determined, and commissioners were appointed to make partition. The decree, through which this was done, gave general directions, in accordance with law, to the commissioners as to the mode of their procedure. The commissioners then appointed made a partition, and reported it to the court, but, on exceptions made to it by one of the interested parties, the report was set aside by an order made at the April term, 1888, when the commissioners theretofore appointed were removed, and others appointed in their stead. The order through which this was done gave to the commissioners then appointed more specific directions as to the manner in which they should proceed in making partition, but it in no way varied the rights of the several parties from the determination made by the original decree directing partition. The commissioners last appointed made a partition, which they reported to the court. Exceptions to this were filed by appellants, but the court, after hearing much evidence, overruled the exceptions, approved the report, and by decree made partition of the land in accordance with the recommendations contained in the report, and from that decree this appeal is prosecuted by the holder of one share, all others being satisfied.

There are but three assignments of error, and the second is as follows: "The court erred in rendering an additional and different judgment to the original judgment herein rendered on the final trial hereof, and had no authority in law to change, amend, or render any other judgment than to reject or confirm the report of the commissioners, as shown by judgment setting aside report of commissioners herein." As before said, the instructions given to the commissioners last appointed did not in any manner change the right of the interested parties as fixed by the decree of April 11, 1887. They were but more specific, and the matter to which this assignment of error is directed consists of an instruction to the commissioners that they were at liberty, if

¹Publication delayed because of failure to receive copy.

they thought it necessary, to make a fair partition of the land; to divide the tract to be partitioned into as many several tracts or parcels as they might think necessary; after which they should divide the land into as many shares as there were persons entitled, each of which should contain one or more of the parcels into which the commissioners might think it necessary to divide the entire tract in order to make an equitable partition of the whole. The statute provides as follows: "Should the commissioners deem it necessary, they may cause the real estate to be surveyed into several tracts or parcels."

"The commissioners shall divide the real estate to be partitioned into as many shares as there are persons entitled thereto, as determined by the court, each share to contain one or more tracts or parcels, as the commissioners may think proper, having due regard in the division to the situation, quantity, and advantages of each share, so that the shares may be equal in value, as nearly as may be, in proportion to the respective interests of the parties entitled." Rev. St. arts. 8475, 8476. The words "several tracts or parcels," used in article 8475, does not mean the same thing as the word "shares," used in the succeeding article; for one or all of these may be composed each of several of the tracts or parcels into which, in the discretion of the commissioners, the land to be partitioned may be divided. This may result in each one of the distributees receiving as a share tracts or parcels not contiguous. Ordinarily such a course may not be necessary, but, shall it so become in a given case, the statute requires that this course shall be pursued. Instructions as to the method of making partition, contained in the statute, must be understood to enter into every decree directing partition to be made, if not therein expressed. If the original decree in this case did not in terms give the directions given by the statute, the action of the court in subsequently so doing was proper, and did not involve the rendition of another or different judgment than that originally entered.

The first assignment of error is: "The court erred in his instructions to the commissioners herein appointed, by instructing them to divide and partition the lands here in controversy between the different owners in any number of blocks or parcels, as they might see proper." The correctness of the instruction here complained of has already been considered under the second assignment, and whether the method pointed out by it for making partitions is the last that might be desired it is unnecessary to consider; for it pointed out a method which the legislature has provided may be pursued. It was therefore a lawful method, and the court did not err in instructing the commissioners that they should follow it, if in their judgment it was necessary so to do in order to make an equitable partition between the parties. It may be true that a literal compliance with article 8477, Rev. St., cannot be, when the shares of the distributees are unequal. If so, the statute should be complied with in such case in accordance with its spirit, which might require, as was done in this case, that the tracts or parcels necessary to make shares should be designated by lot.

It is claimed in the third assignment that "the court erred in its judgment in confirming the report of commissioners herein, because said judgment is contrary to the law of the case, and against the evidence heard upon the trial hereof." This assignment, under the well-settled rules of this court, must be held too general to entitle appellants to a revision of the case upon the sufficiency of the evidence to show that the partition made was equitable between the parties. The evidence covers more than 100 pages of the transcript, and we cannot search through it to ascertain whether there be errors of fact which the parties asking us to do so have not themselves specified. The tract to be partitioned contained 4,650.5 acres, and about 90 acres of it are shown to be within the corporate limits of the city of Sulphur Springs, and suitable for residence lots. The south-eastern part, by reason of its proximity to the city, was shown to be more valuable than other parts. Great care

seems to have been taken by the commissioners, and, the matter having been passed upon by the court below, after hearing such evidence as the parties brought, in the absence of some specific assignment of error we cannot undertake to pass upon other questions.

The judgment of the court below will be affirmed.

HENSON v. REED.¹

(*Supreme Court of Texas. November 13, 1888.*)

VENDOR AND VENDEE—VENDOR'S LIEN.

Plaintiff owned land on which was a lien for purchase money. He sold part of it to defendant, who paid part, and agreed to pay two-thirds of the original purchase-money notes, but failed to meet one of them when due, and plaintiff paid it; defendant agreeing to repay his share. By mutual agreement plaintiff's vendor conveyed their respective portions to each, taking from each new notes for the portions of the purchase money unpaid each had agreed to pay. *Held*, that plaintiff had a lien on defendant's tract for the two-thirds of the note so paid by him.

Appeal from district court, Hunt county; GEORGE S. PERKINS, Special Judge.

Action by Robert Henson against Nathan Reed, to foreclose an alleged lien on land. Judgment for plaintiff for the amount of the debt, but the court found that it constituted no lien, and refused foreclosure. Plaintiff appeals.

B. F. Looney, for appellant. *Montross, Grubbs & Hefner*, for appellee.

STAYTON, C. J. Robert Henson bought a tract of land from Shelby county, containing 166 acres, for which he gave notes falling due annually. The deed made to him reserved a lien for purchase money. Henson conveyed to Reed 108 acres of this same land, for which the latter agreed to pay \$700, and in addition to this two-thirds of the sum still due to Shelby county by Henson for the land. Reed paid the \$700, and when a note executed by Henson to Shelby county for \$99.60, with interest due thereon, became due, Reed was unable to pay it, or his share of it, and at request of Reed the same was paid by Henson under promise made by Reed that he would repay to him the money so paid. Both parties being desirous to be relieved from liability to pay to Shelby county more than the balance due on the purchase money for the land by them severally held, and to relieve their lands so far, applied to the agent for Shelby county to make a deed to Reed for the 108 acres conveyed to him by Henson, and to Henson for the 58 acres still in his hands. This was done, and Reed executed to Shelby county his own notes for the balance due on the 108 acres, as did Henson for the balance due on the 58 acres still held by him. The original deed to Henson, as well as the deed from him to Reed, was at the same time canceled; but all this occurred after Henson had paid the note at request of Reed, as before stated. This action was brought by Henson to recover two-thirds of the sum he had paid at request of Reed, and to foreclose lien on the land conveyed by him to Reed. The court rendered a judgment in his favor for the sum claimed by him, but refused to establish and foreclose the lien claimed.

It is urged that the court erred in refusing to foreclose the lien. Henson was under obligation to Shelby county to pay the note, but, as between him and Reed, it was the duty of the latter to have paid two-thirds of the sum due on it. Under this state of facts we are of the opinion that Henson was entitled to be subrogated to such rights as Shelby county might have enforced had the note not been paid. That county held a lien, and might have enforced it in default of payment. *Joiner v. Perkins*, 59 Tex. 302; *Hicks v.*

¹Publication delayed through failure to receive copy.

Morris, 57 Tex. 659. Henson was essentially the vendor of Reed, and the sum which the latter had agreed to pay to Shelby county on the purchase-money notes made by the former was a part of the purchase money Reed agreed to pay for the land, and when that was paid by Henson, at the request of Reed, it in so far satisfied the claim of Shelby county, but, as between Henson and Reed, left so much of the purchase money, which the latter in effect had agreed to pay to the former, unpaid. We think the lien should have been established and foreclosed, if the proof showed that the land described in the petition was the same sold by Henson to Reed. There is no statement of facts, but we find in the record the conclusions of fact and law found by the judge who tried the cause. The conclusions of fact find that Reed was indebted to Henson as alleged in his petition, which set out the facts as we have already stated them, and that this indebtedness was for 108 acres of land; but there is no specific finding that the land described in the petition embraces the particular 108 acres of land sold by Henson to Reed. It is most probably true that it is the same land, and that the finding would have been more specific upon this point but for the fact that the court deemed a finding as to this unimportant, under the holding that no lien existed.

In this state of the record, although the judgment will have to be reversed, we cannot render such a judgment as the court below should have rendered on the facts. The judgment of the court below will therefore be reversed, and the cause remanded.

BISSE v. SOUTHWORTH.

(*Supreme Court of Texas. November 16, 1888.*)

1. APPEAL—REVIEW—HARMLESS ERROR.

In an action for damages for maintaining a bawdy-house adjoining plaintiff's premises, where a case warranting exemplary damages is presented, there is no error of which defendant can complain in instructing the jury that injury to plaintiff's feelings is an element of actual damage, but that the case does not warrant the allowance of exemplary damages.

2. PLEADING—COMPLAINT—ALLEGATIONS OF DAMAGE.

Allegations, in substance, that on account of the maintenance of the bawdy-house plaintiff had been damaged by difficulty in renting his property as well as by depreciation in its value, and that his aggregate damages were a stated sum, are sufficient, in the absence of special exceptions, to warrant a recovery for loss of rents.

3. SAME—RECORD—EVIDENCE.

In determining whether or not any evidence was given on a particular issue, the court, on appeal, must look, not to the charge of the trial court, but only to the statement of facts.

Appeal from district court, Navarro county; SAMUEL R. FROST, Judge.

Suit by J. H. Southworth against Peter Bisse to enjoin a nuisance, and for damages. Judgment for plaintiff, and defendant appeals.

John D. Lee and Simpkins & Neblett, for appellant. *Beale & Autrey*, for appellee.

GAINES, J. This suit was brought by appellee against appellant to enjoin him from permitting a bawdy-house to be kept upon certain property owned by him in the city of Corsicana, and to recover damages caused by the nuisance. The allegations of the petition show that the defendant was the owner of a house and lot in the city, and that the plaintiff owned other houses and lots in the same vicinity, upon one of which he resided with his wife and children, the other being used "for rental purposes;" that for two years previous to the filing of the petition the defendant had rented his house to lewd women as a place of prostitution, and that during all that time it had been occupied by his consent by such women as a place of public prostitution. It was also averred that during the time the inmates of the house, "at all hours of the day and

night, had been guilty of boisterous, vulgar, and indecent conduct in the view and hearing of this plaintiff and his family and his tenants." It was also alleged in substance that the plaintiff and others had used efforts to abate the nuisance by prosecuting the inmates, by warning the defendant, and by notifying him in writing not to permit the house to be used for such purposes; and that, notwithstanding this, for the purpose of shielding himself from the consequences of his conduct, defendant had made a deed to the keeper of the house, which was without consideration, and "a sham and fraud." The petitioner also averred that by reason of the premises the plaintiff had had great difficulty in renting the houses kept by him for that purpose; that they had depreciated in value; and that he had suffered a wrong and outrage to his feelings; and claimed damages, actual and exemplary, both to his property and feelings. The court charged the jury that if they found for the plaintiff, and awarded damages, that they would state in their verdict how much was allowed for permanent depreciation in the value of the property, how much for loss of rents, and how much for injury to the plaintiff's feelings; but also charged them that they should not give exemplary damages. The jury found for plaintiff, and gave \$25 as damages for loss of rents, and \$75 for injury to his feelings, and that there had been no depreciation in the value of the property.

It is insisted that the pleadings did not warrant an award of damages for a loss of rents, and that therefore the charge of the court instructing the jury to find such damages was error. We do not concur in the proposition. The allegations in the petition indicated that plaintiff had been damaged by the difficulty in renting his property, as well as by depreciation, and alleged his aggregate damages from this source at \$2,000. This was, we think, sufficient, in a general way, to apprise the defendant of the nature of plaintiff's claim in these particulars; and that, if he had desired a more specific allegation, he should have interposed a special exception to the petition. It is also complained, in effect, that the court erred in instructing the jury that the plaintiff could recover for the injury to his feelings as actual damages; and the proposition is submitted that mental suffering is not an element of actual damages in such a case. There is no statement of facts in the record; and it is a general rule that, in the absence of such statement, errors assigned upon the charge of the court will not be considered. *Devoes v. Hudgous*, 1 Tex. 192; *Byrre v. Wanhop*, 23 Tex. 441; *McMahan v. Rice*, 16 Tex. 335; *Lewis v. Black*, 16 Tex. 652; *Managan v. Ward*, 12 Tex. 209. If it should be conceded that the proposition insisted upon is correct, then the question would arise, has the defendant been prejudiced by the error in the charge? Mental suffering being an element to be considered in the estimate of exemplary damages, if the pleadings and evidence made a case of such damages, the question would have to be answered in the negative. The petition does show a case for exemplary damages. It is elementary that when a recovery has once been had for a nuisance, and it is continued, exemplary damages are allowed as a matter of course upon a second successful suit. *Wood, Nuis. § 855*. The ground of recovery in such case is that the continuance of the nuisance after damages are once recovered shows "a wanton and willful invasion of another's right." In the case before us the petition shows that the defendant had been warned of the nature of the establishment complained of; and notified in writing to suppress it; and that he subsequently made a pretended conveyance (which was without consideration) to the keeper of the house, in order to shield himself from responsibility. Hence, if the allegations be true, he knew the nature of the house, and that it was damaging and offensive to his neighbors; and the law charges him with notice that it was unlawful. The making of the pretended conveyance showed a consciousness of his guilt, and a willful determination to persist in the wrong. This, we think, makes as strong a case for exemplary damages as that of a second recovery.

As to the evidence, in the absence of a statement of facts, we must consider

as proved every fact necessary to a recovery which could have been proved under the pleadings, unless we are to be governed as to this matter by the statement made in the charge of the court to the effect that there was no evidence to warrant a recovery of exemplary damages. But we are of the opinion that we cannot look to the charge of the court to determine whether or not there has been any evidence upon a particular issue. A statement of facts is the method provided by the statute for certifying to this court the evidence adduced upon a trial in the court below; and when this is absent we must consider everything as proved which is necessary to sustain the verdict. If the circumstances of aggravation alleged in the petition were proved, as we must presume they were, then we think the plaintiff was entitled to recover for the injury to his feelings; and that the error of the court in charging that such injury could be recovered as actual damages becomes immaterial, if error it was. If the appellant had brought up a statement of facts, and it had appeared therefrom that a case for exemplary damages was not made by the evidence, it would have been necessary for us to determine whether the charge complained of was erroneous or not. As the record is presented, we are relieved from entering upon the discussion of that vexed question. There being no error in the proceedings of the court below which has operated to the prejudice of appellant, the judgment is affirmed.

GULF, C. & S. F. RY. CO. v. EDWARDS.

(*Supreme Court of Texas*: December 14, 1888.)

APPEAL—DISMISSAL—MOTION TO SET ASIDE.

When the party whose duty it is to file a transcript on appeal fails to do so, and the judgment is affirmed on certificate, a motion to set the judgment aside, based on "unavoidable absence and other engagements of counsel," will be overruled, when it is not shown how the absence of counsel became unavoidable, and no offer is made to file the transcript and submit the case.

Appeal from district court, Ellis county; ANSON RAINEX, Judge.

On motion to set aside judgment affirming the judgment below.

J. W. Terry and Alexander & Clark, for appellant. *Groce & Templeton*, for appellee.

STAXTON, C. J. The appeal in this case was perfected more than 20 days before the time set for cases belonging to the assignment to which it belongs. Within a week after the appeal was perfected a transcript complete, save a few verbal inaccuracies, was delivered to appellant's counsel. On November 14th a certificate for affirmance was filed, and on this, on November 27th, the judgment was affirmed. On December 1st the motion now before us to set aside the judgment affirming the judgment of the court below, was filed. The motion is based on "unavoidable absence and other engagements of its counsel," of whom there are three. How the absence of counsel became unavoidable is not shown. What other engagements counsel had are not stated, and there is no offer made to file the transcript at the present term, and submit the cause. No sufficient reason for not prosecuting the appeal to the present term is shown, and the purpose of the statute in permitting judgments to be affirmed on certificate, when the party whose duty it is to file the transcript fails to do so, is to enable the appellee or defendant in error to protect himself against unnecessary delay. Had the transcript been filed, even since the affirmance, or offered with proposition to submit the cause for decision during the present term, the application would be entitled to more favorable consideration. This is not done, and the application to set aside the judgment in this court, heretofore rendered, not showing that by the use of reasonable diligence the transcript might have been filed in proper time, this motion must be overruled. It is so ordered.

FLOYD *et al.* v. PATTERSON.

(Supreme Court of Texas. December 4, 1888.)

1. GAMING—GAMBLING CONTRACTS—RECOVERY OF MONEY FROM BROKER.

Though a contract for the future delivery of wheat, intended only as a speculation on the probable difference in price, no actual delivery being contemplated, is illegal as a gaming contract, and not enforceable, yet a sum of money representing the margins deposited and the profits realized in the deal, paid over by one of the parties to the broker who negotiated the transaction, to be by him paid to the other, can be recovered in an action by the latter against the broker.¹

2. SAME—LIABILITY OF BROKERS—EVIDENCE.

Plaintiff sued L. and F. & Co., alleging that, while L. was nominally agent for F. & Co. in making such contract, he was in fact a partner, and that they were brokers for the real party to the transaction. The evidence of defendants was that they were not partners, and that F. & Co. dealt as principals, though there was sufficient proof that they allowed L. to represent them to be brokers. There was no evidence that any other person was connected with the transaction, or that defendants had received any sum representing the profits of the deal from any one. *Held*, that a verdict for plaintiff against all of the defendants should be set aside for insufficient evidence to charge F. & Co. as brokers.

3. APPEAL—DECISION—REVERSAL.

It appearing that L. had received from F. & Co. the sum representing the margins and profits of the transaction, he would be liable to plaintiff for the amount thereof, though the judgment, being erroneous as to F. & Co., must be reversed as to all the defendants.

4. PARTIES—MISJOINDER.

On the theory of plaintiff's action, viz., that the money in question was received by F. & Co. as brokers from their principal, and remitted to L., for payment to plaintiff, a petition against L. and F. & Co. jointly does not show a misjoinder of parties.

5. PLEADING—COMPLAINT—MULTIFARIOUSNESS.

Nor is such a petition multifarious for alleging that L. was either an agent or a partner with F. & Co. in the alternative, as the liability would be the same in either case.

Appeal from district court, Smith county; FELIX J. McCORD, Judge.

Action for money by J. P. Patterson against S. S. Floyd, J. Leopold, and others. Verdict and judgment for plaintiff, and defendants appeal.

Clark, Dyer & Boltinger, for appellants. *Whitaker & Bonner*, for appellee.

GAINES, J. Appellant Leopold was engaged in business in the city of Tyler as a broker in grain and other produce, or as the agent or partner of his co-appellants, who had their principal place of business in Houston, and were either brokers or dealers in such commodities. The principal business was in contracts for the delivery of produce at a future time, in which it was contemplated that the commodities should not be delivered, but only that the profit or loss on the transactions should be paid. On January 28, 1887, appellee placed an order or made a contract with Leopold, who was purporting to act for Floyd & Co., for the delivery in May of 100,000 bushels of wheat. Leopold gave him a slip, which read as follows: "*Confirmed Orders. TYLER, TEXAS, Jan'y 28th, 1887. J. Leopold, agent for S. S. Floyd & Co., future brokers in grain, provisions, cotton, and stocks. Bought, acct. J. P. Patterson, 100,000 May wheat. [Signed] J. LEOPOLD.*" One thousand dollars was paid at the time as a margin, which was increased by additional demands to \$7,000, when the trade was "closed out." There was a net profit to appellee in the transaction of \$625. Floyd & Co. transmitted the sum of \$7,625 to Leopold, to be paid in settlement of the transaction. He paid appellee a small

¹ As to the liability of a stakeholder to the parties to a wager, see *Riddle v. Perry*, (Neb.) 27 N. W. Rep. 721, and note; *McGrath v. Kennedy*, (R. I.) 3 Atl. Rep. 453, and note; *Corson v. Neatheny*, (Colo.) 11 Pac. Rep. 83, and note. Concerning the validity of contracts for dealing in futures, see *Beadles v. McElrath*, (Ky.) 3 S. W. Rep. 153, and note; *Osgood v. Bauder*, (Iowa,) 89 N. W. Rep. 887, and note; *Washer v. Bond*, (Kan.) 19 Pac. Rep. 328, and note.

part of the sum due him, leaving a balance still due of \$6,762. Appellee brought this suit against appellants jointly to recover this sum, alleging that Leopold was the agent, and also the partner, of Floyd & Co. in the transaction, and that in the deal Floyd & Co. acted as brokers, and as such had received of their principals the sum sued for in satisfaction of plaintiff's demand. The defendants denied the agency, and also the partnership; and also that Floyd & Co. acted for any third party in the transaction, or received any money from any third party on plaintiff's account. The plaintiff obtained a verdict and judgment for the full amount of his demand against all the defendants.

We will proceed to the consideration of the main question in the case. This is presented by appellants' assignment of error, that the verdict of the jury is contrary to evidence, "for the reason that the evidence, without contradiction or conflict, shows that the contract which the plaintiff is seeking to enforce in this action was a wager or gambling contract," etc. According to the testimony, the original transaction is clearly such as has been denounced by this court as being contrary to public policy, and therefore such as cannot be enforced. *Seeligson v. Lewis*, 65 Tex. 215. Counsel for appellee concede the proposition that the original contract will not support an action, but maintain that Floyd & Co. were merely acting as brokers in the transaction. It is well settled that a contract for the future delivery of stocks, produce, or other merchandise, in which an actual delivery is not contemplated, but only a payment of the difference between the contract price and the value of the article at the time agreed upon as the date of delivery, is a mere wagering contract, which will not support an action. But if the transaction has been completed, and another grows out of it collateral to it, dependent upon a new consideration, the new contract is not vitiated by the taint of the old one, and will be enforced. "It has been observed that the test whether a demand connected with an illegal act can be enforced is whether the plaintiff requires any aid from the illegal transaction to establish his case." *Gilliam v. Brown*, 43 Miss. 641, citing *Simpson v. Bloss*, 7 Taunt. 246; *Roby v. West*, 4 N. H. 290.

It is accordingly held that when one, as agent of another, has received money growing out of an illegal contract, he can be made to pay it over at the suit of his principal. In the case above cited (*Gilliam v. Brown*) the testator of the defendant, as the agent of the plaintiff, took the latter's cotton to Memphis during the war, and sold it there, as was conceded, in violation of law, and received the proceeds. The plaintiff was held entitled to recover.

In *Beeston v. Beeston*, L. R. 1 Exch. Div. 13, the court held that the plaintiff could recover on a check given by the defendant to plaintiff for moneys received by defendant, for winnings on bets made by defendant with third persons, as agent of plaintiff.

In *Owen v. Davis*, 1 Bailey, 315, the defendant received a note in settlement of the joint winnings of plaintiff and himself at cards. He transferred the note in payment of a gambling debt of his own to a third party, who received payment of the maker at a discount. The plaintiff was held entitled to recover one-half of the amount which was actually paid by the maker of the note.

In these cases, and in many similar ones, which need not be cited, it is held that the cause of action is not dependent upon the illegal transaction. When the plaintiff shows that the defendant has received of a third party money for his own use, the law from the naked fact implying a promise, the case is made out without going into the illegal transaction, and the defendant will not be permitted to set up the illegality of the original contract in order to defeat a recovery. So far the rule seems to be generally concurred in, and the principle of the rule is intelligible. There are authorities, even some in our own state, which go further, but we need not discuss them.

Counsel for appellee seek to bring this case under the rule of decision laid down in the cases last cited; and the question presents itself whether there is sufficient evidence in the record before us to warrant the jury in finding that a case existed in which Floyd & Co., upon the close of the transaction, received any money for the use and benefit of appellee. Howie, who was a member of the firm of Floyd & Co., testified that, as to the dealings in futures, that firm were not brokers, but were dealing on their own account. In other words, his testimony was positively and distinctly to the effect that, when Floyd & Co. accepted an order or contract for future delivery, they accepted it for themselves as principals, and not as agents of another. He also testified that in the particular transaction in question in this suit Floyd & Co. dealt upon their own account. The testimony of Leopold is substantially to the same effect. We have failed to find anything in the record which is in conflict with this evidence. The testimony of appellee does not show that he knew any one in the transaction, except Leopold and Floyd & Co. Neither does that of his silent partner in the contract. There is strong evidence tending to show that Floyd & Co. were held out as brokers. Perhaps the verdict should be held conclusive upon that question, for the reason that, as we think, there was sufficient evidence to warrant the jury in finding that Floyd & Co. are estopped to deny the agency of Leopold, and in the contract signed by him they are named as brokers. But appellee's case does not rest upon the fact that Floyd & Co. permitted themselves to be held out as brokers, or were in fact such. His case is not maintainable against Floyd & Co. by proof that they were acting for third parties, or that they are estopped to deny that fact, but he must show that, as a matter of fact, in a settlement of his contract, Floyd & Co. received of some third party for his use the sum of money which he seeks to recover. There is no proof whatever of the intervention of any third party in this transaction, or that any money was ever paid to Floyd & Co. for plaintiff on its account. The payment of money to them for his use is the gist of the only action he can maintain against Floyd & Co. growing out of the contract disclosed by the evidence. The evidence shows that the money which was coming to plaintiff under the contract was sent by Floyd & Co. to Leopold, but there is no testimony showing that the money was paid to Floyd & Co. for plaintiff by any one. This latter was an affirmative fact, which it was incumbent upon plaintiff to prove in order to maintain his suit against that firm. The mere fact that they may have been held out as brokers, and may ostensibly have contracted as brokers, does not prove that in this particular transaction they had a principal, and that such principal paid them the money for plaintiff. We conclude that the verdict of the jury as to Floyd & Co. is not supported by the evidence, and that, therefore, the judgment must be reversed.

What we have said as to the verdict against Floyd & Co. does not apply to that against Leopold. It is shown that Floyd & Co. placed the money in his hands, if not for the benefit of plaintiff by name, at least in settlement of his contract. The principles we have already announced we think sufficient to show that the illegality of the transaction does not stand in the way of plaintiff's recovering a judgment against him. But the reversal of the judgment as to Floyd & Co. reverses it as to him.

We are of the opinion that the exceptions to the petition on the ground of the misjoinder of parties and of multifariousness were not well taken. If the plaintiff had shown, as he alleged, that Floyd & Co. had received the sum of money sued for from some third party on account of plaintiff, and that they had remitted it to Leopold, and that he had failed to pay it over, they would have a cause of action both against Leopold and the company; and, since both causes grew out of the same transaction, they could be joined in the same suit. We also think that our system of pleading permits a plaintiff, who is doubtful about the particular facts which he can establish, to plead in the al-

ternative, without rendering his pleading demurrable for inconsistency or multifariousness. The testimony in this case shows that the exact relations between the defendants existing at the time the cause of action arose were not definitely known to any one but themselves, and seems to illustrate the necessity which frequently exists of permitting alternative allegations. Whether under a given state of facts one is to be considered as the agent or partner of another is often difficult to determine, and in such a case it is peculiarly proper to permit a party to allege that he is either the one or the other, when the liability would be the same either way.

The judgment is reversed, and the cause remanded.

ST. LOUIS, A. & T. RY. CO. v. WELCH.

(*Supreme Court of Texas.* December 14, 1888.)

1. MASTER AND SERVANT—FELLOW-SERVANTS—NEGLIGENCE OF CO-EMPLOYES.

A foreman of a bridge gang upon a railroad and employes operating a train on the road are "fellow-servants," in the sense that precludes the former from a recovery from the company for injuries resulting from the negligence of the latter.¹

2. SAME—WHEN RELATION EXISTS.

Plaintiff should be considered as being "on duty" while asleep upon a car provided for the purpose by the company, and under his contract subject to be called out for duty at any moment.

Appeal from district court, Smith county; FELIX J. MCCORD, Judge.

Action by L. Welch against the St. Louis, Arkansas & Texas Railway Company, to recover damages for personal injuries sustained through the alleged negligence of defendant's servants. Defendant appeals from a judgment for plaintiff.

N. Webb Finley, for appellant. *John M. Duncan*, for appellee.

GAINES, J. This was an action for personal injuries, brought by appellee against appellant. The case made by the plaintiff showed the following facts: The plaintiff was the foreman of a bridge gang in the employment of the defendant company, engaged in putting in and repairing bridges along the line of its road. About 3 o'clock in the morning, on the day of the accident, he was asleep in the bunk of a sleeping car provided by the company for the purpose, which was lying on a side track of the railway in the town of Gilmer. At the time mentioned the employes of the defendant operating a freight train on its road negligently ran the train rapidly upon the side track, and struck the car upon which he was sleeping with such violence that he was thrown from his bunk, and seriously injured. He and the employes who caused the injury were engaged in different departments of the company's road. His employment was in the bridge department, and he received his instructions from the superintendent or management of that department, while the employes on the train were working in the transportation department, and were under the orders of its superintendent. It appears from the testimony that the plaintiff was subject to the orders of the company to go out on duty at any time. Without referring to the assignments of error, it is sufficient to say here that the two questions presented by the record are whether the plaintiff and the employes of the train are to be deemed fellow-servants, in the sense that precludes him from a recovery of the company for injuries inflicted by reason of their negligence; and, if so, whether he is to be considered as on duty at the time of the accident.

¹ As to who are fellow-servants within the rule exempting the master from liability to one caused by the negligence of the other, see *Wolcott v. Studebaker*, 34 Fed. Rep. 8, and note; *Brown v. Sullivan*, (Tex.) ante, 288, and cases cited; *Keith v. Coal Co.*, (Ga.) 7 S. E. Rep. 166, and note.

Upon the question, who are to be held "fellow-servants," in the legal sense of that term, there is great contrariety of judicial opinion. The doctrine that one fellow-servant cannot recover of the master for injuries inflicted through the negligence of his fellow-servant is of comparatively recent origin. It was first announced in 1837, in the English court of exchequer, in the case of *Priestly v. Fowler*, 3 Mees. & W. 1. The supreme court of South Carolina laid down the same rule in the case of *Murray v. Railroad Co.*, 1 McMul. 385. This case was decided in 1841, and is the first case in which the rule was applied in this country. The opinion shows that the court were unaware of the decision in *Priestly v. Fowler*, *supra*. In 1842 the subject was very carefully considered by the supreme court of Massachusetts in the case of *Farwell v. Railroad Corp.*, 4 Metc. 49, and the same doctrine was announced. This has become the leading case, and has been rigidly followed by the courts of England and by a majority of the courts in this country. The question of persons employed in different departments of the same general business of the common master was considered in that case, and in discussing it Chief Justice SHAW, who delivered the opinion, uses this language: "It was strongly pressed in argument that although this might be so, where two or more servants are employed in the same department of duty, where each can exert some influence over the conduct of the other, and thus to some extent provide for his own security, yet that it could not apply where two or more are employed in different departments of duty, at a distance from each other, and where one can in no degree influence or control the conduct of another. But we think this is founded upon a supposed distinction, on which it would be extremely difficult to establish a practical rule. When the object to be accomplished is one and the same, when the employers are the same, and when the several persons employed derive their authority and compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty."

The language employed in the last sentence quoted has been generally used by courts and text writers as the basis of the definition of the term "fellow-servants." Substantially the same language has been frequently employed by our own courts in defining the term. *Railway Co. v. Rider*, 62 Tex. 267; *Railway Co. v. Harrington*, Id. 597; *Railway Co. v. Watts*, 63 Tex. 549.

The rule so announced in *Farwell's Case* has, as previously intimated, been followed closely in the courts of England, and generally in the American courts, in its broadest application. Latterly there has been shown some disposition to modify the doctrine, but it has mainly been in the direction of making a distinction between servants of a different grade. The case of *Railroad Co. v. Ross*, 112 U. S. 377, 5 Sup. Ct. Rep. 184, is a case of this latter character. As to service in different departments of the same common employment, there is less conflict of authority. In the courts of a few of the states it has been held that the employes in different branches of the same general employment are not fellow-servants. This is the rule in Illinois, (*Railroad Co. v. Moranda*, 108 Ill. 576,) in Tennessee, (*Railroad Co. v. Jones*, 9 Heisk. 27;) in Kentucky, (*Railroad Co. v. Cavens*, 9 Bush, 559;) in Georgia, (*Cooper v. Mullins*, 30 Ga. 150;) and perhaps in Virginia, (*Moon v. Railroad Co.*, 78 Va. 745.) This was the ruling in Indiana in the earlier decisions, (*Gillenwater v. Railroad Co.*, 5 Ind. 339; *Fitzpatrick v. Railroad Co.*, 7 Ind. 436;) but these cases have since been overruled, (*Railway Co. v. Arnold*, 31 Ind. 174.) Judge Thompson, in his work on Negligence, lays this down as the "exceptional" doctrine. 2 Thomp. Neg. 1026. Our researches have satisfied us that this is correct, and that the great weight of authority is the other way. The cases are too numerous for citation, but see Thomp. Neg. *supra*; Shear. & R. Neg. §§ 108, 109; Whart. Neg. § 230; Wood, Mast.

& Serv. § 425. See, also, Patt. Ry. Accident Law, §§ 324, 325, where the cases are grouped.

In reference to these citations, the caution is to be observed that in many of the cases in which certain employees were not held fellow-servants it was upon the ground that the one was subject to the control of the other. In considering this question, there is danger of a mistake growing out of that class of cases which hold a railroad company liable to its servants operating its trains for injuries resulting from negligence in the keeping of the track. In deciding these cases, the courts sometimes say that the train-men and the track-repairers are not fellow-servants; and it is pretty generally held that in these cases the person charged with the duty of keeping up the track is the representative of the company, and not a servant only. But the true rule, as we take it, is that it is the implied obligation and duty of the company to its employees to furnish a safe track. But in the present case, if we should hold that the plaintiff, as to repairing bridges, etc., was the representative of the company, and that the servants in the transportation department could recover for injuries resulting from his neglect, it would not follow that he could recover for their negligence. A servant may be a representative of the company in one relation; a fellow-servant with co-employees in another. *Crispin v. Babbitt*, 81 N. Y. 516.

Recurring to our own decisions, we think it has been decided in the case of *Dallas v. Railway Co.*, 61 Tex. 196, that service in different departments of duty does not exempt an employe of a railroad company from the operation of the general rule. There the railroad company was engaged in constructing an extension of its line. The plaintiff had been employed in watching the ties along the line, but had undertaken for the company to procure and record a deed, and in the discharge of this duty took passage upon the construction train, when he was injured by the negligence of the employees who were operating the train. He was held not entitled to recover. We understand the decision to be placed upon the broad ground that the fact that plaintiff, though engaged in a different line of duty from the employees who were running the train, was their fellow-servant. We confess that the reasoning upon which the rule has been adopted is not very satisfactory. It is said that when the servant accepts the employment of the master he impliedly assumes the risk of the negligence of his fellow-servants. The argument seems illogical. It amounts to saying that the law is that he cannot recover because he takes the risk, and that he takes the risk because the law is so. By a parity of reasoning, we might assume that he takes the risk of his master's own personal negligence, and that, therefore, the master would not be liable to a servant for such negligence. A more reasonable ground is that of public policy. It is frequently asserted as the true basis of the doctrine, and is founded upon the theory that it is calculated to make servants in a common employment watchful of each other, and thereby to promote carefulness in the performance of their duties. If this is to be taken as the true ground, the rule should be confined to those servants whose duties bring them into such juxtaposition that one would be enabled to observe the negligence of his fellows. But, however unsatisfactory may be the reasons for the doctrine, it is too well established, and its limits, in so far as the question before us is concerned, are too well defined, to permit us to intrench upon it. We feel constrained, both by the former opinions of this court and the great weight of authority elsewhere, to hold that the employees who were operating the train which caused the injury in this case were the fellow-servants of the plaintiff. If we could hold it an open question, our ruling might be otherwise; but we consider the doctrine too firmly established to be changed, except by the action of the legislature.

The other proposition in this case requires no extended discussion. The plaintiff at the time of the accident was asleep on a car belonging to the com-

pany, provided by it for that purpose, which was placed upon its side track. He was liable to be called upon at any moment to go out with his gang upon duty upon the road. We think he must be held to have been upon duty at the time he received the injury. That the accident occurred when he was resting from his labors, we think makes no difference. He was subject to the call of the company at the time, and his case differs from that of other servants who engage for certain hours of employment, and who are injured during the intervals in which the master has no claim upon his services. We think the court should have instructed the jury that if plaintiff was foreman of the bridge gang, and was injured by the negligence of the employes operating a train on the road, he was the fellow-servant of such employes; and also that if at the time of the accident he was asleep upon a car provided for the purpose by the company, and under his contract was subject to be called out for duty at any moment, he was on duty.

The assignment that the court erred in overruling the motion for a new trial, on the ground that the evidence is not supported by the verdict, sets out fully the particulars in which the evidence fails to support the verdict, and is well taken.

The judgment will accordingly be reversed, and the cause remanded.

MERRILL v. TAYLOR *et ux.*

(Supreme Court of Texas. December 14, 1888.)

1. NEGOTIABLE INSTRUMENTS—ACTION—FAILURE OF CONSIDERATION—FRAUD.

In an action on notes given for real and personal property sold together, defendants pleaded failure of consideration in that they were induced to buy through the false representations of plaintiff as to the quantity and value of the property. *Held*, that to charge that if such misrepresentations were made, as alleged, it would be a good defense, but that, if defendants examined the property before purchasing, no reduction for deficiencies should be made, unless plaintiff by stratagem prevented a full investigation, is error when such stratagem is not alleged in the answer, though there is evidence to establish it.

2. SAME—DEDUCTION FOR DEFICIENCIES.

Such a charge is erroneous where it directs a deduction for the deficiencies if plaintiff prevented such full and satisfactory examination, as defendants' knowledge of facts acquired by partial investigation would not be obliterated by any hindrance to further inspection interposed by plaintiff.

3. SAME.

The measure of reduction for such partial failure of consideration is such proportion of the agreed price of the entire property as the deficiency bears to the property as represented, and it is error to instruct the jury to deduct the amount of the deficiencies from the purchase-money notes.

4. ESTOPPEL—IN PARS—PAYMENTS ON ACCOUNT.

The fact that defendants occupied the land, and took possession of the personal property after their purchase, and made payments on their notes without objection as to the fraud in such representations, would not estop them from making said defense, such conduct not having induced plaintiff to any action.

5. EVIDENCE—COMPETENCY.

In such case the value of adjoining lands is incompetent evidence for the purpose of ascertaining the relative value of the land in controversy, and of the personal property included in the sale.

Appeal from district court, Gregg county; WILLIAM STEDMAN, Special Judge.

Action by Granville Merrill against William H. Taylor and Fidelia Taylor, his wife, to enforce a vendor's lien on certain land. Judgment for defendants, and plaintiff appeals.

John M. Duncan, for appellant.

WALKER, J. This is a suit filed June 4, 1884, by Merrill against W. H. Taylor and Fidelia Taylor, husband and wife, to recover the sum of \$3,205 and interest, balance due on five vendor's lien notes executed on June 20,

1881, by appellees in favor of A. B. and S. A. Merrill, and afterwards by the latter indorsed to appellant, and to foreclose the vendor's lien retained to secure same on certain lands in plaintiff's petition described. Defendants below answered by demurrer general denial, and specially that the consideration for the notes had wholly failed, which plea of failure of consideration was, in substance, as follows: That defendants were, before the purchase, residents of another state, and were led to the purchase by newspaper advertisement, by A. B. Merrill, which offered a fine farm, a lot of personal property, hogs, cattle, etc., for sale, and placing a high value on same; that defendants saw Merrill, and he made representations to them about the quality of the land, amount and value of personal property, etc., which were intended to deceive defendants, and which were untrue; that upon such false representations the purchase was made, notes executed, and defendants came into possession; that the sale included a lot of farm belongings, besides horses, hogs, cattle, etc., all of which were found to be far short of representation in quantity and value; that defendants had paid, at the time of the sale, on the purchase price of the whole property, \$2,000 cash, which was more than the whole property bought was worth; and they pray that the notes sued on be canceled, etc. To this answer plaintiff below filed a reply, alleging, in substance, that there was no fraud practiced; that both defendants went upon the land and viewed all the property before they purchased, paid any money, or executed the notes; that they made payments on the notes long subsequent to moving on the land, and taking possession of all the property, without ever claiming failure of consideration, or expressing dissatisfaction; that the bill of sale to the personalty recites the cash, \$2,000, received for the personalty, and conveys the property in the terms "more or less." Upon these issues the case was tried, and verdict and judgment rendered for defendants, and plaintiff appeals.

The above statement, which is full, is adopted from brief of appellant. The court charged upon the defense. "If you believe from the evidence that the said A. B. Merrill made to the defendants any representations touching the condition of said tracts of land, as to the fences thereon, the number and condition of the houses thereon, the quantity of the open land on said tracts, and the condition of said open land as to a state of cultivation, and of other matters appendant and connected with said tracts of land, and that such representations were made by means of an advertisement printed in a newspaper published in the city of Cincinnati, in the state of Ohio, or by verbal statements to the defendants, or both, and that said representations were not true, but overstated the condition of said fences, the quantity of open land, the number and condition of the houses, and the amount and quantity of other matters and things, then you will ascertain the value of said deficiencies, and deduct the amount thereof from the sum of the principal and interest of said notes. But if you find from the evidence that before the execution of said notes and deeds the defendants came to Gregg county for the purpose of examining said tracts of land and ascertaining the truth of said representations, and did so examine the lands, and were afforded full opportunity for examining said lands, and were satisfied with the examination so made, then you will make no deduction on account of said deficiencies, unless they were prevented from making a full and satisfactory examination of said lands by the interference and device of said A. B. Merrill; and if such were practiced on them, then you will make a deduction of the value of said deficiencies as aforesaid. And if you believe from the evidence that at the time of the sale and conveyance of said land the said A. B. Merrill sold to the defendants certain articles of personal property, as described in the deeds read to you, or the testimony of the witnesses before you, or both, and that the value of said personal property constituted a part of the consideration of said notes, and that the sale and conveyance of said lands and personal property constituted one and the same transaction; and if you further find that said Merrill did not deliver to said

defendants all the personal property sold by him to them, then you will ascertain the value of the personal property not so delivered according to the terms of the sale thereof, and you will deduct the value of the same from the amount due on said notes; but if you believe from the evidence that when the defendants came to Gregg county to examine the said lands aforesaid, the object of their visit was also to examine the said personal property, to learn as to the truth of said representations made respecting it by the said A. B. Merrill, and did so examine it, and were fully satisfied therewith, then you will not deduct the value of the property not so delivered to them by said Merrill, unless the said Merrill, by stratagem or device, threw the defendants off their guard, and thereby prevented a full and fair examination of said property. In that case you will deduct from the amount due on said notes the value of the articles not so delivered as aforesaid."

The deed by A. B. Merrill and wife to the defendants for the land, and the bill of sale from A. B. Merrill to defendants, were executed at the same time. The personal property was described as "on or appurtenant to the Merrill homestead," conveyed, and the several items were enumerated in the bill of sale. It appeared that the defendants came from their former residence in Toledo, Ohio, to Gregg county, Tex., for the purpose of examining said estate. They remained upon the premises at least two nights and the intervening day. During this time the defendants were partly employed in examining the property. There is some testimony that A. B. Merrill took them to see the parts of the plantation which were not out of repair. Some testimony tends to show that he misled defendants, and did not point out the deficiencies, which were great and many when compared with his representations, both in the advertisement and in his oral descriptions. But little opportunity was afforded for knowing the facts as to the number of hogs and cattle about the place. It is evident, however, that the general condition of the farm, buildings, fields, orchards, etc., could have been known by defendants during the time they were upon it.

The charge is considered erroneous in several particulars: (1) It referred to testimony to Merrill's strategy in preventing a full investigation, when this was not alleged. In the specific acts of fraud this was omitted. (2) It failed to give any effect whatever to the investigation made by the defendants, save as if full and satisfactory; but the jury were directed that if they found that Merrill had in any way hindered investigation they should deduct the full value of the deficiencies. Whatever effect Merrill's conduct may have had in hindering further investigations, it did not and could not obliterate from the minds of the defendants the knowledge they had already acquired by their inspection, partial though it may have been. To the extent of the deficiencies apparent, and of which they must have known, the defendants, in completing the purchase, could not complain. Whatever they knew or should have known by the examinations would not be affected by the misrepresentations of Merrill. (3) It seems that in the effort to establish a partial failure of consideration that the estimated value of the entire property should form a basis for an estimation of the measure of damages, or the extent of the failure proved; that is, upon such partial failure the deduction to be made on account of it should be such proportion of the agreed price of the entire property as the deficiency bears to the property as represented. This might be difficult to ascertain, but the practical judgment of an intelligent jury would be equal to the task.

The court did not err in failing to charge upon the conduct of defendants, subsequent to the sale, in making payments, and keeping silence as to facts from which an estoppel could be inferred. This is not an effort to rescind the contract. Besides, Merrill was not induced to any action by the alleged silence and payments by the defendants, which are insisted upon as evidencing or constituting an estoppel.

The testimony as to value of adjoining lands was properly excluded. The value of the lands conveyed was a proper subject of inquiry in order to give assistance to the jury in estimating the relative value of the land, and of the articles of personal property, to the whole purchase.

For the errors in the charge above noted the judgment is reversed. Reversed and remanded.

DIXON *et al.* v. SANDERSON.

(*Supreme Court of Texas.* December 21, 1888.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—PRIZE IN LOTTERY.

Money received as a prize on a lottery ticket purchased with the separate money of the wife is community property; Rev. St. Tex. art. 2852, providing that all property acquired by either husband or wife during marriage, except that acquired by gift, devise, or descent, shall be deemed the common property of both.

2. FRAUDULENT CONVEYANCES—FROM HUSBAND TO WIFE—EVIDENCE.

A voluntary conveyance by a husband to his wife cannot be held fraudulent as to creditors, where both testify, by deposition, that at the time he had ample means to pay all his debts, and they are not cross-examined or contradicted, and where they asked, and, on objection, were refused, a postponement of the trial, that they might appear and testify more fully.

Appeal from district court, Ellis county; ANSON RAINY, Judge.

Action by T. A. Dixon and another against J. S. Sanderson. Plaintiffs appeal.

Coombes & Gano and *M. B. Templeton*, for appellants.

STAYTON, C. J. This is a suit brought by Mrs. Dixon to enjoin the sale of a house and lots under an execution issued against her husband. She claims, and the evidence is sufficient to show, that some time during her coverture, with one dollar, which she had before her marriage, she bought a ticket in the Louisiana State Lottery, on which a prize of \$15,000 was drawn, and that with a part of this the lots in controversy were bought and the improvements thereon made. It is further shown that the husband agreed, at the time the lottery ticket was bought, that whatever prize might be received on it should be the separate property of the wife, and that the money so drawn and property bought with it have, as between the husband and wife, been treated as her separate estate. The lots were bought on June 13, 1883, and it is not made to appear how long before that time the prize was received. It is proved that there were six judgments rendered against the husband in 1879, aggregating about \$2,500, and that these were settled by compromise in October, 1883. The husband became indebted to appellee in 1877 in the sum of \$200, for which a note was given, due one year after date. This note, after the expiration of nearly five years, was unpaid, when the husband renewed it by another note, which was never paid, but on which appellee recovered judgment on April 22, 1885. Under this judgment an execution issued, and was levied on the property in controversy. The purpose of this suit is to restrain a sale under this levy. Four witnesses who lived in the town of Ennis, where the property seems to be situated, and where Dixon seems formerly to have lived, testified that they had known him since 1875, and that he was then in mercantile business with another person, and failed in the year 1879, since when he has been generally considered insolvent, and without any property subject to execution. These witnesses, however, stated that they did not know of their own knowledge that Dixon had not property in Dallas county, at all times, subject to execution. Dixon and wife both testified that, at the time the property in controversy was bought, he had ample means to pay all his debts, but neither of them state in what the means consisted, and it appears that the money received as a prize was placed on deposit in a bank in

New Orleans in the name of Mrs. Dixon. On the case thus made the court below dissolved the injunction, and rendered a judgment for the defendant.

If the money with which the lots were bought was the separate property of Mrs. Dixon, otherwise than through gift of her husband, there can be no question of her right to an injunction; for the deed upon its face does not show it to be other than community property, and a sale under execution would cloud her title.

It is insisted that the money received as a prize became the separate property of Mrs. Dixon, by reason of the fact that the lottery ticket on which it was drawn was bought with money owned by her in her separate right. The statute declares that "all property acquired by either husband or wife during marriage, except that which is acquired by gift, devise, or descent, shall be deemed the common property of the husband and wife." Rev. St. art. 2852. That the prize came not by gift, devise, or descent, is too clear. It came as the fortuitous result of a contract based on valuable consideration paid, and is but the profit on a venture, which, like other profit, not resulting from the increased value of a thing bought with the separate means of one party to the marital union, becomes the common property of the husband and wife. Property purchased with money, the separate property of husband or wife, or taken in exchange for the separate property of either, becomes the separate property of the person whose money purchases or whose property is given in exchange, in the absence of some agreement, express or implied, to the contrary; and, if the thing purchased or taken in exchange increases in value, this necessarily inures to the benefit of its owner. Such a state of fact, however, is not before us, and we are constrained to hold that all profit realized on purchase of the lottery ticket became community property.

As between the husband and wife, the facts are sufficient to show that the money received through the lottery ticket became the property of the latter through the gift of the husband; and the inquiry arises whether he was in condition lawfully to divert so much of the common property, and thus place it beyond the reach of his creditors. If the husband had ample means remaining within reach of his creditors, at the time he made the gift, to satisfy all their claims, then the gift to his wife was not fraudulent, and ought to be sustained. There is evidence tending to show that he was considered insolvent, but there was no witness who was able to say that he may not have had, at all times, in an adjoining county, property subject to execution sufficient to pay his debts. So far as shown, he seems to have paid all his debts except that due appellee, which on April 22, 1885, amounted to less than \$825. The contradicted evidence of both husband and wife is that when she bought the property in controversy he had ample means to pay all his debts. The voluntary conveyance of property by one indebted is evidence of fraudulent intent, and the burden of showing that this did not exist rests upon the donor. This may be shown by proof of the fact that the debtor, at the time of the conveyance, had ample means remaining to discharge all his pecuniary liabilities then existing. If a donor at the time of making a gift be insolvent, his conveyance is void, for its necessary effect is to hinder, delay, or defraud creditors; but the mere fact of indebtedness alone is not sufficient to render a voluntary conveyance void. If, however, looking to the magnitude of the gift, the amount of indebtedness existing, and the value and character of the property left to the donor after making the gift, it does not appear that the assets remaining in the hands of the donor were ample to satisfy all his debts, then the voluntary conveyance ought to be held fraudulent. It should appear, also, that the property remaining in the hands of the donor, even if sufficient to discharge all his debts, was such as was readily and conveniently accessible to his creditors under the ordinary process used in the collection of debts, or a voluntary conveyance ought to be held fraudulent. In the case before us the evidence of Dixon and wife was taken by deposition, and there seems

to have been no effort made to ascertain, by cross-examination, what property, besides that given by the husband to the wife, remained in his hands after the gift. Under this state of fact, more weight ought to be given to the general statement that the husband had ample means to pay his debts than would be given to such statements when inquiry had been made as to what property he possessed, and there was a failure to show this.

It appears from a bill of exceptions that there was some misunderstanding as to the time when the cause would be called for trial, and that when called an application was made for a postponement of the trial, in order that the plaintiff and her husband might be present and testify more fully than had they in the depositions which were taken before the amended petition, on which the cause was tried, was filed. This evidences the fact that there was no indisposition to state every fact on which the right of the parties might depend, and tends to show a desire to develop the facts more fully than had been done in the depositions. This opportunity having been refused, on the objection of appellee, we are of opinion that he ought not to complain if full effect be given to the uncontroverted statements made by plaintiff and her husband, which, so considered, were such as to entitle plaintiff to a judgment.

The judgment of the court below will be reversed, but, as there is reason to believe that the case has not been developed as it may be, the cause will be remanded. It is so ordered.

GALVESTON WHARF CO. v. GULF, C. & S. F. RY. CO.

(Supreme Court of Texas. January 18, 1892.)

1. EMINENT DOMAIN—CONDEMNATION PROCEEDINGS—JURISDICTION OF DISTRICT COURT. Since Rev. St. Tex. art. 4183 *et seq.*, provide for condemnation proceedings by railroads in the county court, the district court has no jurisdiction to award condemnation in a suit by the land-owner against the railroad for use and occupation.
2. TRESPASS—TO REALTY—MEASURE OF DAMAGES.

When one occupies the land of another by mistake, the measure of damages is what the owner could have leased it for had the other not occupied it, and the owner cannot, by notifying the trespasser that he demands a certain rent, and sending him monthly bills at that rate, raise an implied contract on the trespasser's part to pay such rate.

Appeal from district court, Galveston county.

Action by the Galveston Wharf Company against the Gulf, Colorado & Santa Fe Railway Company for use and occupation. From the judgment of the district court plaintiff appeals.

Wheeler & Rhodes and *C. L. Cleveland*, for appellant. *Gresham, Jones & Spencer*, for appellee.

GAINES, J. The Gulf, Colorado & Santa Fe Railway Company having laid its track across the corner of a lot in the city of Galveston belonging to the Galveston Wharf Company, and erected certain buildings thereon, the latter brought suit against the former to recover for the use and occupation of the property, alleging a contract to pay \$100 per month rent. The defendant company pleaded a general denial; and also pleaded in reconvention that the property (describing it) was necessary to its uses, and that it had tendered the plaintiff the value thereof, (stating the sum,) and prayed that the property be condemned. The plaintiff recovered for the use of the property a less sum than it claimed, and there was also a judgment for the defendant condemning the property to its use, and awarding to the plaintiff the value thereof as found by the jury. The plaintiff appeals.

The first question presented is as to the power of the court to enter a judgment of condemnation in this proceeding. In *Railway Co. v. Benitos*, 59 Tex. 326, it is said that "it is held by the great weight of authority that,

when a statute provides a tribunal and mode of procedure by which property may be condemned to a public use, such tribunal has exclusive jurisdiction, and that the person or corporation to whom the statute gives the right to institute a proceeding to condemn land cannot resort to any other." Following this doctrine, it was decided by the commission of appeals, in an opinion adopted by this court, that property could not be condemned for public use in the district court in a suit of this character. *Railway Co. v. Poindexter*, 70 Tex. 98, 7 S. W. Rep. 316. As authority for holding that the court below erred in not sustaining the exceptions to so much of defendant's answer as sought to condemn the land, the case cited is precisely in point. The appellant company there had been sued in the court below by the owners of a certain tract of land covered by its line of road to recover the land upon which the road-bed was constructed and the right of way claimed. The company in its answer prayed that, in the event that the plaintiffs should be held entitled to recover, the right of way should be condemned in that suit, and its value assessed, and it had judgment accordingly. This was held error, and that the district court had no jurisdiction to hear and determine the plea for the condemnation of the land. The only distinction between the two cases, so far as the point under consideration is concerned, is that in the former case the condemnation of an easement only was sought, while in this the defendant asked the condemnation of the fee. But the statute provides the same mode of procedure for condemning the fee as for condemning the right of way, and therefore the principle applicable to the two cases is the same. Rev. St. arts. 4180, 4194, 4206. The exceptions to defendant's special answer should have been sustained, but it is due to the learned judge who tried the case below to say that at the time of the trial the opinion in *Railway Co. v. Poindexter*, above cited, had not been delivered. The other assignments of error which relate to this branch of the case need not be considered.

In reference to the rents, the evidence showed that the defendant company appropriated plaintiff's land by mistake. In 1883 the wharf company discovered that the railroad company was in possession of its land, and thereupon the secretary of the wharf company wrote to the president of the railroad company demanding rent at the rate of \$100 per month, and presenting a bill, but received no reply. He wrote again a short time afterwards, notifying the railroad company that if it continued to occupy the premises it would be charged \$100 per month. In 1886 the general manager, to whom a bill for rent at \$100 per month had been presented, wrote, declining to pay it, because it was exorbitant. The secretary of the plaintiff company presented defendant company a bill for \$100 rent at the end of every month, but none of them were paid. The plaintiff asked the court to give a charge which embraced this instruction: "And you are further charged that if you find from the evidence that the defendant used and occupied the plaintiff's property for the period claimed, and that there was no express understanding as to rent or compensation, but that the plaintiff charged rent therefor at the rate of \$100 per month, and rendered and delivered monthly bills for such charge of \$100 per month, monthly to defendant, and that defendant received these bills monthly, and made no objection thereto, and continued to use and occupy said property after such notice of said charge, then you are charged that under these circumstances the law implies a contract on the part of defendant to pay such sum, and your verdict should be for plaintiff for such sum per month for the number of months that it has been shown by the evidence the defendant occupied said premises after such notice." The court refused this charge, and its refusal is assigned as error. We think the court did not err in refusing the instruction. A contract necessarily requires the consent of both parties, except in a small group of cases, where the law implies the consent of the party sought to be charged; but the occupation of land without the consent of the owner is not one of this class. See Bish. Cont. c. 8. The

rule is not changed where the owner notifies the trespasser that unless he gives up the possession he will be charged rent at a certain rate. To so hold would be to decide that the owner of the land, by giving notice to the trespasser that he must pay rent or abandon the premises, could change the relation of the parties, and of his own motion make them landlord and tenant. Not only this, but by fixing the amount of rent to be paid, he could recover in his action a sum not agreed upon by the occupant, but arbitrarily fixed by himself. In cases of this character, in order to recover rent, technically as such, there must be an agreement to pay the rent to which the minds of both parties have assented. In the absence of direct proof of an express agreement, an agreement may be established by circumstances; but they must be such as to evidence the belief that it was consented to by the parties to it. Such being the law in reference to the assignment under consideration, it is sufficient to say that the charge given by the court went as far as the plaintiff had the right to demand, and no further instruction was necessary.

It is also assigned that the court erred in refusing to grant a new trial on the ground that the evidence did not warrant a verdict for the sum awarded by the jury. Upon the question of the value of the use and occupation of the premises, the evidence was conflicting. One witness swore that the value was \$100 per month for railroad purposes. Another put it as low as \$20, but did not know what it was worth for railroad purposes. We fail to see any reason why it was worth more because a railroad might desire to use it than if an individual wanted it. It does not appear that any railroad company other than the defendant could have made use of the property. It seems to us the proper measure of plaintiff's damages was what the plaintiff could have leased it for if the defendant had not inadvertently occupied it, and that, if the jury believed the witness who last testified as to the value, they gave an ample compensation. We cannot say that the damages are manifestly too small, and therefore the verdict should stand.

The judgment will be reversed, and here rendered for the plaintiff below for the amount found by the jury as damages for the use and occupation of the premises, and also for the plaintiff against the defendant on its plea in re-convention. The appellee will pay all costs in this court and the court below.

GARZA v. CASSIN.

(*Supreme Court of Texas. January 18, 1889.*)

1. PUBLIC LANDS—ENTRY—SURVEY—RELOCATION.

Under Rev. St. Tex. art. 3902, providing that all lands located by entry or application shall be surveyed within 12 months from the date of entry, or the same shall be null and void, and the lands be subject to relocation and survey, but not by the same certificate, one who has failed to have his survey made within 12 months, and then relocates the land, has no such equitable title as to prevent another from locating the land.

2. SAME—NOTICE OF FORFEITURE—BURDEN OF PROOF.

The burden is on one who has forfeited his location by failure to return the field-notes within 12 months from the date of survey, to show, as against a subsequent locator, that the 90-days notice of forfeiture required by act Tex. Feb. 11, 1881, amending Rev. St. art. 3812, was not given, or that, if it were given, he completed his relocation within the 90 days.

Appeal from district court, Webb county.

Trespass by Cayetano de la Garza against William Cassin to try title to land. Judgment for defendant. Plaintiff appeals.

McLane & Allee, for appellant. *S. G. Newton* and *William Cassin*, for appellee.

STAYTON, C. J. Appellant brought this action to recover eight separate tracts of land. Appellee disclaimed as to two tracts, and pleaded not guilty

as to the residue. The certificates by virtue of which appellant claims the lands were first located thereon in July, 1880, and in September, 1881, but no surveys were made under these locations within 12 months after the several locations were made. On August 1, 1882, appellant relocated the certificates located in July, 1880, and September, 1881, on the land in controversy, and under this relocation surveys were made within 12 months; but those with the certificates were not returned to the general land-office, but were mailed by the surveyor to Johns and Spence, whose relation to appellant is not shown. Appellant, ascertaining that his surveys had not been filed in the general land-office, procured copies of the field-notes, which he caused to be there filed on February 2, 1885. Some of the certificates located in 1880 and 1881, by appellant, on relocation in 1882 were placed on the same land covered by the first location of same certificates, but whether this was true as to all the certificates we are unable to ascertain from the record. Appellee, in October, 1884, located valid certificates on all the land theretofore located and surveyed for appellant, except that as to which he disclaimed; and within one year after he made his locations caused surveys to be made and returned to the general land-office. Neither party has obtained patents. Such being the facts on which the rights of the respective parties rest, the court below, on trial without a jury, rendered judgment for appellee.

It is urged by appellant that the locations and surveys made by and for him in 1882, rested on equitable ownership in him, notwithstanding the surveys were not returned to the general land-office within 12 months after they were made. He further insists that, although no surveys were made within 12 months under his locations made in 1880 and 1881, and although each of his certificates may have been relocated in 1882 on the same land on which they were formerly located, yet that his surveys made under the relocation gave to him equitable ownership, and withdrew the lands from the unappropriated public domain. To sustain these propositions he relies upon Const. art. 14, § 2, and decisions construing it.

The proposition last stated we will consider first, and, to maintain it, appellant—the land not having been patented—must show such facts as confer on him equitable ownership. This cannot arise out of a transaction which the statute expressly forbids. The statute declares that “all lands which may be located by entry or application, as aforesaid, shall be surveyed within twelve months from the date of entry, or the same shall be null and void, and the lands be subject to relocation and survey; but such lands shall not in any case be subject to relocation by the same certificate.” Rev. St. art. 3902. The effect of this statute is to declare absolutely void a location not followed by a survey within 12 months after entry, and to restore the land once covered by it to the mass of unappropriated public domain, and to subject it to relocation by any person. In such case, however, the statute denies to the person who thus forfeits a location the right to relocate the land under the certificate on which the forfeited location was made. The locations made in 1880 and 1881 ceased to confer any right on failure to make surveys within 12 months after the locations were made, and the relocation of the same certificates on the same land, being expressly forbidden by law, conferred no right whatever, and interposed no obstacle to the appropriation of the land by appellee under valid land certificates. If, however, any of the tracts of land located in 1880 and 1881 were not relocated under the same certificates as in the original location, then such relocations were valid, and, as to such land, appellant would be entitled to a judgment, unless his failure to return the surveys made under the relocation of 1882 to the general land-office, within 12 months after the surveys were made, defeats his right. The statute declares that “the field-notes of all surveys shall be returned to and filed in the general land-office within 12 months from the date of survey.” Rev. St. art. 3909. This article, however, does not declare that a failure to return the sur-

veys within the time prescribed shall, as between the state and the person having the survey made, absolutely destroy the right of the latter to acquire the land under the certificate filed and survey made, as does the statute to which we have before referred, when there is a failure to survey within 12 months after a location is made. Article 3900, Rev. St., recognizes the right of one who has caused a survey to be made by virtue of a valid land certificate, but has failed to return the field-notes to the general land-office within 12 months after the survey, to relocate the same land by virtue of the same certificate, and without a resurvey, if this be done before the land be located by some other person. This statute was carried into the Revised Statutes from the act of February 10, 1852, (Pasch. Dig. art. 4563.) Article 3901, Rev. St., provides the manner in which the relocation provided for in the preceding section may be made, which is by presentation to the surveyor of the land claim, and an entry by him on the record of field-notes of the fact that the land has been relocated. This was not done by appellant; and if the rights of the parties depend solely on the statutory provisions found in articles 3900 and 3901, it is evident that appellee has the superior right, for his locations under these laws defeated the right of appellant to relocate the land, although but for these locations appellant's right to relocate would have been clear. This is also true if the demanding of certified copies of the field-notes and their return to the general land-office by appellant could be deemed a relocation, for before that was done appellee's locations were made. While the right to relocate was conferred by the statutes before referred to, it does not follow from that that any equitable ownership remained in appellant on his failure to return the field-notes within the time prescribed by law. The statute referred to gave him a means by which he could reacquire a right once existing, but lost by his failure to comply with the law, but in no respect continued in force the right which some of the surveys made for him in 1882 may have given. If it were true that under the act of February 11, 1881, (Gen. Laws, 1881, p. 6,) amendatory of article 3812, Rev. St., the lands were not subject to location by appellee until the expiration of 90 days after notice of the forfeiture of appellant's surveys contemplated by that act was given to him, that would not better his condition; for, as plaintiff, the burden was upon him to show that he had such title as would enable him to recover, and the mere failure of title in appellee would not entitle appellant to recover. It is, however, unnecessary now to construe that act, for if it could be held to have continued in appellant any equitable ownership, until 90 days after the notice therein contemplated was given to him, the burden was on him to prove that the notice was not given, or that, having been given, within the 90 days thereafter he had taken the steps necessary under that act and other statutes regulating the relocation of lands to fix his right to the lands. The record is silent as to any such facts, and their existence cannot be presumed.

It follows that there is no error in the judgment, even if it had been shown to be true that all of appellant's locations and surveys made in 1882 were originally valid. The judgment of the court below must therefore be affirmed, and it is so ordered.

PAGE v. ORTIZ, Clerk.

(Supreme Court of Texas. January 18, 1889.)

MANDAMUS—TO COUNTY CLERK—JURY CERTIFICATE.

Code Crim. Proc. Tex. art. 1086, provides that the amount due to jurors and bailiffs for services shall be paid by the county treasurer upon the certificate of the district or county court in which such services were rendered. Article 1086 provides that such certificates shall be transferable by delivery. *Held*, that it was not the duty of the clerk of a district or county court to pass upon the validity of a transfer by a juror or bailiff of such a claim against a county, and that the clerk could not

be compelled by *mandamus* to issue to an assignee of such claim the certificate designated in the said statute, although evidencing only the right of the assignor to compensation.

Appeal from district court, Webb county.

J. O. Nicholson, for appellant. *McLane & Atlee*, for appellee.

STAYTON, C. J. This action was brought by appellant to compel appellee, who is alleged to be the clerk of the district and county courts for Webb county, to issue to him, as assignee, certificates for services rendered by many persons, as jurors and bailiffs, during a period more than four years before the action was brought. The names of the persons alleged to have served as jurors or bailiffs, and all facts necessary to show that such persons were once entitled to the compensation now claimed by appellant as their assignee, are stated in the petition. The defendant filed a general demurrer and two special exceptions. The first of these special exceptions questions the right of appellant to compel the clerk to issue certificates to one as assignee who has purchased from a juror or bailiff his right to compensation for services; the other interposes the defense of stale claim and the statutes of limitation of two and four years. The court overruled the general demurrer, but sustained the special exceptions; but the reason assigned, in judgment, for doing this was that the cause of action was barred by limitation of four years. There being no request for leave to amend, judgment was rendered for the defendant, and the only question before us is, did the facts pleaded entitle the appellant to have issued to him, as assignee, the certificates which he asked that the clerk be so compelled to issue to him?

The statute prescribes the compensation that shall be paid to jurors and bailiffs. Rev. St. art. 3104; Code Crim. Proc. art. 1084. In reference to jurors, it provides that "the amount due to jurors shall be paid by the county treasurer upon the certificate of the district or county court in which such service was rendered, which certificate shall state the service, when rendered, by whom rendered, and the amount due therefor." Rev. St. art. 3105. Bailiffs are entitled to be paid in the same manner, and on certificates stating the same facts. Code Crim. Proc. art. 1085. From this legislation it will be seen that the law does not make it the duty of a clerk of a district or county court to pass upon the validity of a transfer by a juror or bailiff of the right such person may have against a county for services, and to issue to an assignee any certificate evidencing his right as such; nor does the law require such clerks to deliver to a person claiming to be the assignee of a juror's or bailiff's claim for services a certificate such as the juror or bailiff may be entitled to. We understand from the petition that appellant demanded that appellee should, and now seeks to compel him to, deliver to him certificates that will evidence his right as assignee to the several sums claimed originally to be due to the jurors and bailiffs named. Before the clerk could do this, if he had the power, it would be necessary for him to pass on the validity of the several transfers through which appellant claims; thus exercising judgment or discretion. If the clerk had the power to do this, the courts would not control him in this respect, through a writ of *mandamus*, but would leave appellant to his ordinary legal remedies. A clerk, however, has no power or right conferred upon him to pass upon the validity or genuineness of the claim of an assignee to the sum due to a juror or bailiff, and, should he exercise such a power, it would be at his peril. If, however, appellant only sought to have delivered to him certificates drawn in strict accordance with the statute, and evidencing only the right of such persons as were entitled to compensation for services rendered as jurors or bailiffs, even then we are of opinion that the clerk might properly refuse to deliver them to him, and that he could not be compelled to do so through a writ of *mandamus*. Such certificates as the law provides shall issue, as evidence of right to withdraw from the county

treasury money as compensation for services rendered as juror or bailiff, are by statute expressly made transferable by delivery. Rev. St. art. 3106; Code Crim. Proc. art. 1086. It would be the duty of a county treasurer to pay them to any person who should present them, in the absence of knowledge that such person was not lawfully holding them, or of some fact that would make it his duty to inquire as to this. Title to such certificates passing by delivery, and it not being made by law the ministerial duty of a clerk to deliver them to any person other than to the one who rendered services, the law will not compel him to deliver them, at his peril, to any other person, and thus clothe such person with apparent power to collect them. Whatever may have been the form of the certificates appellant demanded the clerk should issue and deliver to him, his demand was for the performance of acts which the law does not make purely the ministerial duty of the appellee as clerk, and for this reason both the general demurrer and first special exception should have been sustained. If appellant be the owner of the claims on which he bases this action, then he has other adequate remedy than that now sought, and this of itself would be a sufficient reason why a writ of *mandamus* should not be awarded. The court below sustained the defense of limitation, and it has been held that this defense might be made by a clerk in a case very similar to this. *Prescott v. Gonser*, 34 Iowa, 179. In the case cited it was held that the statute of limitation would operate, in cases of this character, from the time the person who had the right to have the act performed might legally have demanded its performance. The statute under which the decision was made was, however, somewhat peculiar; and, as this case stands, we do not deem it necessary to pass on the ruling of the court below sustaining the defense of limitation, for the judgment must be affirmed without reference to that ruling. It is so ordered.

SHIRLEY v. WACO TAP R. CO. *et al.*

(Supreme Court of Texas. January 22, 1889.)

1. RAILROAD COMPANIES—CONVEYANCE OF FRANCHISE—LAND GRANTS.

A conveyance by a railroad company of "all and singular the chartered rights, privileges, and franchises of every kind" belonging to, or which should thereafter belong to, the grantor, does not include land grants which are not directly connected with the operation of the road.

2. ACTION—JOINDER OF CAUSES.

Under the Code system, a simple contract creditor may in the same action recover a judgment for the indebtedness, and have set aside a fraudulent conveyance by the debtor to a co-defendant.

3. LIMITATION OF ACTIONS—RUNNING OF STATUTE—ABANDONMENT OF CLAIM.

Plaintiff, by pleading filed in 1878, alleged that defendant conveyed certain land, in 1874, to a co-defendant, in fraud of plaintiff's rights. Subsequently he expressly abandoned these allegations, and went to trial on other issues. In 1881, more than seven years after the alleged conveyance, and while the action was still pending, plaintiff renewed his allegations of fraud in the conveyance. *Held*, that the effect of the abandonment was to set the statute of limitations in motion as from the date of the conveyance.

4. DAMAGES—EXEMPLARY—PLEADING—DOUBLE RECOVERY.

Allegations that plaintiff had a contract with defendant to construct its railroad; that defendant wrongfully and forcibly seized and converted his property while he was using it in constructing the road under the contract; and that defendant instigated an unlawful levy of attachment upon his property while he was so using it, for the purpose of making it impossible to perform his contract,—state a cause of action in tort authorizing exemplary damages, though such allegations are connected with others charging breach of the contract, for which actual damages are sought.

5. APPEAL—REVIEW—HARMLESS ERROR.

But there was no reversible error in ruling that no recovery could be had under the allegations of tort, on the ground that there was an attempted double recovery

for the same wrong, where it is alleged that the wrongful acts complained of were committed in 1869, and the petition was not filed until 1885. The statute of limitations, which was interposed, was a bar to any recovery for the tort.

Commissioners' decision. Appeal from district court, McLennan county.

HOBBY, J. This litigation, now for the third time upon appeal, had its origin in a suit brought by the plaintiff, T. M. Shirley, in July, 1870, against the Waco Tap Railroad Company, to recover damages for the breach of a written contract by that company, which the parties had entered into, for the construction of said company's road from Bremond to Waco, Tex. A trial, in February, 1875, resulted in a judgment in favor of Shirley for the sum of \$167,682.95; which, upon appeal by the Waco Tap Railroad Company, was reversed upon questions not recurring in nor connected with this appeal. It was then decided that Shirley had "an equitable mortgage on the road for the amount found to be due him for money advanced under the terms of the contract." 45 Tex. 376. Pleadings subsequently filed by the parties alleged other facts, and presented questions necessary to be noticed, so that the issues involved in this appeal, and their connection with those heretofore determined, may be understood.

It is disclosed by the record in this case that within a few weeks after the institution of this suit in July, 1870, among other changes made in the charter of the Waco Tap Railroad Company, its name was changed to that of the Waco & Northwestern Railroad Company. In 1871 the Waco & Northwestern Railroad Company entered into a written contract with the Houston & Texas Central Railway Company, in which, for the consideration of \$600,000, to be secured by deed of trust, and other considerations, the Houston & Texas Central was to complete and furnish the Waco & Northwestern Railroad by October 1, 1872. A supplemental contract was entered into between these companies, changing the original in some of its provisions; among others, relieving the Waco & Northwestern Railroad Company of its obligation to grade and furnish cross-ties; the consideration to the Houston & Texas Central being that the Waco & Northwestern Railroad Company should issue to the former company 2,000 shares of its capital stock, and deliver \$100,000 in bonds of the city of Waco, and assign absolutely to the Central all notes, accounts, tax-lists, and demands whatever, owned by the Waco & Northwestern Railroad Company.

In February, 1873, under the terms of the deed of trust executed to secure the payment of the \$600,000 above mentioned, the Waco & Northwestern Railroad Company was sold, and the Central became the purchaser, and a conveyance was executed by the trustees to all of the property of the Waco & Northwestern Railway Company. By an act of the legislature of May, 1873, the Waco & Northwestern Railroad Company was merged in the Houston & Texas Central Railway Company; no provision being made for the creditors of the former road by this act of merger. After the happening of the foregoing events appellant filed an amendment, in April, 1876, making the Houston & Texas Central Railway Company a party defendant, and alleged a fraudulent combination entered into between the two companies for the purpose of absorbing all of the property of the Waco & Northwestern Railroad Company, and illegally transferring it to the Houston & Texas Central Railway Company, with the intention of placing said property and assets beyond the reach of appellant, who was a creditor of the former company. The acquisition of the Waco & Northwestern Railroad Company by the Houston & Texas Central Railway Company, in February, 1873, was charged to have been fraudulent and *ultra vires*. It was also claimed by appellant that the latter company, by its acceptance of the act of merger of May, 1873, consolidating the Waco & Northwestern Railroad Company with the Houston & Texas Central Railway Company, became liable to the creditors of the former road. In June,

1878, appellant further amended his pleadings, and charged that after the act of merger the directory of the late Waco & Northwestern Railroad Company, on the 24th of June, 1874, in fraud of his rights as a creditor of said company, transferred, by resolution and deed of conveyance, to the Houston & Texas Central Railway Company the land certificates representing the land donation to which the Waco & Northwestern Railroad Company was entitled from the state, aggregating about 500,000 acres of land.

An important feature in its effect upon the rights of appellant is developed at this juncture. The plea of appellant just mentioned, filed June 7, 1878, and alleging the fraudulent assignment of the land donation to the Central on the 24th of June, 1874, was withdrawn by him on the 15th of November, 1878; the record disclosing the fact that it was expressly averred by appellant that he no further relied upon the plea attacking said transfer of the land donation to the Houston & Texas Central Railway Company, but caused his abandonment of the same to be entered of record upon the minutes of the court. The cause thus standing, a trial was had at the November term, 1878, upon appellant's allegations of a fraudulent acquisition by the Houston & Texas Central Railway Company of the Waco & Northwestern Railroad Company, and the liability of the former to him, as a creditor of the latter company, by reason of the act of merger of May, 1873, accepted by the Houston & Texas Central Railway Company, together with appellant's claim for exemplary damages upon the ground of a fraudulent breach of the contract by the Waco & Northwestern Railroad Company with the malicious intent to oppress. A judgment was again rendered in favor of appellant for actual and exemplary damages, aggregating about \$100,010.50, against the Houston & Texas Central Railway Company. From this judgment the Houston & Texas Central Railway Company appealed, and it was reversed upon the grounds that the acceptance of the conditions of the act of merger of May, 1873, by the Central, did not subject that company to liability for the debts of the Waco & Northwestern Railroad Company. The act of merger, it was said, in substance, did not affect the rights of creditors of the last-mentioned road, and did not place beyond their reach any of its assets. The claim for exemplary damages, it was also held, could not be sustained, under the averments of the petition that the "breach of the contract had been committed fraudulently and with a malicious intent to oppress." As actual damages had been recovered for the breach of the contract, to allow a recovery of exemplary damages under these averments would amount to a "double recovery for the same wrong." The rule was, however, recognized, of "the right to sue in" one action for a breach of contract and for damages for a tort, where both claims grow out of the same transaction, and are so connected that they may conveniently and appropriately be litigated together. *Railway Co. v. Shirley*, 54 Tex. 188.

After the disposition made of the second appeal in the manner last mentioned, the plaintiff, Shirley, on the 10th November, 1881, by amendment, made the directory of the late Waco & Northwestern Railroad Company last elected by its stockholders previous to the sale in February, 1873, parties defendant, under the statute constituting such directory trustees of the creditors of the sold-out road. Pasch. Dig. art. 4916. The allegations filed, as before stated, by him, on June 7, 1878, charging the fraudulent transfer of the land donation, and which were withdrawn and abandoned on November 15, 1878, were revived by appellant on November, 1881, to which the statute of limitation was promptly interposed by the Houston & Texas Central Railway Company. Again, in October, 1885, elaborate amendments were filed by appellant, consolidating his pleadings, upon which this trial was had, setting forth the contract for the construction of the Waco & Northwestern Railroad from Bremond to Waco; compliance with its stipulations by plaintiff until its breach by said company, in April, 1869, as he had previously alleged in his original petition; claiming actual damages in the sum of \$150,000. Appel-

lant's pleadings were, as they had been originally, replete with charges of a fraudulent combination between the two companies, entered into for the purpose of defrauding him, and to hinder and delay him, as a creditor of the Waco & Northwestern Railroad Company; in the collection of his claim, and "to consolidate, illegally absorb, appropriate, and fraudulently convert and merge, to the use and benefit of the Houston & Texas Central Railway Company, all of the property, rights, franchises, assets, and the entire *corpus* and existence, of the Waco & Northwestern Railroad Company, regardless of law and equity," etc., and that, in pursuance of that purpose, said companies entered into the contract of June, 1871, by the terms of which the Houston & Texas Central Railway Company was to construct and equip the road of the Waco & Northwestern Railroad Company to Waco by October 1, 1872, in consideration of \$600,000, and other considerations, to be secured by deed of trust to be executed by the Waco & Northwestern Railroad Company. That in October, 1871, these two companies entered into a supplemental contract, changing some of the provisions of the original, among other things relieving the Waco & Northwestern Railroad Company of its obligation to grade and furnish cross-ties for said road: the consideration to the Houston & Texas Central Railway Company being that the Waco & Northwestern Railroad Company should issue to the Houston & Texas Central Railway Company 2,000 shares of its capital stock,—the original contract having provided that the Waco & Northwestern Railroad Company should issue no more shares of its capital stock without the permission of the Houston & Texas Central Railway Company,—and deliver to the Houston & Texas Central Railway Company the bonds of the city of Waco to the amount of \$100,000, and to assign absolutely to the Houston & Texas Central Railway Company all notes, accounts, tax-lists, and demands whatever, owned by the Waco & Northwestern Railroad Company. That through the aid of the Waco & Northwestern Railroad Company said 2,000 shares were obtained from the city of Waco, and transferred to the Houston & Texas Central Railway Company. That in November, 1872, an election was held of the stockholders of the Waco & Northwestern Railroad Company, at which election, by means of its holding a majority of the shares of the capital stock of the Waco & Northwestern Railroad Company, the Houston & Texas Central Railway Company elected, as a majority of the directors of the Waco & Northwestern Railroad Company, persons who were its own directors, and that by means of its said directors obtained absolute control and management of the affairs of the Waco & Northwestern Railroad Company. That the directory of the Waco & Northwestern Railroad Company, as then constituted, intentionally and willfully permitted a default of payment of the \$600,000, and that, because of said default, Gray & Botts, as trustees, did, in February, 1873, sell the property described in said deed in trust to them, being the road, road-bed, etc., of the Waco & Northwestern Railroad Company, and the Houston & Texas Central Railway Company became the purchaser, at \$400,000. Reviewing the before-mentioned abandoned allegations, as follows: "That on June 24, 1874, the late directory of the sold-out Waco & Northwestern Railroad Company met at Waco, and by resolution and deed of conveyance transferred to the Houston & Texas Central Railway Company all the land and land certificates to which the Waco & Northwestern Railroad Company was entitled as a donation from the state of Texas, aggregating about 500,000 acres, which had been located and surveyed by the Houston & Texas Central Railway Company, in the counties of Childers, Cottle, and other counties." Alleging "that all said before-recited acts are fraudulent and void, because, among other things, made and executed with the intention on the part of both companies to hinder, delay, and defraud your petitioner of his just claim against the Waco & Northwestern Railroad Company, and in the collection of the same." That it reduced the Waco & Northwestern Railroad Company to bankruptcy, and the

Houston & Texas Central Railway Company is insolvent. That appellant is the principal if not the only legal creditor of the Waco & Northwestern Railroad Company. That the Houston & Texas Central Railway Company is in possession and holding all the property of the Waco & Northwestern Railroad Company, through these recited acts of the two companies. That the original contract between the two companies was contingent on the ratification of the same by the stockholders of the Waco & Northwestern Railroad Company. That the stockholders did ratify said contract, and the resolution of ratification authorized John T. Flint, as president, to execute a deed in trust to secure the payment of the bonds incumbering "the franchise or charter rights of the Waco & Northwestern Railroad Company, road-bed, right of way, and other privileges and appurtenances of its railroad," and upon no other property or rights, and that said land donation from the state of Texas was not included in said deed in trust to Gray & Botts, but the same is now a part of the assets and property of the Waco & Northwestern Railroad Company, and subject to the payment of the claim of appellant, as held by said Houston & Texas Central Railway Company." Closing with a prayer for relief, as follows: (1) For judgment against the Waco & Northwestern Railroad Company for his said sums of money due him,—his damages, profits, etc.,—and to foreclose his lien upon the road, road-bed, etc., of the Waco & Northwestern Railroad Company; and that the cloud upon the title of the Waco & Northwestern Railroad Company to the land donation be removed. (2) Or, if said land grant did pass under said deed in trust, then that said deed be set aside for fraud upon the rights of stockholders and creditors of the Waco & Northwestern Railroad Company, and that the two said contracts, and all sales, ratification, etc., and all acts between the two companies as set out, be declared null and void, and all property now in the hands of the Houston & Texas Central Railway Company coming from the Waco & Northwestern Railroad Company be decreed to be held by the late directors of the Waco & Northwestern Railroad Company as trustees, as assets of the Waco & Northwestern Railroad Company, for the benefit of creditors and stockholders, and for judgment against them as trustees, and that they be directed to proceed immediately against the Houston & Texas Central Railway Company for account. (3) Or that all said contracts, deeds, etc., be declared null and void for fraud, and the property be decreed to be assets and property of the Waco & Northwestern Railroad Company, and that said trustees be ordered to at once enter and take possession of the same for the creditors and stockholders of said Waco and Northwestern Railroad Company.

As the allegations upon which appellant sought to recover exemplary damages were sufficient, and within the qualified rule laid down upon the last appeal, there is no necessity for repetition of them. They were filed, however, in October, 1885, and alleged the tort to have been committed in April, 1869, the effect of which will be hereafter noticed.

The answers of the appellees, necessary to be referred to in this recital of the pleadings in this cause, are the special exceptions of the Houston & Texas Central Railway Company to appellant's claim as to exemplary damages "for want of certainty, and because a double recovery was thereby sought for the same breach of contract." Exceptions were also taken to his averments of fraud and *ultra vires* in the acquisition of the assets and property of the Waco & Northwestern Railroad Company by the Houston & Texas Central Railway Company, upon the ground "that no facts were alleged constituting fraud and excess of power," and because appellant could not subject property in appellants' hands to his claim, except in so far as the same was secured by mortgage, as a simple contract creditor could not maintain such bill without a prior lien against his debtor. Appellees filed also special pleas, denying appellant's right to "maintain any action for, or to subject to his claim, said land grants" alleged to have been acquired by the Houston & Texas Central Rail-

way Company from the Waco & Northwestern Railroad Company, to which the latter was entitled as a donation from the state, because under valid conveyances it had had adverse and peaceable possession of said lands, and appellant had prosecuted no suit to subject the same to his claim until November, 1881, except vague allegations contained in his amended pleadings of June 7, 1878, which he had withdrawn and abandoned in November, 1878; wherefore by the statutes of limitation and his laches appellant is barred and precluded from maintaining his action to subject or interfere with said lands. The statutes of limitation of two and four years were also pleaded against appellant's right of action. Similiar pleas were filed by the directory of the Waco & Northwestern Railroad Company, made parties, in November, 1881.

The answer of the Houston & Texas Central Railway Company to appellant's petition charging a fraudulent combination between the companies to absorb the property of the Waco & Northwestern Railroad Company, and with the fraudulent intention to deprive him of the means of enforcing his debt and claim, was, as briefly as can be stated, as follows: That the Waco & Northwestern Railroad Company was in danger of losing its charter because of failure to construct its road. That it was wholly without credit. Not having a mile of road built in June, 1871, it applied to appellee to come to its rescue. That the contract of June, 1871, was entered into as a result of the negotiations between the two companies, and the supplemental contract followed; and describing the property pledged by the Waco & Northwestern Railroad Company to the Houston & Texas Central Railway Company through contract, bond, and in trust. That a failure to pay the bond resulted in a sale under the deed in trust, and appellee became the purchaser; and that both parties intended that the then inchoate right to the land donation by the state to the Waco & Northwestern Railroad Company should be included in said deed in trust, and the same was actually conveyed by the deed in trust. That the Waco & Northwestern Railroad Company was merged in the Houston & Texas Central Railway Company, May 24, 1873. That the sale of the Waco & Northwestern Railroad Company to the Houston & Texas Central Railway Company was afterwards ratified by and confirmed by the board of directors of the Waco & Northwestern Railroad Company, and the president was authorized to make a special transfer and conveyance of said land donation in consideration of the \$200,000 due and unpaid on said bond. That appellant was a director of the Waco & Northwestern Railroad Company, and that at the meeting of June, 1874, appellant appeared, claimed, and took his seat as a member of said board. That no quorum could have been had but for his presence, and that he is now estopped to assert that the acts of said board were not legal or valid. That appellant was in January, 1871, and for more than five years thereafter, a stockholder in appellee Houston & Texas Central Railway Company, and that from 1871 to 1876, being a stockholder in appellee, appellant was informed and advised of all the actions and doings of the appellee in and about all said contracts, deed in trust, etc., between the appellees, the Waco & Northwestern Railroad Company and the Houston & Texas Central Railway Company, and that he made no exceptions thereto as a stockholder of appellee, or otherwise, but stood by and permitted appellee to expend \$900,000 in the execution of these contracts without objection, and that he ought not now to be heard to assert that this appellee was without authority to make these contracts. That appellant, being a stockholder in appellee on May 6, 1872, was then elected a director of appellee, and was appointed on the executive committee, and accepted and entered upon the discharge of his duties as such; and that while so acting a large part of the work of construction under the contract was carried on and completed, under the direction of the board of directors of appellee. That soon after the purchase of the Waco & Northwestern Railroad Company the action of Mr. Hutchins in purchasing said property was approved by the board of directors of appellee, at which meeting

appellant was present and assented to said resolution; and afterwards, on 11th June, 1878, at a meeting of the board of directors of appellee, appellant being present, a resolution was unanimously adopted authorizing the issuance by appellee of a series of bonds of \$1,000 each, at the rate of \$20,000 to each mile of completed road of the Waco & Northwestern Railroad Company's railroad, and authorizing a deed in trust conveying the road of the Waco & Northwestern Railroad Company, and 6,000 acres of land out of the donation to the Waco & Northwestern Railroad Company; and that by the approval and acquiescence of appellant in these proceedings he ought not now to be allowed to question or impeach them. That all the acts and doings in and about the contracts between appellee and the Waco & Northwestern Railroad Company were characterized by the utmost good faith and fair dealing towards appellant and the world, and denies that appellee was guilty of any act, open or covert, of fraud of which appellant has any grounds of complaint. Denies that appellee has any property or thing upon which appellant has any lien or charge; that appellee occupies the position of a purchaser in good faith, without notice of any adverse right or legal claim of appellant; and that appellant had slept so long upon his rights that he is precluded from his recovery; and adopts the answer of appellee Waco Tap Railroad Company.

The directors of the sold-out Waco & Northwestern Railroad Company adopted the foregoing answer, and pleaded specially as to themselves that appellant "ought not to recover of them, because since the sale and merger of the Waco & Northwestern Railroad Company, in 1878, the Houston & Texas Central Railway Company had exercised exclusive and adverse control of the property and franchise of the Waco & Northwestern Railroad Company, and that they were not performing any functions as directors of the sold-out company at any time after the consummation of said sales;" and that it is inequitable and unjust for appellant now to seek to require these appellees to assume the responsibilities and duties of directors to take charge of or recover said property, and that he is barred by the statute of two and four years, and equitably by lapse of time. The court sustained the exceptions to appellant's allegations seeking to recover exemplary damages, and overruled the exceptions as to those of appellant charging fraud.

The third trial of this cause was begun in the district court, October 19, 1885, and resulted in a verdict of the jury and a judgment against appellee the Waco & Northwestern Railroad Company, for appellant, in the sum of \$19,453.90, for money and interest due appellant, and a foreclosure of his equitable mortgage on the 45 miles of road of the Waco & Northwestern Railroad Company now held by the appellee the Houston & Texas Central Railway Company; and also for \$96,602 against the appellee the Waco & Northwestern Railroad Company, as actual damages; from which judgment the plaintiff, Shirley, prosecutes this appeal, assigning several errors alleged to have been committed upon the trial.

We proceed to the consideration of those we conceive to be decisive of the cause, and upon which a reversal is sought. The first error complained of is the action of the court in sustaining exception to plaintiff's allegations filed for the first time in October, 1885, seeking to recover exemplary damages. They set forth with sufficient certainty facts establishing a tort, which, it is said, text writers have had some difficulty in accurately defining. It is generally described as a wrong independently of a contract, though it is conceded that a tort may grow out of, make a part of, or be coincident with, a contract. So the same state of facts, between the same parties, may admit of an action *ex contractu* or *ex delicto*. Cooley, Torts, 8, note 1; Id. 90; 1 Hil. Torts, 1; 2 Bouv. Law. Dict. 600. "In such cases the tort is dependent upon, while at the same time independent of, the contract." *Rich v. Railroad Co.*, 87 N. Y. 390. Plaintiff's averments as to the intentional, wrongful, and forcible seizure of his property by the officers of the Waco & Northwestern Railroad Com-

pany, while it was on the line of his work, and used in constructing the road; the conversion thereof to their use; the unlawful levy of the Byrnes attachment upon his property at their instigation, for the alleged purpose of disrupting the contract for the construction of the road,—stated facts which, though connected with the breach of the contract, and for which actual damages were sought, described also a tort, authorizing, independently of said breach, a recovery of exemplary damages. Hence we think there was error in sustaining the exceptions upon the ground that it was an attempted double recovery for the same wrong. But, while we think there can be no doubt as to the correctness of this view of the assignment, the question of limitation, as presented by appellee in this connection, is decisive of appellant's right to recover under this plea, which, as we have said, sufficiently described a tort authorizing a recovery of exemplary damages, but which were filed in October, 1885, for the first time, and alleged the commission of the tort in April, 1869. The statute of limitation was interposed by appellee to this claim, and it is obvious, therefore, that for this reason he was precluded from a recovery of such damages, and the error complained of would not authorize a reversal.

It is contended by appellant that the court below erroneously construed the conveyance, executed in February, 1873, of the property, rights, privileges, and appurtenances of the Waco & Northwestern Railroad Company to the Houston & Texas Central Railway Company as vesting in the latter company title to the land donation, aggregating about 500,000 acres of land, to which the former company was entitled as a donation from the state. It is urged by appellant that this land donation was not embraced in said conveyance, but that it remained a part of the assets of the Waco & Northwestern Railroad Company in the hands of the directory of the sold-out road, under the statute constituting said directory trustees for its creditors. He alleges, also, and this is supported by the proof that the land was transferred on June 24, 1874, to the Houston & Texas Central Railway Company by said directory. This transfer, he charges, was made in fraud of his rights as a creditor. We concur in the position of appellant that the land donation to which the Waco & Northwestern Railroad Company was entitled from the state was not embraced in the conveyance to the Houston & Texas Central Railway Company in February, 1873, and we are of opinion that there was error in the construction given this conveyance, to the effect that it operated to convey said land to the Houston & Texas Central Railway Company.

The contract between the two companies provided that, to secure the payment of the sum of \$600,000 to the Houston & Texas Central Railway Company by the Waco & Northwestern Railroad Company, a deed of trust should be executed by the latter, by which there shall be conveyed the franchise or charter rights of the Waco & Northwestern Railroad Company, road-bed, right of way, and other privileges and appurtenances of their railroad, etc. The resolution of the board of directors of the Waco & Northwestern Railroad Company ratifying this contract contained the same language. The deed of trust described the property intended to be conveyed as "all and singular the several tracts and parcels of land which now are or may hereafter constitute the site of the roadway, turn-outs, side tracks, depot grounds and appurtenances, and all lands which now or may hereafter constitute and be a part of the road, and the rights of way, from the town of Bremond to the depot grounds in the city of Waco, the cross-ties and superstructure of the road." The deed of trust, as well as the conveyance of February, 1873, described the property as follows, actually conveyed: "And also all and singular the chartered rights, privileges, and franchises of every kind granted to the Waco & Northwestern Railroad Company by acts of the legislature of the state of Texas, which are now possessed by it, or to which it may hereafter become entitled under said acts and the laws of Texas relating to railroads,

and all other rights and appurtenances conveyed to us by said deed of trust."

The authorities are abundant to the effect that whether subsequently acquired property is included in a conveyance executed by a railroad company depends upon its being necessary to the enjoyment of the franchise, or to the operation of the road, in the absence of special description of it in the conveyance. So a conveyance of all its property, "real and personal, acquired, or to be acquired, owned, or to be owned, used or appropriated, for operating or maintaining the road," does not include lands acquired by the company, and not thus used or employed. A conveyance of "its corporate privileges and appurtenances" was held not to embrace town lots adjoining the road-bed, unless as a matter of fact they were essential to the enjoyment of the corporate franchises. The purchaser at a foreclosure sale acquires title to the road as constructed. 2 Perry, Trusts, § 759; *Walsh v. Barton*, 24 Ohio St. 28; *Seymour v. Railroad Co.*, 25 Barb. 284; *Ellwell v. Railroad Co.*, 67 Barb. 83; *Railroad Co. v. Livermore*, 47 Pa. St. 465.

Again, where "the road, superstructure, track, and all appurtenances, made or to be made, the land upon which the road had been, or should be constructed, including depots," etc., were conveyed, and the company subsequently acquired a large tract of woodland seven miles from the road for the purpose of supplying it with fuel and timber, it was held by the supreme court of Wisconsin that the last-mentioned tract of land was not included in the conveyance. *Dismore v. Railroad Co.*, 12 Wis. 649. We have cited only a few of the numerous cases substantially to the same effect. A later case, involving and deciding a similar question, is that of *Railroad Co. v. Whittaker*, 5 S. W. Rep. 448, (by the supreme court of our state.)

We are of opinion that the title to the land donation of the Waco & Northwestern Railroad Company did not vest in the Houston & Texas Central Railway Company by the terms of the conveyance executed to the latter in February, 1873, but that this acquisition of the land donation was consummated by the Houston & Texas Central Railway Company on the 24th of June, 1874. Its effect upon the rights of the parties to this suit we will now consider.

In the previous recital of the pleadings in this cause it will be noticed that on June 7, 1878, about two years after the Houston & Texas Central Railway Company was made a party defendant by appellant, he alleged, among other fraudulent acts of the two companies in pursuance of the purpose to absorb all of the property of the Waco & Northwestern Railroad Company in fraud of his rights as a creditor thereof, "that after the act of merger, in 1873, and about the 24th of June, 1874, the Houston & Texas Central Railway Company ordered a meeting of what was termed the directors of the Waco & Northwestern Railroad Company, a majority of whom were directors of the Houston & Texas Central Railway Company, and they granted and conveyed to the latter company all of the lands and land certificates to which the Waco & Northwestern Railroad Company was entitled as a donation from the state, amounting to about 500,000 acres of land," etc. As before stated, it was made a matter of record that this averment had been expressly withdrawn and abandoned by the appellant in November, 1878, and at the trial of the cause, during the November term, 1878, in lieu of this allegation, it appears that the liability of the Houston & Texas Central Railway Company for the debts of the Waco & Northwestern Railroad Company was urged, under the operation of the act of merger of May, 1873. Whether appellant did or did not rely upon the latter plea in lieu of the former, the plea quoted was declared to be abandoned. Upon an appeal from that trial, and after the decision upon that appeal, that the Houston & Texas Central Railway Company did not become liable for the debts of the Waco & Northwestern Railroad Company under the operation of the act of merger, the withdrawn and abandoned plea was revived in October, 1881, and in 1885, to which the statute of limitation was at once pleaded by appellees. It appears, then, from the record that the title of

the Houston & Texas Central Railway Company to the land donation was acquired in June, 1874; and appellant alleged the acquisition thereof to have been fraudulent in June, 1878, at which time the averment was not obnoxious to the statute of limitation. But having abandoned this allegation, as before explained, in November, 1878, and having gone to trial upon other issues, the statute of limitation was thereby put in motion. And when the allegations were renewed in October, 1881, attacking the acquisition of the land donation by the Houston & Texas Central Railway Company upon the ground of fraud, the statute of limitations, being pleaded by appellees, precluded appellant's right to attack and set aside the same upon that ground; seven years having elapsed from the date of the acquisition of the land by the Houston & Texas Central Railway Company in June, 1874, to the filing of his plea, in October, 1881. If this plea had not been withdrawn by appellant in November, 1878, he would have had the same right to inquire into and attack the transfer of the land that he had to attack, upon the alleged ground of fraud, the conveyance of all of the other property of the Waco & Northwestern Railroad Company to the Houston & Texas Central Railway Company.

Under the facts of this case, we do not think appellant was precluded from inquiring into and setting aside the conveyance of the land donation upon the alleged ground of fraud, because he was a simple contract creditor. As said in *Cassaday v. Anderson*, 53 Tex. 535, where a similar question was well considered: Our system being one of blended law and equity, he could sue upon the indebtedness due him by the Waco & Northwestern Railroad Company, and in the same proceeding also seek to set aside the conveyance of the land because made in fraud of his rights as a creditor. Such proceeding is sustained upon the grounds that the remedy in equity would be more adequate, and the conveyance, unless removed, would be a cloud upon the title preventing the ultimate satisfaction of the judgment which might be obtained; and therefore the aid of the court is properly invoked to remove the cloud caused by the alleged fraudulent conveyance as an obstruction to a fair sale in satisfaction of the judgment, and not for the purpose of enforcing a lien on the land. But appellant was, as we have attempted to show, precluded from attacking the transfer of the land by reason of the fact, which appears from his averments and proof, that an adverse possession of this property by the Houston & Texas Central Railway Company, from its acquisition in June, 1874, until November, 1881, when the transfer was attacked for fraud, vested title thereto in that company. There was no withdrawal or abandonment by appellant of any allegation save that attacking the assignment of the land to the Houston & Texas Central Railway Company, and seeking to set it aside upon the ground of fraud. Consequently his averments of a fraudulent acquisition of all of the other property of the Waco & Northwestern Railroad Company by the Houston & Texas Central Railway Company, remained substantially in October, 1885, as had been originally pleaded by him, and persistently adhered to in his successive amendments, raising the issue as upon the last trial of a fraudulent conveyance of all of the other property and assets of the Waco & Northwestern Railroad Company to the Houston & Texas Central Railway Company. This issue alone—that with respect to the land conveyance having been eliminated—should have been submitted to the jury for determination, accompanied with such instructions as to the law as were applicable to the evidence. This was not done. On the contrary, though appellant's allegations of fraud and *ultra vires* with reference to the transfer of the property of the Waco & Northwestern Railroad Company to the Houston & Texas Central Railway Company were recognized by the court as sufficient in law, as appellees' exceptions thereto were overruled, and though more than one-half of the evidence contained in this record was introduced without objection by appellant and appellees in support of their respective averments upon this issue, it was excluded by the charge from the jury's consideration.

The court instructed the jury in this language: "There being no evidence before you of the allegations of fraud in the conveyance, plaintiff cannot question the same, and that issue is not submitted to you," etc. The conveyance referred to in the charge is that executed in February, 1878, conveying the Waco & Northwestern Railroad Company, with its rights and appurtenances, to the Houston & Texas Central Railway Company, and which the court instructed the jury operated to convey the land donation of 16 sections of land to the mile to the latter company, which the former was entitled to from the state. This was an erroneous construction of this conveyance, the land donation having been acquired in June, 1874, by the Houston & Texas Central Railway Company, as alleged by appellant in his plea of June 7, 1878, withdrawn by him in November, 1878, and as shown by the proof.

As to all of the other property of the Waco & Northwestern Railroad Company which was conveyed, appellant's pleadings and proof raised the issue of fraud in the conveyance thereof, which was controverted by the answers and evidence of the appellees; and we are of opinion that it was error to withdraw from the jury the issue thus made. While we think, for the reasons given, that the statute of limitation pleaded in this cause precludes the inquiry by appellant as to the conveyance of the land donation on June 24, 1874, to the Houston & Texas Central Railway Company, and that this is no longer an issue in the case, we do not mean to express the opinion that the fact of the conveyance may not be used in support of the allegations of a fraudulent combination to absorb the property of the Waco & Northwestern Railroad Company, in fraud of appellant's rights as a creditor, as any other competent fact or circumstance might be so used.

There have been three verdicts rendered in this cause, from each of which appeals have been prosecuted. More than 18 years have elapsed since the institution of this suit and the breach of the contract sued upon. We find no complaint in the record as to the amount of the judgment in favor of appellant. In the present case it is for the sum of \$16,453.90 for money and interest due, with foreclosure of his mortgage upon the 45 miles of road from Bremond to Waco, and \$96,602 actual damages in the nature of prospective profits lost by the breach of the contract against the Waco & Northwestern Railroad Company. The Houston & Texas Central Railway Company, and the directors of the former road, made parties as trustees under the statute, were discharged, with their costs. We think the judgment is erroneous, and that the cause should be disposed of as follows: The judgment should be reversed, and the cause remanded, with instructions to the court below to try the issue whether the sale of the Waco & Northwestern Railroad made to the Houston & Texas Central Railway Company, through and under the terms and provisions of the deed of trust executed by John T. Flint for and as president of the Waco & Northwestern Railroad Company to Gray & Botts, the trustees therein mentioned for the Houston & Texas Central Railway Company, was fraudulent as to appellant's rights as a creditor of said Waco & Northwestern Railroad Company, and to try no other issue now made or presented by the pleadings in this cause; and if upon a trial of the issue above instructed to be tried it shall be found that said sale so made, under said deed of trust, was not fraudulent, then, and in that event, judgment shall be entered against the trustees for the stockholders and creditors of said Waco & Northwestern Railroad Company, in their representative capacity only, for the sum of \$16,453.90, with interest on said sum from the date of the judgment from which this appeal was taken, together with a foreclosure of appellant's lien upon the railroad and appurtenances thereto belonging, from Bremond, in Robertson county, to the city of Waco, in McLennan county, against said trustees and the said Houston & Texas Central Railway Company, to enforce its payment; and that judgment be rendered against said trustees for the sum of \$96,602, with interest thereon also from the date of the judgment

from which this appeal was taken, to be paid out of any assets in their hands as such trustees; and if, upon a trial of the issue above directed to be tried, it should be found that the sale of said Waco & Northwestern Railroad Company and its appurtenances, under the terms of said deed of trust, was made with intent to defraud the creditors of said Waco & Northwestern Railroad Company, then, and in that event, the said Waco & Northwestern Railroad shall be adjudged subject to sale for the satisfaction of the judgment to be rendered in favor of appellant against said trustees.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed and remanded, with instructions.

LEWIS v. SIMON *et al.*

(Supreme Court of Texas. January 22, 1889.)

1. FRAUDULENT CONVEYANCES—FUTURE CREDITORS—VALIDITY.

A voluntary conveyance in fraud of existing creditors, recorded on the day of its execution, is not void as to future creditors because the grantor afterwards engages in extensive speculations, and soon becomes insolvent; Rev. St. Tex. art. 2466, providing that a voluntary conveyance, void as to prior creditors, shall not on that account merely be void as to subsequent creditors.¹

2. HUSBAND AND WIFE—CONVEYANCES BETWEEN—COMMUNITY PROPERTY.

A voluntary conveyance by a husband to his wife of community property vests the property in the wife separately.

3. APPEAL—REVIEW—HARMLESS ERROR.

Error in excluding evidence is harmless where, had it been admitted, it would have remained the duty of the court to direct the verdict which was actually returned.

4. SAME.

Where a verdict is properly directed by the court, a refusal to charge as requested is not error.

Appeal from district court, Washington county.

Trespass to try title by Angelina Simon, joined by her husband, Solomon Simon, against M. Lewis. Defendant appeals.

J. T. Swearingen, for appellant. *Bassett, Muse & Muse*, for appellees.

GAINES, J. This suit was brought by appellee Angelina Simon, joined by her husband, to recover of appellant a certain parcel of land described in her petition. On the 16th day of February, 1885, the land in controversy was the property of Solomon Simon, who on that day conveyed it to appellee Angelina, his wife. The consideration expressed is \$10, "paid by Angelina Simon, and the further consideration of the love and affection" borne by the grantor to her. The deed was acknowledged and filed for record on the day of its date, and was duly recorded. The defendant claimed title by virtue of a sheriff's sale and deed to him, made under an execution issued from the county court of Galveston county, upon a judgment there rendered in favor of Ullman, Lewis & Co. against Solomon Simon. The judgment established the lien of an attachment which had been formerly issued in the suit, and levied upon the land in controversy as the property of Solomon Simon. The debt upon which the judgment was rendered was an open account contracted on the 29th day of July, 1885, more than five months after the conveyance from Simon to his wife. The appellant defended upon the ground that the deed from Simon to his wife was made with intent to defraud the subsequent, as well as existing, creditors of the grantor, and was therefore void as to Ullman, Lewis

¹Respecting the right of subsequent creditors to complain of prior conveyances by their debtor as fraudulent, see *Stove Co. v. Walrod*, (Iowa,) 39 N. W. Rep. 811, and note; *Walsh v. Byrnes*, (Minn.) 40 N. W. Rep. 831, and cases cited.

& Co., although the debt upon which they obtained judgment was not created until after the deed was made. In order to maintain his defense, the appellant introduced the testimony of but one witness. Presenting this testimony in the light most favorable to defendant, it would have authorized the jury to find that Simon was indebted at the time of the conveyance to his wife in an amount in excess of the value of his assets; that after this time he continued his regular business, and also engaged in the purchase of mules or other speculations upon an extensive scale for a man of his means; and that within 10 months after the deed to his wife he failed, being indebted to a large amount. The witness knew but little of the details of Simon's business, and the conclusions thus stated are the limits of the inferences which the jury could have legitimately drawn from his evidence.

The appellee, the plaintiff below, having introduced her deed, and the defendant having introduced evidence of the attachment proceedings, judgment, execution, and sheriff's deed, under which he claimed, and such being the parol evidence adduced to establish the fraud, the court instructed the jury to find for the plaintiff. This instruction is assigned as error.

Article 2466 of the Revised Statutes is as follows: "Every gift, conveyance, assignment, transfer, or charge made by a debtor, which is not upon consideration deemed valuable in law, shall be void as to prior creditors; unless it appears that such debtor was then possessed of property within this state subject to execution sufficient to pay his existing debts; but such gift, conveyance, assignment, transfer, or charge shall not, on that account, merely be void as to subsequent creditors, and though it be decreed to be void as to a prior creditor, because voluntary, it shall not for that cause be decreed to be void as to subsequent creditors or purchasers." Conceding, therefore, that the deed from Simon to his wife was a voluntary conveyance, and that it was void as to existing creditors, this does not render it void as to subsequent creditors. The only facts remaining, from which fraud in the conveyance as to the latter class of creditors could be deduced, are that soon thereafter Simon began operating upon a large scale, and shortly became insolvent. The use of the word "merely" in the statute quoted indicates that the legislature contemplated that cases might arise in which a voluntary conveyance should be held void even as to subsequent creditors, but we are clearly of opinion that the facts here in evidence do not make such a case. If a grantor should voluntarily convey his property to his wife or children, and should cause the deed to be withheld from the record, intending notwithstanding his conveyance to obtain credit upon the faith of his still being the owner of the property, and should he accordingly obtain such credit, a strong case would be presented for holding the conveyance fraudulent, although it might be placed upon the record before the creditor secured a lien upon the property by judgment or otherwise. But such is not the case before us. Here the deed was recorded upon the day of its execution, and notice was given to the world that the grantor had parted with his title to the property. It has been held that where a voluntary conveyance is made in contemplation of the grantor's entering upon hazardous speculations, and with a view to protect it from subsequent creditors, in the event his ventures should result disastrously, it is fraudulent as against such subsequent creditors. *Wait, Fraud. Conv.* §§ 100, 101, and cases cited. But the author cited also says: "As a general rule, a subsequent creditor, who acquired his claim with knowledge or notice of the conveyance sought to be annulled, cannot attack it as fraudulent." *Id.* § 106; *Baker v. Gilman*, 52 Barb. 39. This rule has been recognized in former decisions in this court. *Lehmberg v. Biberstein*, 51 Tex. 457; *De Garca v. Galvan*, 55 Tex. 53; *Van Bibber v. Mathis*, 52 Tex. 406. The creditor knowing that the grantor has voluntarily parted with his property, we fail to see the device or deceit by which he can claim to have been defrauded. We conclude there was no evidence to warrant a verdict for the de-

fendant, and that the court did not err in instructing the jury to find for the plaintiff.

The decision of the foregoing question practically disposes of the case. If the answers of the witness Breckenridge which were excluded would have materially strengthened the defendant's case, it would be a question to be determined whether the court erred or not in excluding them. But we are of the opinion that, if they had been admitted, it would still have been the duty of the court to charge the jury to find for the plaintiff. The error, therefore, in excluding the testimony, if error it were, is harmless.

The plaintiff Angelina Simon having shown title in herself, and defendant not having made a case to defeat her title, it was not error to refuse the charges requested. It is unnecessary to determine whether they were correct or not, as applied to a proper case. The proposition that the deed from Simon to his wife placed the title in the community cannot be maintained. Such a construction would be equivalent to holding that it passed the title from the community to the community; or, in other words, that it passed nothing. The consideration in the deed from Wilkinson to Simon, and the bid at the sheriff's sale, show clearly that the \$10 expressed in the deed in question were merely nominal, and that the conveyance was purely voluntary. By it the land clearly became the separate property of the wife, as the grantor evidently intended.

The evidence adduced admitted of no other proper judgment except that rendered, and it will therefore be affirmed.

SAN ANTONIO & A. P. RY. CO. v. HARRISON.

(*Supreme Court of Texas. January 22, 1889.*)

1. NEGOTIABLE INSTRUMENTS—ACTION ON DRAFTS—DENIAL OF EXECUTION.

Rev. St. Tex. art. 2262, provides that when a pleading shall be founded on an instrument in writing charged to have been executed by the other party or by his authority, and not alleged to be lost or destroyed, such instrument shall be received as evidence without the necessity of proving its execution, unless the other party shall file his written affidavit denying execution. A petition alleged that the drafts sued on, which were drawn on and accepted by "J. P. Nelson, Agent," were accepted by defendant's authority, and neither the execution of the acceptances nor the authority of the agent were denied on oath. *Held*, that they were admissible without proof of those facts, and were a sufficient basis for a judgment.

2. TRIAL—RECEPTION OF EVIDENCE—USE OF DEPOSITION.

Under Rev. St. Tex. art. 2238, providing that when cross-interrogatories have been filed and answered either party has the right to use the depositions on the trial, a party who has not filed cross-interrogatories cannot use depositions taken by his adversary over the latter's objection.

3. EXECUTION—LEVY—DESCRIPTION.

Under Rev. St. Tex. art. 177, requiring the sheriff's return to "describe the property attached with sufficient certainty to identify it," a levy describing two tracts of land each as a certain tract containing 150 acres, more or less, on which is located the new town of M., in L. county, state of Texas, along the line of the said S. A. & A. P. Ry., including all of the right, title, and interest of said railway company in and to any and all town lots and blocks heretofore laid off upon said tract, said interest being such as has been deeded, sold, released, or contracted to said railway company, or to any person as trustee for them, by S. B. M., of F. county, Tex., less such portions as have been heretofore legally disposed of by them, and donated and set apart for right of way and depot purposes, is insufficient, since, if it intended to describe a survey, it should have pointed out what survey was meant, or, if not, it should have described each lot and block intended. As it stands, it would compel a sale in mass.

Appeal from district court, Fayette county.

Action by J. M. Harrison against the San Antonio & Aransas Pass Railway Company on certain drafts. Judgment for plaintiff. Defendant appeals. Rev. St. art. 2262, cited in the opinion, provides that when a pleading

shall be founded on a written instrument, charged to have been executed by the other party, or by his authority, and not alleged to be lost or destroyed, such instrument shall be received as evidence without the necessity of proving its execution, unless the other party shall file his affidavit denying execution.

S. C. Patton, for appellant. *Phelps & Lane* and *Brown & Dunn*, for appellee.

GAINES, J. This suit was brought by appellee to recover of appellant on sundry drafts, of all of which the appellee was alleged and admitted to be the owner. Upon the trial the defendant objected to the introduction in evidence of four of the drafts, upon the ground that they did not purport on their face to be either drawn or accepted by defendant, or any one authorized to bind it. The court overruled the objection, and in this there was error. One of these drafts is drawn on the defendant company, and shows an acceptance signed, "J. P. NELSON, Agt." The others are drawn on "J. P. Nelson, Agent," and are accepted in like manner. We fail to perceive upon what the objection is based, unless it be contended that in order to admit the drafts in evidence, without proof of the authority of the agent, the acceptance should have been shown expressly that Nelson purported to sign as agent of the company. But in order to admit in evidence an instrument charged in a pleading to have been executed by the authority of the opposite party without proof of the authority, when the execution is not denied under oath, it need not purport on its face to be the act of the party on whose behalf it is alleged to have been executed. See *Water-Works v. White*, 61 Tex, 586, and cases cited. The petition alleged that the drafts were accepted by Nelson as the authorized agent of the defendant company, and neither the execution of the acceptances nor the authority of the agent was denied under oath. The drafts were properly admitted in evidence.

During the progress of the trial the defendant's counsel offered to read in evidence two depositions taken by plaintiff which contained no cross-interrogatories on behalf of the defendant. The court correctly excluded the depositions. No cross-interrogatories having been filed on the defendant's behalf, the depositions could not be read over the objection of plaintiff's counsel. The rule is statutory. Rev. St. art. 2233.

Appellant's fifth assignment of error is, in effect, that the court erred in rendering judgment against defendant without proof of the authority of the agent who signed the drafts and acceptances. The authority was not denied under oath, and no proof was necessary. Rev. St. art. 2262.

There was no error in rendering judgment for the amount of the drafts and interest; but we think the assignment that the court erred in refusing to dissolve the attachment on motion of the defendant is well taken. The ground of the motion was that the description of the land in the levy was not sufficient. There are two tracts of land sought to be described in the levy, and, as the descriptions are alike, we copy here but one of them. It is as follows: "A certain tract of land containing 150 acres, more or less, on which is located the new town of Moulton, in Lavaca county, state of Texas, along the line of the said San Antonio and Aransas Pass Railway, including all of the right, title, and interest of said railway company in and to any and all town lots and blocks heretofore laid off upon said tract of land; said interest being such as has been deeded, sold, released, or contracted to said railway company, or to any person as trustee for them, by S. B. Moore, of Fayette county, Tex., less such portion of said interest in said land as has been heretofore lawfully and legally disposed of by them, and less such portion of said tract of land as has been heretofore donated or set apart for right of way and depot purposes for said railway." The statute requires that the return of the sheriff "shall describe the property attached with sufficient certainty

to identify it;" and at an early day, in construing this statute, this court held that it was not sufficient to describe a merchant's wares "as a stock of goods, wares, and merchandise," but that an inventory of the goods must be given. *Messner v. Levois*, 20 Tex. 221. From the principle so described, it would follow that, when an attachment is sought to be levied upon several tracts of land, each should be specifically described; and, if the description of each is not certain in itself, then it should at all events refer to some document which would make it certain. If the description above quoted means to point out a survey merely upon which the town of Moulton is situate; it is too vague to show by any definite terms what particular survey it is. If it means a 150 acres which had been laid off into lots and blocks, and designated as the town of Moulton, then it should have described each lot and block by its number, or by some other designation, so that each could be particularly identified, and so that the order of sale under the judgment of foreclosure could direct the sheriff specifically to sell each particular parcel. The levy would have compelled a sale in mass, and was therefore illegal. In *Mackay v. Martin*, 26 Tex. 57, it is said: "It is scarcely possible that a sale in gross, pursuant to a levy upon a mass of property without any specific description, embracing undefined and unascertained interests, could be a fair sale of the property for its full value." The part of the levy not quoted above is upon another town tract, and the description is very similar, and no better. We are of opinion that the entire levy is insufficient, and that it should have been held for naught.

The judgment of the court below is accordingly reversed, and is here rendered for the appellee for his debt and interest, and that he take nothing by reason of his attachment.

HAWES *et al.* v. NICHOLAS.

(Supreme Court of Texas. January 23, 1889.)

WILLS—REVOCATION—REVIVAL.

Rev. St. Tex. art. 4861, prescribes that a will may be revoked by a subsequent will, codicil or declaration in writing executed with like formalities, or by the testator destroying, cancelling, or obliterating the same, or causing it to be done in his presence. *Held*, that the cancellation of a will expressly revoking all former wills does not revive a former will.

Appeal from district court, Calhoun county.

Application by Emma J. Nicholas to probate the will of H. W. Hawes, deceased. E. Hawes, the widow, and a number of the children of deceased, opposed the probate; which being granted on appeal to the district court, contestants appeal.

E. Hawes, for appellants. *Glass, Callender & Proctor*, for appellee.

HENRY, J. In the year 1878, H. W. Hawes executed a will, by which he devised specified portions of his estate to one of his sons and his granddaughter Emma J. Nicholas. This paper was styled a "deed," and shortly after its execution was acknowledged by the maker, and recorded as a deed by the county clerk of Calhoun county. The instrument remained in the custody of one of the devisees, and was produced by him after the death of the maker. In the year 1879 the said H. W. Hawes executed another will, in which he expressly revoked all prior wills, and which was inconsistent in some material respects with the will of 1878. In 1883 the testator destroyed the will of 1879 by tearing and burning it. He died in the year 1883.

In the year 1887 appellee, Emma J. Nicholas, filed in the county court of Calhoun county an application to probate the will of 1878, which she produced and proved. This application was opposed by the widow and a number of the children of the deceased, H. W. Hawes. The contestants pleaded,

as reasons why the will of 1873 should not be admitted to probate; the execution and subsequent destruction of the will of 1879. The case was tried in the county court, and appealed to the district court. In the district court exceptions to the answer of contestants were sustained, and the will of 1873, upon proper proof of its execution being produced, was admitted to probate. The contestants offered, but were not permitted to prove, the execution as required by law of the will of 1879, containing a clause expressly revoking all previous wills, and provisions inconsistent with the will of 1873, and the subsequent destruction by tearing and burning of the will of 1879. The contestants appeal, and assign as error that "the court erred in sustaining the exceptions of applicant to contestants' answer, and in holding that the destruction by the decedent of the will of 1879, in 1888, had the effect of reviving the will of 1873."

The question as to whether, and under what circumstances, the destruction of a subsequent will, will revive a prior one, has been much discussed. The authorities are conflicting. In 4 Kent, Comm. 532, it is said: "If the first will be not actually canceled, or destroyed, or expressly revoked, on making a second, and the second will be afterwards canceled, the first will is said to be revived. But the first will is not revived if the testator makes a second, and actually cancels the first by an absolute act rendering it void, and then cancels the second will. It will, in such a case, require a republication to restore the first will." The attorneys for appellee quote in their brief the following language from Redfield on Wills: "The general rule seems to be firmly established from an early day that a later will, revoked, will not prevent an earlier and inconsistent one from remaining in force; and it makes no difference whether the later will contained an express clause of revocation or not." Volume 1, pp. 308, 309. But further on the same author says: "It seems to have been regarded as an unsettled question in the English courts, both in Westminster hall and doctors' commons, whether the cancellation of a later revoking will would have the effect to revive the former will thus revoked. The result of the most careful examination of the cases leaves the question in a state of distressing uncertainty. The most we can say is that it depends upon circumstances; and that extrinsic evidence is admissible, in regard to the intention of the testator, was freely admitted before the late statute, which required some positive act of revival." Id. 320, 322.

The question is discussed in the case of *Colvin v. Warford*, 20 Md. 391, and there it is said: "The authorities undoubtedly established the principle that an unconditional revocation is not essentially testamentary in its nature, and, like the will containing it, liable to vary with the testamentary purpose, but a positive consummated act, producing an immediate and conclusive effect. * * * The principle established in the ecclesiastical courts of England is that the canceling of a will containing an express revocation of a previous will does not necessarily revive the will revoked, although the presumption of an intention on the part of the testator to revive the previous will may be raised by his destruction of the revoking will."

In the case of *James v. Martin*, 3 Conn. 577, Chief Justice HOSMER says: "An express revocation is a positive act of the party, which operates, by its own proper force, without being at all dependent on the consummation of the will in which it is found, and absolutely annuls all precedent devises." "It is because an express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously, and *per se*. As a clear consequence resulting from this principle, all prior wills are recalled or reversed,—the proper meaning of the word 'revoked,'—and must remain in this condition until revived by republication. * * * A deed of revocation, separate from a will, has the effect of annulling a prior will instantaneously; and the operation is the same whether the revoking clause be in deed or will, for it is never a necessary part of the latter."

In the case of *Peck's Appeal*, 50 Conn. 563, it appears that Lucy Peck made a will in 1875, and in 1880 made another inconsistent with the first. She died not long afterwards. The last will was never found, but the first one was. The new will did not expressly revoke the first one. The court held that "prior to 1821 any will might be revoked in writing, and it was not necessary that the writing should be executed with every particular formality. It was then held that a revocation contained in another will was not ambulatory, but took effect immediately, and that the will revoked could not be revived without a republication."

In 1821 a statute enacted that "no devise of real estate shall be revoked otherwise than by burning, * * * or by some other will or codicil in writing. * * *" That section required that a written revocation should be in another will. The statute changes the aspect of the question. Before the statute any written declaration to that effect revoked a will, irrespective of any statute, and without regard to the death of the testator. Now, the statute requires that the writing, in order to have that effect, must itself be a will or codicil, and executed with all the formalities required for such instruments.

In our state a statute prescribes the method of revoking a will to be "by a subsequent will, codicil, or declaration in writing executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence." Rev. St. art. 4861. A written declaration, properly executed, as effectually revokes a will from the date of its execution as does its destruction. If the purpose to revoke is sufficiently expressed, and the writing is properly executed, it cannot be controlled or limited by the name given the instrument, or by its containing other provisions. If the will of 1879 was properly executed as a will, and contained a clause expressly revoking the will of 1873, we do not think that the subsequent destruction of the will of 1879 had the effect of reviving the will of 1873.

We think there was error in sustaining exceptions to the answer of contestants, and that for this cause the case must be reversed.

HOLSTEIN v. ADAMS *et al.*

(Supreme Court of Texas. January 23, 1889.)

1. TRESPASS TO TRY TITLE—PLEADING—IMPROVEMENTS.

Evidence of improvements offered by defendant in trespass to try title cannot be excluded because his plea does not state the grounds for alleging himself to be a possessor in good faith, such plea being otherwise sufficient, and not having been excepted to, though Rev. St. Tex. art. 4813, requires such grounds to be set out. The objection should be taken by special demurrer.

2. APPEAL—REVIEW—RULINGS ON EVIDENCE—HARMLESS ERROR.

But where the bill of exceptions states that defendant proposed to show by certain witnesses that the improvements were made in good faith, but does not show that such witnesses would testify to any facts from which good faith may be found, the rejection of the evidence is harmless, as a witness could not be permitted to state his conclusion that the improvements were made in good faith.

3. SAME—OBJECTIONS NOT MADE BELOW.

Where plaintiffs show that a certain person acquired title on a specified date, and that a person of the same name, who was in the state about that time, died in another state, and that they are his heirs, and there is nothing to disprove the identity of the owner and such ancestor, a judgment for plaintiffs will not be reversed for want of further proof of identity; the objection not having been made below.

4. ADVERSE POSSESSION—ACTUAL AND CONTINUOUS.

Adverse possession, to be available, must have been continuous for the statutory period. Rev. St. Tex. art. 8198, defining adverse possession to be an actual and visible appropriation, commenced and continuous under claim of right, etc.

Appeal from district court, Fayette county.

Trespass to try title by J. H. Adams and others against A. M. Holstein and others. A. M. Holstein appeals. Rev. St. Tex. art. 3198, defines "adverse possession" to be "an actual and visible appropriation of the land, commenced and continued under a claim of right, inconsistent with and hostile to the claim of another." Article 4813 provides that "defendant in any action of trespass to try title may allege in his pleadings that he, and those under whom he claims, have had adverse possession in good faith of the premises in controversy for at least one year next before the commencement of such suit; and that he, and those under whom he claims, have made permanent and valuable improvements; * * * and stating, also, the grounds of such claim."

Moore & Duncan, for appellant. *Osceola Archer*, for appellees.

STAYTON, C. J. This action was brought by appellees to recover 125 acres of land, part of a larger grant. They show that Daniel J. Adams acquired title to this land in 1858, through a regular chain of transfer from the sovereignty of the soil; and, further, that a person of that name, whose heirs they are shown to be, died in West Virginia in 1886, having lived there for many years. They further show that Daniel J. Adams, through whom they claim, was in Texas about the time the deed to the person of that name was made. There was no evidence tending to show that the person to whom the deed was made was not the same person through whom appellees claim; nor, so far as the record shows, was any question of identity made in the court below; but it is urged in this court, for the first time, that the judgment ought to be reversed for want of further proof of identity. This proposition we cannot assent to.

There were several defendants, claiming different parts of the tract of land sued for, and judgment was rendered in favor of all of them except A. M. Holstein, who prosecutes this appeal, against whom a judgment was rendered for so much of the land as he claimed through deed from H. C. Holstein, and in his favor for the land claimed by him. Appellant was unable to deraign title to any part of the land from the sovereignty of the soil, or from common source, and was compelled to rely upon limitation based on 10 years' adverse possession, which he pleaded. It appears that P. B. Faison, in 1875, was claiming, under deed, something over 600 acres of land, of which the land in controversy was a part, but it is not shown that he had title thereto. In 1876 Faison gave bond for title to 101 acres of the land in controversy to A. M. Holstein (appellant) and H. C. Holstein. Whether this bond required a separate part of the 101 acres to be conveyed to each of the Holsteins does not appear; but, they having paid for the land in 1879, Faison, by deed, conveyed the north half to A. M. Holstein, and the south half to H. C. Holstein. The Holsteins were brothers, and after they contracted for the land moved on it, in 1876, and made improvements, all of which were on the north half. They seem to have used the land in common, and to have so continually occupied until Faison made to each of them deeds for separate parts in 1879.

Some time about the time these deeds were made, H. C. Holstein began to make preparation to improve the south half, which had been deeded to him, but the evidence justifies the holding that, for a year or more after the deed to the south half was made to him, no such possession thereof existed as is necessary to evidence an adverse holding. In 1880 or 1881, however, the facts which existed would evidence such a holding, and so continued until this action was brought, on June 27, 1887. H. C. Holstein conveyed the south half to appellant in 1882, and it may be said that there has been such adverse holding of the entire 101 acres as would support the plea of limitation for a period of 10 years, except that there was a break in this holding as to the south half for a year or more after deed to H. C. Holstein. The court below, evidently on account of this break in the possession of the south half, rendered judg-

ment for that in favor of the appellees, but against them as to the residue of the land claimed by appellant and the other defendants. There was no error in this, for the 10-years adverse possession was not shown to be continuous. The burden of proof in this respect rested on appellant.

Appellant sought to recover the value of improvements made on the land, and alleged his holding under Faison, adverse possession for about 12 years before the bringing of this action, and that in good faith he had made permanent and valuable improvements, which were specified, and each item valued. The plea, however, did not further state the grounds of his claim to be a possessor in good faith. His plea for improvements was not excepted to, but when he proposed to prove the character and value of improvements made by him, and his good faith, this was objected to, on the ground that his pleadings did "not set forth any acts showing inquiries regarding the title to the land, or any other facts showing good faith;" and the objection was sustained, and the evidence excluded. The practice of calling in question the sufficiency of pleadings by objecting to evidence has been often condemned by this court, and it has been uniformly held that an objection to pleadings, when thus raised, will be overruled, unless, giving to the plea a liberal construction, it would be held bad on general demurrer.

As said in *Black v. Drury*, 24 Tex. 292: "The party who seeks such an advantage, by not excepting to the plea, but by objecting to the admission of the evidence under it, must expect that the plea will be taken and understood in its full force against him. He has waived the right to make special exceptions to it. If it be good on general demurrer, and will sustain a verdict and judgment rendered upon it, his objection cannot prevail. * * * Under our system of pleading, great liberality has uniformly been indulged in favor of pleading, where no special exceptions have been made. General statements of fact, and legal conclusions, constituting parts of a plea, have not been held to vitiate it upon general demurrer. This has long been the ruling of this court when the question has been directly presented for adjudication."

The statutes regulating the pleadings, in cases in which compensation for improvements made on land is claimed, now, as they did not before the adoption of the Revised Statutes, require that the grounds of the claim that improvements were made in good faith shall be stated. Rev. St. art. 4813. How far, and with what particularity, the grounds on which the claim to good faith is made must be stated, is not prescribed; but, if the adverse party desires it, he is entitled to a statement, at least in a general way, of the facts on which the claim to good faith is based. If these facts be not stated, it is his duty and right, by special demurrer, to point out the want of particularity or fullness in statement; but, if he fails to do this, he must be deemed to have waived this right, and to consent that the adverse party may introduce, under any averment good on general demurrer, evidence of every fact necessary to sustain his defense.

The plea, in effect, alleged a holding under a deed for many years, and that this was in good faith, itemized the improvements, and placed a value upon them, and alleged that they were permanent in character. The plea would have been good under the former law against any kind of exception, and we are of opinion was good under the law now in force on general demurrer. In the case of *Thompson v. Comstock*, 59 Tex. 318, cited in support of the ruling of the court below, special exceptions were filed and overruled.

While the ruling of the court excluding evidence, on the ground on which the exclusion was asked, was erroneous, the question arises whether the bill of exceptions shows that any injury to appellant resulted from the ruling. It is not urged that the court ought to have rendered a judgment for the value of improvements on evidence received, but that the court erred in excluding evidence. Under well-settled rules, it must be made to appear, in a bill of exceptions taken to the exclusion of evidence, what the evidence was, and

that its exclusion may have influenced the judgment. The bill of exceptions shows that appellant proposed to prove by his own evidence, and that of two other witnesses, that he made the improvements alleged, and that they were of the value stated in his plea; and, further, that they were placed on the land in good faith. The bill is full as to the two items of evidence first named, but is it sufficient as to the last? The witness would not have been permitted to state that the improvements were made in good faith, but would have been required to state the facts under which the possession was taken and held, and the improvements made, and from the evidence thus given it would have been the province of the court or jury trying the case to determine as a fact whether good faith existed. The bill of exceptions shows that the evidence was that of the appellant and two other named persons, and thus evidences the fact that by parol evidence he proposed to prove his good faith. Such evidence often is necessary and proper on such an issue, but we are unable to know from the bill of exceptions that either of the witnesses would have stated any fact sufficient or tending to authorize a finding that the improvements were made in good faith. The existence of good faith is a fact to be established in such cases by evidence of other facts tending to show that the person asserting it, at the time he made improvements on land, believed himself to be its owner, and had grounds for such belief, such as would ordinarily be satisfactory to one unlearned in the law, but of ordinary intelligence, after having made such inquiry as the law presumes every person desiring to buy land will make, and as an ordinarily prudent man for his own protection ought to make. The bill of exceptions not showing that either of the witnesses would have stated a single fact from which the court might have found good faith, we cannot presume that they would. The presumption is that the judgment is correct; and, although the ground on which the court acted in excluding evidence may have been erroneous, this furnishes no sufficient reason for reversal of the judgment, unless it be shown that the evidence excluded was of such character as might have authorized or required a different judgment. The bill of exceptions does not show this, and the ruling complained of must be deemed harmless error.

We find no error in the judgment, and it will be affirmed.

RIO GRANDE & E. P. R. CO. v. MILMO NAT. BANK.

(*Supreme Court of Texas. January 29, 1889.*)

TRESPASS TO TRY TITLE—EVIDENCE—CERTIFIED COPIES—ABSENCE OF ORIGINAL.

In trespass to try title defendant agreed to waive the filing and notice by plaintiff of certified copies "as a predicate to show a common source of title." Rev. St. Tex. art. 4802, provides that plaintiff in such an action may prove a common source of title by certified copies of deeds, etc., without requiring proof of the inability of the plaintiff to produce the originals. *Held*, that a certified copy of a recorded patent, offered by plaintiff to show title in himself, there being no evidence of such common source, was not admissible, over defendant's objection, without accounting for the absence of the original, as provided by Rev. St. art. 2257.

Appeal from district court, Webb county.

McLane & Atlee, for appellant. *J. O. Nicholson*, for appellee.

STAYTON, C. J. This action was brought by Daniel Milmo against appellant, to recover block No. 224, in the city of Laredo. The Milmo National Bank intervened, and asserted title to the property. Daniel Milmo offered in evidence (1) deed to the block from A. C. Hunt to W. W. Hungerford, dated April 19, 1883; (2) deed from Hungerford to himself, dated July 3, 1883. The Milmo National Bank offered in evidence (1) deed from W. W. Hungerford, by trustee, Nicholson, to itself, for the block, dated June 21, 1884; (2) deed of

trust to Nicholson, made by Hungerford, of date April 27, 1883, empowered the trustee to sell, under which the deed above named was made; (3) deed from A. C. Hunt to W. W. Hungerford, same offered by Daniel Milmo; (4) deed from Raymond Martin to A. C. Hunt, dated September 3, 1882; (5) deed from city of Laredo to Raymond Martin, dated June 2, 1880; (6) certified copy from the county records of patent from the state to city of Laredo for land embracing the block in controversy, and dated July 18, 1884. The defendant offered no evidence of title, but, when the certified copy of patent was offered, objected to its introduction, because secondary evidence, and not admissible without the non-production of the original was accounted for. This objection was overruled, and the copy of the patent received and considered in evidence for all purposes. It further appears that the intervenor offered the copy of patent for the purpose of showing chain of unbroken title from the sovereignty of the soil as well as common source, and that it was admitted under a written agreement, signed by counsel of the respective parties, that certified copies of named deeds might be used as could the originals, if properly filed, and notice thereof given. The patent, however, was not one of the instruments named; but it is claimed that under a clause in the agreement, as follows: "Also that the filing and notice by plaintiff, intervenor, to defendant of certified copies, as a predicate to show a common source of title, is hereby waived, and no objection thereto will be made by reason of the want of notice and failure to file,"—the certified copy of patent was admissible. A judgment was rendered in favor of the bank, and from that this appeal is prosecuted.

As appellant gave no evidence of title, no common source of title was shown; and the question is, did the court err in admitting and considering as evidence of title in appellee the certified copy of the patent?

In *Ney v. Mumme*, 66 Tex. 268, it was held that a copy of a patent certified from the general land-office was admissible as evidence in any case in which the patent would be, and so without the predicate necessary before secondary evidence can be received. It does not follow from this, however, that a certified copy, taken from the record of deeds of a county, is entitled to be introduced under seals other than would be applicable to any other instrument authorized or permitted by law to be recorded. A patent may be recorded without further evidence of its authenticity than the law requires to appear upon its face; but, when recorded, certified copies taken from the record stand upon the same footing as to admissibility in evidence as do certified copies of other instruments properly admitted to record. To authorize the admission of the certified copy of the patent, over the objection of appellant, it should have been shown by appellee that the patent had been lost, or that it could not procure it, even if the agreement could be construed to apply to any evidence offered for the purpose of connecting appellee with the sovereignty of the soil. Rev. St. art. 2257. The agreement was doubtless made in view of article 4802, Rev. St., which seems to dispense with proof of inability of a plaintiff to produce original deeds or other papers to show that a defendant claims under a common source, and only to require, when certified copies of papers under which a defendant claims are used for the purpose of showing that both parties claim under common source, that such certified copies shall be filed, and notice thereof given. This was waived by the agreement, as to all certified copies introduced solely to show common source of title, but this did not authorize appellee to offer in evidence a certified copy of the patent to show title in itself, over the objections made by appellant, without showing the facts required by article 2257.

The court below evidently considered the certified copy of the patent, as offered, sufficient to show, in connection with the other evidence offered, title in appellee, and so acted upon it; for otherwise the judgment must have been for appellant, on the ground that appellee neither deraigned title from the sovereignty of the soil, nor showed common source of title. The certified copy

of patent should not have been admitted for the purpose for which admitted and used, and for this reason the judgment will be reversed, and the cause remanded.

It is not necessary now to consider the other assignments of error, further than to say that nothing appears in the record from which we can see that either of the propositions contained in them do affect the right of the parties to this appeal.

It is ordered that the judgment of the court below be reversed, and the cause remanded.

MAYER *et al.* v. DUKE.

(Supreme Court of Texas. January 18, 1889.)

1. ATTACHMENT—WRONGFUL—EXEMPLARY DAMAGES.

In an action for seizure of goods under a wrongful attachment, an instruction that, if the jury find that the attachment was malicious, and without probable cause, they should give exemplary damages, is not error.¹

2. SAME—ACTUAL DAMAGES.

The sheriff having sold part of the goods, and credited the amount received on the judgment against plaintiff rendered in the attachment suit, plaintiff can only recover as actual damages the value of the goods less such credit.

3. SAME—PLEADING—EVIDENCE.

An allegation in the petition that plaintiff was damaged to the extent of the value of the goods, and a general denial in the answer, sufficiently authorize defendant to show that plaintiff received the benefit of the proceeds of the sale, and that his loss was to that extent diminished.

4. CONTINUANCE—ABSENCE OF WITNESS—DILIGENCE.

A continuance was properly refused, asked because of the absence of one of the defendants, who, as was alleged, was a material witness, and was informed that the trial had been set for that day; affiant not knowing the cause of the absence, and no diligence being shown to procure his testimony, though the case was not called till nine months after suit brought, and the absent defendant was a resident of another county.

5. NEW TRIAL—ABSENCE OF WITNESS.

Nor should a new trial be granted on account of defendant's absence, even though the importance of his testimony, and the fact that his absence was due to mistake as to the date set for trial, sufficiently appear; as defendant, in omitting to give his testimony by deposition, assumed the risk of losing the benefit of it.

6. APPEAL—PRACTICE—ASSIGNMENT OF ERRORS.

An assignment of error in the words: "The court erred * * * for the reasons fully set out in defendant's * * * motions therefor, including closing arguments for plaintiffs, as set out in defendant's bill of exceptions number 5,"—raises no objection, except the closing arguments; there being more than seven objections raised in the motions.

7. TRIAL—INSTRUCTIONS.

Where instructions are correct, as far as given, judgment will not be reversed for failure to give further instructions, which were not requested.

8. SAME—ARGUMENTS OF COUNSEL.

Where counsel in his closing argument used improper epithets, applied to the opposing party, the words applying to no facts outside the record, and the court having promptly reprimanded him, and fined him for contempt, the words will not be presumed, on appeal, to have influenced the jury.

9. COSTS—ON APPEAL—EXCESS IN JUDGMENT REMITTED.

Where appellee offers to remit an excess in the judgment, if the judgment is otherwise affirmed, and the fact of the excess was not mentioned below on motion for new trial, and no charge was asked on the subject, appellee is entitled to costs in both courts; the judgment being affirmed, after deducting the excess.

Appeal from district court, Colorado county.

¹Concerning the allowance of exemplary damages in actions for wrongful attachment, see *Rice v. Miller*, (Tex.) 8 S. W. Rep. 317, and note; *Bank v. Eborn*, (Ala.) 4 South. Rep. 336, and note. See, further, as to the allowance of exemplary damages in actions *ex delicto*, *U. S. v. Taylor*, 35 Fed. Rep. 484, and note.

Action by J. M. Duke against Mayer, Kahn & Freiberg, their sureties, and the sheriff, for damages for seizure of goods under an alleged wrongful attachment. Plaintiff recovered judgment, and defendants appeal.

Scott & Levi, for appellants. *Foard, Thompson & Townsend*, for appellee.

GAINES, J. This suit was brought by appellee to recover of appellants damages, both actual and exemplary, for the seizure of appellee's goods under a writ of attachment alleged to have been wrongfully and maliciously sued out. Mayer, Kahn & Freiberg were the plaintiffs in the attachment proceedings. This suit was brought, not only against them, but also against their sureties upon the attachment bond, and the sheriff who levied the writ. Appellee recovered a judgment against all the appellants for actual, and against Mayer, Kahn & Freiberg for exemplary, damages.

It is first urged that the court erred in refusing to postpone the trial of the case to a later day of the term, and in overruling the defendants' application for a continuance. The case, by agreement of counsel, was set for the 6th of September, and was called for trial on that day. A postponement was first asked, which being refused, a continuance was applied for, upon the ground of the absence of Jacob Kahn, one of the defendants, who was alleged to be a material witness for the defense. The application showed that Kahn had been informed by one of the attorneys for the defense a few days previous that the case had been set for the 6th of September, and that, as soon as it was discovered that he was not in attendance upon the court, his attorneys had telegraphed his firm that the case was called, and had received a reply informing them that he was at the town of Willis, and could not reach Columbus, where the court was held, until the 8th day of the month. The application further showed that the affiant did not know the cause of Kahn's absence, but knew that he was impressed with the importance of his presence upon the trial, and that the affiant believed that his absence was the result of some mistake. The applications for postponement and for a continuance stated substantially the same facts. No diligence was shown to procure the testimony of the witness. The suit was instituted in December, 1886, and the case was not called until the following September. The record discloses that Kahn was a resident of Galveston county, and diligence required that his deposition should have been taken. The motion to postpone was purely in the discretion of the court, and the application for continuance showed no legal diligence, and was properly overruled.

In connection with the assignments of error which raise the question just considered, counsel for appellants submit their sixth assignment, which is as follows: "The court erred in refusing to grant a new trial for the reasons fully set out in defendants' original and amended motions therefor, including closing argument for plaintiff, as set out in defendants' bill of exceptions number five." There are seven grounds upon which a new trial is asked in the original motion, and additional grounds are stated in the amended motion. We think, therefore, that the assignment is too general to call for the consideration of any ground urged in the motion except that of language used by counsel for plaintiff in the closing argument to the jury. But, should we look to the question sought to be raised by counsel in their brief under this assignment, we could not say that the court committed an error in the particular complained of. It may be conceded that the affidavit of Kahn attached to the motion for a new trial sufficiently showed the materiality and importance of his testimony, and that his failure to attend was the result of a mistake as to the day which was set down for the trial of the cause. The fact however, remains that the diligence was not used which the law requires. A party to a suit, whose testimony is material to his cause, may prefer to give his testimony in person, and may therefore decline to have his deposition taken in his own behalf. But if he do so he takes the risk of losing the ben-

eff of his testimony, in the event he should fail from any cause to attend upon the trial. Having elected to take his chance of attendance upon the trial, his absence should not, in an ordinary case, be permitted to result to the prejudice of the opposite party. It should neither be a ground for a continuance, nor for the granting of a new trial. There is nothing in this case to take it out of the ordinary rule. The facts within the knowledge of Kahn could have been as well presented by deposition as by his oral testimony upon the stand. Besides, the affidavits supporting the motion for a new trial tend very strongly to show that the mistake which caused his absence came about by his negligence in failing to give attention to his counsel, when the latter informed him of the day set down for the trial of his case. At all events, it was the result either of his own negligence or that of his counsel, and the consequence would be the same in either case.

It is insisted that the verdict of the jury for actual damages is excessive. The plaintiff annexed to his petition a bill of particulars of the goods seized by virtue of the attachment, showing the value of each item, and an aggregate value of \$1,198. He testified that the prices stated in the exhibit were the market value of the goods in Eagle Lake (the place of their seizure) on the day the levy was made. The verdict was for \$956 actual damages. But it appears in evidence that a part of the goods were sold by the sheriff for the sum of \$258.30, which amount was credited on the judgment in favor of Mayer, Kahn & Freiberg against appellee rendered in the attachment suit. We are of opinion that plaintiff was entitled to recover as actual damages only the value of the goods seized, less the proceeds of the sale, which were credited upon the judgment. *Blum v. Stein*, 68 Tex. 608, 5 S. W. Rep. 454. But counsel for appellee insist that because this matter was not specially pleaded there was no error. A better practice would have been to have pleaded the fact of the sale of the goods, and that the appellee received the benefit of the proceeds in the manner as above stated. But the petition claimed that the plaintiff had been damaged to the extent of the value of the goods. A general denial was pleaded, and under this, we think the defendants were entitled to show that this was not true; that in point of fact the plaintiff received the benefit of the proceeds of the sale; and that thereby his loss, to that extent, was diminished. The ruling would doubtless have been in accordance with this view of the matter, had it been called to the attention of the trial court. The assignment that the actual damages awarded by the jury are excessive to the extent of the credit in the judgment in the first suit is well taken; but, the appellee having offered to remit, the error may be corrected here, and hence is not a ground for reversal.

The eighth assignment of error is that "the court erred in charging the jury that, if they believed the attachment was sued out maliciously, and without probable cause, they should find for the plaintiff, against the defendants, vindictive or exemplary damages, and in thereby depriving the jury of their discretion to give or not give such damages." The proposition contained in this assignment is not without authority to support it. Some of the text writers on the law of damages lay down the doctrine that exemplary damages are not a matter of legal right, and cite in its support the cases referred to in appellants' brief. We will briefly consider these cases.

The Vermont and Mississippi cases cited sustain appellants' proposition, and we think it may be deemed the settled law in those states. *Snow v. Carpenter*, 49 Vt. 426; *Boardman v. Goldsmith*, 48 Vt. 403; *Railroad Co. v. Burke*, 53 Miss. 200. In the case last cited the supreme court of Mississippi hold that it is error to instruct the jury to give exemplary damages, without leaving it to their discretion, but also hold that it is not reversible error.

In *Wylie v. Smitherman*, 8 Ired. 236, the suit was to recover damages for the burning of a court-house. The judge charged the jury that the measure of damages "was not that for which the court-house would have sold, but the

amount it would have taken to rebuild such a court-house at that place as was destroyed." The supreme court held this was error, and that the real value of the house was the true measure of damages. This was the point decided. There was no question of exemplary damages in the case, and, though the judge who wrote the opinion made some remarks upon that subject, he nowhere says that, when a case for exemplary damages is made out, it is discretionary with the jury whether to allow them or not.

In *Johnson v. Smith*, 64 Me. 553, the question was whether, in an action for an assault, punitive damages could be awarded. It was argued on behalf of the appellant, the defendant below, that, because the assault was punishable in a criminal proceeding, therefore exemplary damages could not be allowed. The court held the contrary, and decided that the trial judge did not err in instructing the jury that they might give such damages. The charge quoted does say that such damages cannot be claimed as a legal right, but that portion of the charge was favorable to defendant, and was not complained of, and hence the point was not before the court.

In the case of *Hawk v. Ridgway*, 33 Ill. 473, the judgment was reversed for error in the charge. The court say: "Whether the trespass is committed under circumstances of aggravation is a question for the consideration of the jury. If this instruction was understood by the jury, as it most likely was, as requiring them to assess vindictive damages, as it took from their consideration all question of aggravation, we think that it virtually told them that they should find such damages. That question should have been left to their determination." This is sufficient to show that the point under consideration was not involved in this case. The same may be said of *Graham v. Railroad Co.*, 66 Mo. 536. We have not examined the case of *Railroad Co. v. Kendrick*, 40 Miss. 374, the volume not being accessible to us at this branch of the court.

It appears from the foregoing review of the cases cited by counsel for appellants that the Vermont cases alone hold that to instruct the jury to give exemplary damages is reversible error.

On the other hand, we find it distinctly held in *Hooker v. Newton*, 24 Wis. 292, that an instruction which tells the jury that they "ought" to give exemplary damages is not erroneous. In speaking of punitive damages in that case, the court say: "It cannot be assumed that the law in giving this power of punishment to juries designed that it should be exercised arbitrarily, wantonly, or capriciously. It was not designed that it should be withheld or applied from any personal motive of favoritism or animosity existing in the breasts of the jury. On the contrary, it must have designed that it should be exercised in a uniform and equal manner, without respect to persons, and with the single purpose of accomplishing the object of granting the power at all, that of protecting the community from such injuries. This can only be accomplished by giving juries to understand that, where the facts are such as authorize them to exercise the power, it ought to be exercised."

In *Goodal v. Thurman*, 1 Head, 209, an instruction which told the jury that they "should give plaintiff exemplary and substantial damages" was held correct by the supreme court. See, also, *Coryell v. Colbaugh*, 1 N. J. Law, 77; *Hodgson v. Millward*, 3 Grant, Cas. 406; *Knight v. Foster*, 39 N. H. 576; *Platt v. Brown*, 30 Conn. 336.

The case of *Champion v. Vincent*, 20 Tex. 812, was an action by the appellant against appellee, instituted in the justice's court, to recover damages actual and exemplary for the killing of three hogs. The plaintiff recovered in the justice's court, but on appeal to the district court the verdict was for the defendant. The proof showed that the hogs were delivered to the plaintiff after they were killed, and that he used them. The value of the hogs was four dollars or five dollars each. The opinion of the court concedes that the plaintiff, having used the hogs, could not recover for their value; but reverses

the judgment, on the ground that the court erred in instructing the jury that, if the hogs were received by the plaintiff, and the killing was done without malice, the plaintiff could not recover. The court say: "It is surprising that the jury should have found no evidence of malice in the positive proof of the willfulness and deliberation of the act, and the animosity between the parties." We infer that the court were of opinion that the jury should have given exemplary damages, and that but for this the judgment would not have been reversed.

We are aware that it is unusual to instruct the juries, in cases calling for a charge upon the subject, that they "may" give exemplary damages, provided they find a certain state of facts proved by the evidence. An examination of the cases in our own Reports will show that the trial judges have ordinarily used the term "may" in charging upon this subject. Yet it seems to us that in many cases, at least, it would not have been error for them to have gone further, and instructed the juries that they should find exemplary damages, if they found the facts proved which warrant such damages.

Upon the subject of exemplary or punitive damages there is much conflict, and it seems to us some confusion, in the authorities. Some courts hold with Prof. Greenleaf that the law does not recognize such damages; but in most cases they practically attain the same result as if such recovery was allowed, by instructing the juries in cases of aggravation to consider as elements of compensation what in other jurisdictions are only allowed as exemplary damages. Our courts permit damages by way of punishment in a proper case, but also in allowing exemplary damages permit a recovery for losses too remote to be considered as elements of strict compensation. When an attachment has been wrongfully and maliciously sued out, the jury are permitted to take into consideration the loss of credit in assessing the exemplary damages. We are of opinion that in such a case it should not be held error for the court to instruct the jury that, if they find that the attachment was both wrongful and malicious, they should give exemplary damages.

The charge is also complained of because it did not instruct the jury that exemplary damages should be given by way of punishment. The charge, in our opinion, was correct, as far as it went, and it was the duty of defendants to ask the additional instruction if they desired it to be given. We also think that the omission to tell the jury that they should give exemplary damages by way of punishment was calculated to operate to the prejudice of the plaintiff, but not to that of defendants.

It is also complained that the exemplary damages are excessive. They are large; but it is a gross outrage, wrongfully and maliciously, by process of law, to seize a debtor's property, and break up his business, although he may be unable promptly to meet his obligations. The records of this court show that it is an evil of frequent occurrence. The heavy damages awarded by juries in these cases seem to evince that they are aware that the only way to suppress the practice is to punish the offenders by verdicts for substantial damages. The amount of exemplary damages is largely in the discretion of the juries, and this court can only set aside their verdicts for excess in amount in such cases when the damages are so large as to show passion, prejudice, or partiality. We think the court did not err in refusing to set aside the verdict for exemplary damages as excessive. The petition showed no cause of action against the sheriff, Townsend. Although the attachment may have been wrongfully and maliciously sued out, the writ protected him. The judgment must be set aside as to him; but, the appellee offering to dismiss as to him, in case the judgment is otherwise affirmed, he will be here dismissed, with his costs.

In reference to the language of plaintiff's counsel used in his closing argument to the jury, we deem it sufficient to say that the court, having promptly reprimanded the counsel, and fined him for contempt, did all that could prop-

erly have been done to maintain its dignity, and to prevent the language from having any influence upon the jury. The offensive words related to no facts outside of the record. They were merely epithets applied to the principal defendants, and, though highly improper, being, like all other epithets, weak as arguments, are not to be presumed to have influenced the minds of the jury.

The appellee having offered to remit the excess in the actual damages hereinbefore pointed out, should the court require him to do so, the judgment, less the sum so remitted, will be affirmed as to all the appellants except Townsend. The fact of the excess in the judgment for actual damages to the extent of the amount of the proceeds of the sale of the goods not having been called to the attention of the court below in the motion for a new trial, and no charge having been asked upon the subject, the appellee will recover his costs both here and in the court below, except such costs as have occurred by reason of Townsend's having been made a party to the suit.

KAHANEK v. GALVESTON, H. & S. A. RY. Co.

(*Supreme Court of Texas. January 22, 1890.*)

1. VENUE IN CIVIL CASES—CHANGE—DISQUALIFICATION OF JUDGE.

Where an order of the county court transferring a cause to the district court recites as the reason thereof that the county judge had been counsel in another suit growing out of the same cause of action, in the absence of evidence in the record to the contrary, the supreme court is not authorized to hold that the cause was not properly transferred.

2. NEW TRIAL—JURISDICTION OF COURT—UNSWORN STATEMENT.

On motion for a new trial in the district court on the ground that the county judge was not in fact disqualified, an unsworn statement by the county judge, offered in support of the motion, but forming no part of the proceedings or of the record, need not be considered.

Appeal from district court, Fayette county.

Phelps & Lane, for appellant.

STAYTON, C. J. Appellant brought this action in justice's court, to recover damages claimed for an injury to horses, harness, and wagon done by a train on appellee's railway. He recovered a judgment in the justice's court, from which an appeal to the county court was perfected. It was transferred to the district court for trial on the ground that the county judge was disqualified to try the case. Judgment in the district court went against appellant, and on motion for new trial, for the first time, appellant brought in question the jurisdiction of the district court. The objection to the jurisdiction of the district court was that the county judge was not in fact disqualified to try the cause. The order in the county court transferring the cause was as follows: "This day, August 6, 1887, came this cause on to be heard, and thereupon came on to be heard defendant's oral motion to transfer this cause to the district court of Fayette county, for reason that his honor, the judge of this court, has been an acting counsel in a suit in the district court of Colorado county, growing out of the same cause of action that this suit is brought for, and the argument of counsel therein being heard, the court doth sustain said motion, and order that this cause be, and the same is, transferred to the district court of Fayette county, to be held at the court-house of said county on the 14th day of November, 1887, when and where the parties and witnesses in said cause will appear before said honorable district court."

No other question but that arising on the action of the court in overruling the motion for new trial is raised on this appeal. The district court had jurisdiction to try this cause, if the county judge was disqualified; and, from the very nature of the question, it was necessary, and the county judge had the power, to determine in the first instance whether he was disqualified. It is

to be presumed, in the absence of evidence to the contrary, that his judgment in this respect was correct. If it appear in the judgment, transferring a cause for trial from a county to a district court on account of the disqualification of the county judge, that the disqualification did not exist, or if this be made to appear from the record, through a bill of exceptions, it would be the duty of the district court to decline to try the cause. *Hall v. Jackson*, 8 Tex. 305; *Rogers v. Waltrous*, 8 Tex. 62; *Taylor v. Williams*, 26 Tex. 584. Whether an issue of this kind could, for the first time, be raised in the district court, and there tried on evidence not found in the record, it is unnecessary in this case to decide. The record made in the county court shows that the county judge had acted as counsel in another suit, in another court, based on the same causes of action as is the present. This does not negative the fact that the county judge "shall have been counsel in the case." The inference, if not the necessary conclusion, from what appears in the order we have quoted, is that the county judge was at one time counsel for one of the parties to this action, in a case based on the claim that appellee had injured his property in this case alleged to have been injured by it, in such manner and under such circumstances as to create a liability to him. If this be true, the county judge was disqualified, and properly transferred the case to the district court for trial. *Slaven v. Wheeler*, 58 Tex. 23; *Railway Co. v. Ryan*, 44 Tex. 480.

There is not that in the record made in the county court that would authorize this court to hold that the cause was not properly transferred. It may be claimed, however, that appellant offered such evidence, in connection with his motion for a new trial, as was sufficient to show that the county judge was not disqualified. That consisted of an unsworn statement made by the county judge on the 10th December, 1887, and filed with the motion. It was no part of the proceedings, or record of the proceedings, which were had on August 6, 1887, in the county court. No bill of exceptions was taken to the action of the court in overruling the motion for a new trial, and we are unable to ascertain whether the court considered, or refused to consider, the statement made by the county judge. If he refused to consider it, he did not err, even if upon an issue made he might have heard evidence for the respective parties as to the qualification of the county judge. *Slaven v. Wheeler*, 58 Tex. 26.

There is no error in the matter complained of made manifest, and the judgment will be affirmed.

MAIN v. BROWNE.

(Supreme Court of Texas. January 22, 1889.)

EXECUTORS AND ADMINISTRATORS—ACCOUNTING—LIMITATIONS OF ACTIONS.

There being no statutory limitation of the time within which an administrator may be cited to an account of his trust, the lapse of more than 16 years since the appointment of an administrator *c. t. a.*, during which no account has been filed or proceedings taken, will not bar a motion for an account by the legatees, the eldest of whom is 25 and the youngest 19 years old, when the answer of the administrator shows that he still has personality of the estate in his hands, and that he had until the year previous collected rents from the realty of his testator.

Commissioners' decision. Error from district court, Cameron county.

Petra de Larosquetu and others, legatees under the will of Ramon de Larosquetu, obtained a citation from the county court of Cameron county requiring James G. Browne, the administrator *c. t. a.* of said estate, to settle his accounts, and to the order made pursuant thereto they obtained a writ of *certiorari*. On motion of said Browne the writ was dismissed, and Jeremiah M. Main, executor, etc., of Petra de Larosquetu, she having died meanwhile, brings error.

W. A. Crafts and Coopwood & Son, for plaintiff in error. *Ward & Walker*, for defendant in error.

COLLARD, J. The writ of error in this case is from a judgment of the district court of Cameron county, dismissing a *certiorari* proceeding by which it was attempted to review a judgment of the probate court in the estate of Ramon de Larosquetu. On the 17th day of November, 1862, Ramon de Larosquetu died testate. On the 28th day of November, 1862, James G. Browne, defendant in error, was appointed by the probate court of Cameron county administrator with the will annexed. The will devised the property of testator to his four children, Petra, Angel, Pedro, and Refugia, at the time minors. On the 29th day of May, 1863, Browne was appointed guardian of the minor children, of their persons and estates. The administrator's bond, \$8,000, was approved, and ordered to record. It was not recorded, and was afterwards lost from the files. Appraisers were appointed to value the estate, November 28, 1862, but if any inventory was ever filed the records of the probate court and files do not show it. It does not appear that any other orders were made in the probate court, or any paper filed therein until August 23, 1879, when a motion was filed by Petra, Angel, and Pedro, alleged in the motion to be 25, 24, and 19 years old, respectively, setting out the foregoing facts. It was also alleged in the motion that the administrator's bondsmen were insolvent, and non-residents; that he had taken possession of all the estate of deceased, and of the legatees, as guardian; that no inventory of the wards' estates was ever filed; that he had never accounted for the estate received by him, its rents and revenues, nor delivered any of the same to the legatees, except a part of lot with small house on Market square, in Brownsville, and \$90 rent on another house on Elizabeth street, which was done between September 1, 1878, and June 1, 1879; that Browne still holds the residue of the estate, and that the estate ought to be of the value of \$12,000. Prayer to require administrator to file bond as administrator and as guardian of the persons and estates of relatives; to file inventory of the estate, etc. On the 27th January, 1880, the court, sitting for probate matters, ordered that the administrator file an inventory showing all the property and credits received by him as administrator, and he was also ordered to be cited to make a full exhibit of the estate.

The administrator, in response to the orders of the court, set up that at the death of the testator, Larosquetu, there was a small herd of cattle belonging to deceased and his widow as community property; that by the vicissitudes of the late war all traces of the inventory was lost, and that the only items of personal estate he has is \$280 in Mexican gold, and one pair of cart-wheels, valued at \$30, lot 7, block 65, and a portion of lot No. 1, block 86, in front of Market square; and that he had received as rents, \$1,416. He further set up that the country was occupied by Banks' army of Federal troops, during which time everything in the shape of cattle and horses were taken by lawless and predatory bands of men; that this condition of things lasted some two years after the military occupation of the country by Gen. Banks, and at the end of the time there was little or no stock of any kind in the country; that he himself by such means lost all his own horses and cattle, of which he had several hundred cattle and many horses; that it was unsafe for persons to travel on the range during this period; that he took the same care of the stock of the estate that he took of his own, and all it was possible for a prudent man to take under the circumstances; that upon the death of the widow (December, 1863) he took to his family, cared for, and supported the children Petra, Angel, and Pedro, and continued to support them until the 23d August, 1878; that he has no recollection of being appointed guardian of the children, but if he was there was no estate to inventory, and can make none. He presents his final account as administrator, resigns his trust, and asks that the account be examined and approved. In the account filed he charges for maintenance and schooling of Petra, 14 years and 9 months, \$2,950; of Angel, \$2,600; of Pedro, \$1,150; cash for chimney, \$20; and various other expenses about the estate,

taxes, etc., which, after allowing credits, leaves the estate in his debt \$5,977.88.

Many objections were made to the account by the legatees, charging that all the property was not accounted for, and disputing the correctness of the items claimed as credits by the administrator. Upon hearing, the court restated the account, so as to charge the administrator with \$288 cash to be accounted for besides the lots, and allowing him credits for allowance of one year's support of the family, and for support of the children, and other items. The debts and credits of the account, as restated, exactly balanced. Partition of the lots and house was ordered between the legatees, and as between them their interests in the property to be decided was to be charged, viz., that of Angel with \$650, of Pedro, \$766.72, of Refugia with \$100, and of Petra with \$10. The costs of the proceeding were adjudged against the administrator, except the cost of reducing testimony to writing, and as to this the parties were to pay for taking down the evidence of their respective witnesses. This judgment was rendered on the 22d March, 1881. July 6, 1881, Petra and Angel filed in the district court their petition for *certiorari*, which was granted. The administrator filed a plea by way of demurrer to the jurisdiction of the court, because the county probate court had no jurisdiction of the matters tried. The court sustained the plea to the jurisdiction, and dismissed the cause, October 23, 1885. Petra de Larosquetu's executor has brought the cause to this court by writ of error.

The only question in the case, as presented by the assignment of errors, is, was the ruling of the court in dismissing the cause for want of jurisdiction correct? On November 28, 1862, James G. Browne, defendant in error, was appointed by the probate court of Cameron county administrator with the will annexed of the estate of Ramon de Larosquetu, deceased. The will devised the property of deceased equally between his four children, Petra, Angel, Pedro, and Refugia, at the time minors. The administrator gave bond in the sum of \$8,000, which was duly approved and ordered to record, but it was not recorded, and was lost from the files. Appraisers were appointed to value the estate, November 28, 1862, but if any inventory was ever filed the records and files do not show it. On the 29th day of May, 1863, Browne was also appointed by the same court guardian of the persons and estates of the minor legatees. No order was made or paper filed in the succession from the 28th of November, 1862, until August 23, 1879, 16 years and 9 months, when a motion was filed in the probate court by Petra, Angel, and Pedro, then aged 25, 24, and 19 years, respectively, setting out the foregoing facts, and charging the administrator with having taken into his possession the whole of the estate, alleged to have been worth \$12,000, and that he had never accounted for any of it, except a part of a lot and house on Market square, in the town of Brownsville, and \$90 in rent on another house on Elizabeth street, in same town, and that this was done between September 1, 1878, and June 1, 1879. The relators prayed that the administrator be required to file a new bond, his bondsmen being insolvent, and having moved out of the state; also that he be required to file an inventory of the estate, an exhibit, and account. After some delay the administrator filed his account, which brought the estate in his debt \$5,977.88, charging the minors with board, schooling, and clothing,—Petra with \$2,950, Angel with \$2,600, and Pedro with \$1,150. These, with other items charged to the estate, aggregated \$7,711.88. Credits were admitted amounting to \$1,734, leaving the estate, as before stated, in debt to the administrator \$5,977.88. The account was contested, many items were disproved, and it was charged that the administrator had not accounted for all the property received.

After hearing the evidence, the probate judge restated the account so as to charge the administrator with \$2,880 cash, and to credit him with the same amount. So the debits and credits exactly balanced, leaving for distribution

between the legatees the two lots and houses. It was ordered accordingly on March 22, 1881. On July 6, 1881, Petra and Angel applied to the district court of the county for a *certiorari* to bring the cause before that court for revision. The writ was granted, but the administrator moved to dismiss the proceeding, upon the ground that the probate court had no jurisdiction. The court sustained the motion, and Petra de Larosquetu's executor (she having died) has brought the cause to this court by writ of error.

It is claimed by defendant in error that so long a time elapsed (16 years and 9 months) during which the administration was ignored by the probate court that it would be conclusively presumed to have been closed. We cannot agree to the proposition contended for by defendant in error. In support of his position he cites the cases of *Murphy v. Menard*, 14 Tex. 62; *Portis v. Cummings*, Id. 139; and *Marks v. Hill*, 46 Tex. 350. The case of *Murphy v. Menard* turned upon the statute of 1840, which limited the period of administration to one year from the day of appointment of an administrator, with power in the court to extend the time on good cause shown. The court had extended the administration for one year, and, upon the expiration of the time as extended, the administrator rendered an account of the assets in hand and the condition of the estate. Nothing more was done until seven years thereafter, when an administrator *de bonis non* was appointed. It was decided that after the lapse of such time no legal administration *de bonis non* could be had. The case of *Portis v. Cummings* rests upon the authority of *Murphy v. Menard*, and the statute of 1840 above cited. In that case the administration was granted in 1839. By order of the court the term of administration was extended to the December term, 1840. In January, 1841, the administratrix was cited to render final account, which was rendered on the following February. There was no other act done in the administration until in November, 1849, when she was cited to account upon application of one of the heirs of the estate. It was held that "*prima facie* the presumption must be that her official connection with the succession in the character of administratrix had been determined;" but it was also held that the presumption might have been rebutted by showing that the administration had not been closed, and that the administratrix was still acting in that capacity. These two cases cannot be invoked in support of the position of defendant in error, because what was said to establish the doctrine was due to a statute which required the close of an administration in one year after letters were granted, unless extended by the court.

The decision in the other case cited (*Marks v. Hill*) rests upon the want of power in the probate court to grant the order made "after a lapse of over ten years without any action in the administration." The court say in that case: "It may well be held that the administration was no longer open * * * But, even if the administration were still open, we are of opinion that the order of the court was unauthorized." The order in question was one setting aside property of the estate at its appraised value to the widow of deceased for a year's support. There was no law authorizing this disposition of the estate at the time, and for a long time after the administration was granted; and while an act was passed afterwards, and in existence at the time of the order authorizing such action, it was held that, as the law required this to be done at the first term of the court after the grant of letters, the act would not have an indefinite retroactive operation. In this view of the matter the court held the action of the court null and void. Without a statute or a well-established rule to that effect, we would be loth to hold that mere lapse of time without action by the court, in an administration, would relieve the administrator from being called to account in the probate court. Since the administration upon the estate of Ramon de Larosquetu was granted, there has been no statute in this state fixing the term of an administration. An administrator may be cited by an heir, or by the court, to render his final account and close the

estate, or he may himself file the account, and ask his discharge by the court after the estate has been fully administered. Certain formalities are required, and certain conditions must exist, as laid down in the statute, before the administrator can be discharged; and these provisions of the law have been in force since the act of 1848. He ought not to be allowed to discharge himself by his own neglect of duty. When the estate is ready to be closed, it is his duty to render an account to the probate court of his acts, the money received and disbursed, and to show the present condition of the estate. There is a distinction in holding an administration closed for some purposes, and for calling the administrator to account in the probate court. He is a trustee, charged with the management of a trust-estate under the rules of the probate law. He ought not to be allowed to plead his own laches as a bar to the jurisdiction of the court to compel him to make settlement of the trust-estate. The law has fixed the jurisdiction, and he should not be allowed to evade it by his own wrong and neglect. His laches might be pleaded by others so as to deprive the court of jurisdiction to order sales of the estate, to reopen the succession, and for some other purposes, but he should not be heard to deny the court's power, conferred by statute, to cite him to account upon such grounds. In the absence of a statute or a decision of our courts fixing some definite limit to the term of administrations, we cannot say that the administrator of Larosquetu's estate is entitled to the legal presumption that the succession was closed, and that the probate court had, merely by the lapse of time, as shown, in which no order was made, lost its power to compel him to render a final account and make settlement with the legatees.

In his final account, and in response to the citation of the court to make settlement, he acknowledged that he had some of the estate property still in his hands,—a note, \$280 in Mexican coin, one pair of ox-cart wheels; and that he had rented the real estate from 1865 to 1878. These facts deny the presumption he seeks to invoke; at least, the renting of the houses does. By this he admits he was still, up to 1878, acting as administrator of the estate. If the administration would, after such lapse of time, be presumed to have been closed, so as to deprive the court of jurisdiction, the presumption could not be indulged against the fact that he was still acting in the capacity of administrator.

We conclude the judgment should be reversed, and the cause remanded for trial.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

TRINITY & S. RY. CO. v. SCHOFIELD.

(*Supreme Court of Texas. January 23, 1889.*)

1. NEGLIGENCE—OVERFLOWING LANDS—EVIDENCE.

In an action for negligently causing an overflow of plaintiff's lands, by means of which sand was deposited thereon, evidence of the cost of removing the sand is admissible.

2. DAMAGES—MEASURE FOR TORTS.

An instruction that the measure of damages is the difference between the market value of the land before and after the damage was caused is erroneous as authorizing the jury to consider the value of the land at any time, instead of immediately, before and after the injury.

3. SAME.

A charge that if the cost of removing the sand exceed the market value of the land before the same was washed on it the measure of damages is the market value of the land at the time of the deposit is erroneous as disregarding the questions, whether the sand injured the land, or whether the value of the land was totally destroyed.

4. TRIAL—INSTRUCTIONS—FAILURE TO ASK.

Alleged omissions to charge will not be considered where no requests to charge to supply the omissions are made.

Commissioners' decision. Appeal from district court, Tyler county.

Action by J. B. Schofield against the Trinity & Sabine Railway Company for damages for the destruction of crops and injury to land occasioned by overflows which, as alleged, were caused by the negligent construction of a ditch cut by defendant to change the channel of a stream through plaintiff's farm. Plaintiff filed an amended petition, setting up additional causes of the overflows in other acts of negligence upon the part of defendant in constructing its road-bed and digging ditches to drain surface water, and alleged that his farm was overflowed three times, destroying the crops, and washing away the soil from a portion of the farm, and depositing sand and gravel upon another portion of it, rendering the portions so washed and covered with sand totally worthless. Defendant appeals.

S. T. Robb and J. P. Stevenson, for appellant. *T. J. Russell*, for appellee.

ACKER, J. The trial court permitted appellee to prove, over the objection of appellant, the cost of removing the sand that had been deposited upon a portion of the farm by the overflows, and upon the question of the measure of damages to land charged the jury that it "would be the difference between the fair market value of said land before and after said damage was caused;" and, further, that "if the facts show that the cost of removing the sand therefrom would be more than the market value of the land before the same was washed upon it, then the measure of damages would be the actual cash market value of the land so covered with sand at the time it was so covered, and if the cost of moving away the sand and restoring the land to its condition before it was so covered with sand, then the measure of damages would be the cost of so removing the sand." Under numerous assignments of error it is contended that the court erred in admitting evidence as to the cost of removing the sand, and in its charge on the measure of damages. As the judgment must be reversed, and the cause remanded, we deem it proper to here announce the rules which we think should control in determining the measure of damages in cases of this character. If the crops are shown to have been totally destroyed in consequence of the negligence or wrongful act of the defendant, the correct measure of damages would be the actual cash value of the crops as they stood upon the land at the time and place they were destroyed, with legal interest to the time of the trial. If the crops are shown to have been damaged in consequence of the negligence or wrongful act of the defendant, but not totally destroyed, then, the correct measure of damages would be the difference between the actual cash value of the crops as they stood upon the land at the time immediately before the injury and their actual cash value immediately after such injury, to the extent that the plaintiff could not have prevented the injury by reasonable diligence, with legal interest to the time of the trial. *Railway Co. v. Joachimi*, 58 Tex. 460; *Railroad Co. v. Young*, 60 Tex. 201; *Railway Co. v. Bayliss*, 62 Tex. 571; *Railway Co. v. Holliday*, 65 Tex. 521. With respect to damages to real property we believe the correct rules to be: If land is taken, or the value thereof totally destroyed, by the negligence or wrongful act of another, the owner would be entitled to recover the actual cash value of the land at the time of the taking or destruction of its value, with legal interest thereon to the time of the trial. If land is permanently injured by the negligence or wrongful act of another, but the value is not totally destroyed, the owner would be entitled to recover the difference between the actual cash value at the time immediately preceding the injury and the actual cash value immediately after the injury, with legal interest thereon to the time of the trial. If land is temporarily but not permanently injured by the negligence or wrongful act of another, the owner would be entitled to recover the amount necessary to repair the injury, and

put the land in the condition it was at the time immediately preceding the injury, with interest thereon to the time of the trial. The purpose of the law is to give to the injured party compensation, and if the real property taken, or the value of which is destroyed, or permanently injured, is so connected with other land that the value of such other land is permanently impaired as the natural and proximate result of the injury, then the injured party would be entitled to recover to the extent of the injury to such other land in addition to the value or depreciation in value of the land so destroyed or permanently injured; and if the injury is only temporary, but in consequence of it the owner is deprived of the use of the property, as of a house, he would be entitled to recover the value of such use in addition to the amount necessary to repair the injury. Field, Dam. § 784; 8 Suth. Dam. 372; *Railway Co. v. Joachim*, 58 Tex. 456; *Railway Co. v. Helsley*, 62 Tex. 596; *Railway Co. v. Seymour*, 63 Tex. 346; *Railway Co. v. Ware*, 67 Tex. 637, 4 S. W. Rep. 13. Whether the injury amounts to total or only partial destruction of value, or whether it be permanent or temporary, as well as the extent of the injury and the consequent amount of damages, are all questions for the determination of the jury under proper instructions.

Appellee alleged that his crops were totally destroyed, and his land rendered valueless, by the overflows. As to the destruction of the crops there seems to be no conflict in the evidence, but as to the extent of injury to the realty the evidence is very conflicting, varying from no injury at all to total destruction in value of five acres by being denuded of the soil, and of about three acres by having sand washed upon it. If the jury believed from the evidence that the overflows were caused by the negligence or wrongful act of appellant, and further believed that the sand deposited upon the land was an injury to it, then it devolved upon them to determine the question whether or not the value of the land upon which the sand was deposited was totally destroyed, and if not, whether the injury thereto was permanent or temporary. We think the evidence as to the cost of removing the sand was properly admitted to assist the jury in determining these questions. Under the rules hereinbefore announced it is clear that the court erred in its charge upon the measure of damages. The portion of the charge first quoted authorized the jury to consider the value of the land at any time prior to the injury and at any time subsequent thereto, when they should have been instructed to confine their consideration of value to the time immediately preceding and immediately subsequent to the injury. The first part of the other portion of the charge quoted authorized the jury to make the cost of removing the sand the measure of damages, if they believed from the evidence that such cost would be more than the market value of the land before the sand was deposited upon it, the amount of damages in that case not to exceed such market value, without regard to whether they believed from the evidence that the sand was an injury to the land or whether they believed that the value of the land was totally destroyed by the sand. The market value of the land at the time of the injury is the rule only in case of total destruction in value; and we have seen that whether there was injury, and, if so, the extent of such injury, are facts to be found by the jury. The latter part of this portion of the charge is unintelligible, and well calculated to confuse and mislead the jury. The first, fourth, and fifteenth assignments of error are too general to entitle them to consideration. The seventh, eighth, and eleventh assignments relate to alleged omissions in the charge. No special charges were requested to supply the alleged omissions, without which such complaints will not be considered. For the errors indicated we are of opinion that the judgment of the court below should be reversed and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

VAN RATCLIFF *et al.* v. CALL *et al.*

(Supreme Court of Texas. January 22, 1899.)

1. VENUE IN CIVIL CASES—ACTION TO RESTRAIN EXECUTION SALE.

Rev. St. Tex. art. 1198, subd. 15, providing that suit to enjoin the execution of a judgment shall be brought in the county in which such judgment was rendered, and article 2880, providing that writs of injunction to stay execution on a judgment shall be returnable to the court where such judgment was rendered, apply to suits going to the validity of the judgment, and not to suits to prevent the sale of property on which the judgment, however valid, is no lien.

2. HOMESTEAD—ACQUISITION—EVIDENCE.

In 1880 and 1881 one M. resided on a lot which he claimed as the property of another, in which he had an interest. He had an indeterminate purpose to occupy it as a home at some future time, if it were freed from litigation. In 1882 he lived at a mill which he was operating, his family living elsewhere in town. In December, 1882, or January, 1883, he began the erection of another mill and dwelling, stating his intention to occupy the place as a homestead, and actually doing so in May or June, 1883, followed by his wife in August. *Held*, that this property was not subject to the lien of a judgment rendered in May, 1883; M.'s intention to occupy having been *bona fide*.

Commissioners' decision. Appeal from district court, Orange county.

Suit by Dennis Call, George Call, and Marian C. Call to enjoin the sheriff of Orange county, and J. Van Ratcliff, Samuel Peveto, and Guy W. Junker, administrators of the estate of W. A. Junker, deceased, from selling two tracts of land in Orange county under an execution. The injunction was made perpetual. Defendants appeal.

Douglass, Lanier & Bullitt, for appellants. *Scott & Levi*, for appellees.

Hobby, J. A judgment was rendered in the district court of Travis county on the 11th day of May, 1883, against George W. Michael as principal, and J. Van Ratcliff, W. A. Junker, and S. Peveto sureties, in favor of the state. On the 17th day of May, 1883, an abstract of this judgment was properly recorded in Orange county, where the land which is the subject-matter of this appeal was situated. It was provided by the terms of the judgment that, in the event of the payment of and application by said sureties of any sum thereto, execution could issue in their behalf against the principal, Michael. This contingency having happened, execution was so issued and levied in September, 1887, upon the land and improvements involved in this suit, and the sale of the same thereunder was advertised. The appellees herein, Dennis, George, and Marian Call, applied to the district court of Orange county for and obtained a writ of injunction to prevent the sale of said property, upon the ground that they had purchased the land and improvements from said Michael in January, 1886, at which time it was the homestead of said Michael and family, and was and had been their homestead prior to the filing of the abstract of said judgment in Orange county in May, 1883; that they had paid a valuable consideration for said property, and bought it with view to selling the same, and that if sold under said execution its sale by them would be affected injuriously, and a cloud cast upon their title. The insolvency of appellants was also alleged. The writ of injunction was perpetuated upon a final trial.

It is assigned as error that the court erred in overruling the defendant's motion to dissolve the injunction in said cause, because (1) the district court of Orange county had no jurisdiction of said cause, because the execution which the plaintiff sought to enjoin issued from the district court of Travis county, Tex., and should have been heard by said district court of Travis county, Tex.; (2) because of want of equity in plaintiff's petition; (3) because plaintiffs had a complete remedy at law.

The statutes invoked in support of the assignment are article 1198, subd. 15, Rev. St., as follows: "When suit is brought to enjoin the execution of a

judgment," etc., "the suit shall be brought in the county in which such judgment was rendered;" and article 2880: "Writs of injunction granted to stay," etc., "execution on a judgment, shall be returnable to," etc., "the court where such judgment was rendered."

There can be no doubt that where the execution of the judgment generally is sought to be prevented, or where the writ is granted to stay—that is, to stop—the execution of a judgment, the statute is imperative, and is susceptible of but one construction; that is, that the writ should be returned or the suit brought in the county where the judgment was rendered. But the law requiring a suit to enjoin the execution of a judgment to be brought in the county of its rendition, evidently applies to suits attacking the judgment; questioning its validity, or presenting defenses properly connected with the suit in which it was rendered, and which should have been adjudicated therein. It has no application to parties who do not sue to stay or enjoin the execution previously of the judgment as contemplated by the statute, but who sue to prevent the sale of property alleged to belong to them, under a judgment, however valid and regular it may be, to which they are not parties, and for the satisfaction of which their property could in no event be subject. Any other construction of the statute would, where an execution was levied upon the property of persons not parties to the judgment, require such persons to adjudicate their rights to the same in a county not that of their domicile, and thus destroy a valuable privilege. We think there was no error in overruling the motion to dissolve the injunction on the ground that the writ was returnable to the district court of Travis county. *Winnie v. Grayson*, 3 Tex. 429.

Nor do we think there was error in overruling the motion to dissolve the injunction for the want of equity in the petition. The allegations that plaintiffs purchased the property at a time when it constituted the homestead of Michael and family, and was therefore not subject to forced sale; that it was bought for the purpose of selling the same; that its sale under the execution would affect injuriously its market value; that appellants were insolvent,—were sufficient to authorize the relief prayed for.

Appellants insist that the court erred in its conclusion of law and fact to the effect that the property in controversy was the homestead of G. W. Michael and wife at the time that the judgment in favor of defendants against G. W. Michael was rendered, as such conclusion can neither be drawn from the conclusion of facts found by the judge, nor from the statement of facts approved by him. In 1880 and 1881 Michael resided on a lot in the town of Orange, which he appears from the evidence to have claimed as the property of Miss Smith, but in which he had an interest. No assertion of a homestead right is shown to this property, other than an indeterminate purpose at some future time, provided it was relieved of litigation, to occupy it as a home. In 1882 he was engaged in operating a saw-mill known as the "Gilman Mill," in the town of Orange, at which he lived; but his wife resided elsewhere in the town, and did not occupy or live at this mill, which was destroyed by fire in November, 1882. In December, 1882, or January, 1883, he commenced the erection of the steam saw and shingle mill, and dwelling for a residence for his family, together with improvements adapted to the operation of this latter mill for the purpose of manufacturing lumber and shingles, in which business he was engaged. This property was beyond the corporate limits of the town of Orange. These improvements were in process of erection from December, 1882, or January, 1883, until May or June, 1883; at which last-mentioned date he moved to the mill, taking his homestead effects, and was followed by his wife in August, 1883. During the time these improvements were being made upon the land, Michael and family boarded in the town of Orange, beyond the limits of which the mill was situated. Michael and wife frequently expressed, while improving the property, the intention to occupy, and referred to it as their homestead. This was followed by an actual residence upon and appro-

priation of it as such, in connection with the use of the steam saw and shingle mill by Michael in the manufacture of lumber, up to the conveyance to appellees, in January, 1886. During their residence upon it, from May or June, 1883, until its sale, Michael on several occasions stated that it was exempt from forced sale because it was his homestead. There is no evidence of the intention to use or the appropriation of any other property as a homestead, which would have entitled it to protection as such. The facts in the case clearly show the existence of the intention to dedicate the property in controversy by Michael as a homestead, in December, 1882, or January, 1883, coupled with and followed by a prompt occupancy of and residence upon it by himself and family, and brings this case within the rule declaring what evidence of intention and occupancy is sufficient in law to impress upon property the homestead character, as announced in *Gardner v. Douglass*, 64 Tex. 78, and cases there cited. The judgment upon which the execution issued was rendered on May 11, 1883, against Michael as principal, and appellants as sureties. An abstract thereof was properly filed and recorded in the county of Orange on May 17, 1883. It has been decided in this state, upon a careful and thorough examination of the cases involving the question, "that a previously acquired judgment lien upon real property cannot be subsequently defeated by the voluntary act of the debtor in attempting to make it his homestead." *Gage v. Neblett*, 57 Tex. 374; *Wright v. Straub*, 64 Tex. 66. The abstract of the judgment rendered against Michael, the vendor of appellees, was recorded in the county of Orange on May 17, 1883. It appears, however, from the evidence, that active preparations were made, and the intention expressed, to occupy and use this property as a homestead, as early as December, 1882, or January, 1883, which was followed up by an actual residence upon and use of it as a homestead in connection with his business calling, that of the manufacture of lumber, in operating a steam saw and shingle mill. "Where the purchase is made for the purpose of a homestead, with a view to an early occupancy, and this is followed in reasonable time by such occupancy, this may secure the homestead, as such, from the time of its purchase." "Some time must usually intervene in the preparation of the property for actual occupancy, and the homestead character is not made to depend on the personal presence of the members of the family." *Gardner v. Douglass*, *supra*. That Michael intended as early as January, 1883, the property to be used as a place of residence for himself and wife, in connection with the pursuit of his business, is quite evident. That it was so used by them, as soon as it was in a condition to be occupied as a residence, from about June, 1883, until conveyed to appellees, in January, 1886, cannot be doubted. If any other homestead was owned by them during this time, it is not made to appear by the evidence.

We are of opinion that the evidence abundantly supports the finding of the court that at the time of the filing of the abstract of the judgment against Michael the property was his homestead; that it had been and was so used by him as such up to the sale to the appellees.

There is no error in the judgment, and it should be affirmed.

STAYTON, C. J. Report of commission of appeals examined; their opinion adopted; judgment affirmed.

POLK *et al.* v. CHAISON *et al.*

(Supreme Court of Texas. January 22, 1889.)

1. DEED—RECORD—CONSTRUCTIVE NOTICE—SUFFICIENCY OF DESCRIPTION.

A deed to plaintiffs' ancestor, from the parties' common grantor, recorded before defendants' deed was executed, described the property as "all my right, title, and interest * * * for and of one certain half league of land, * * * situated, lying, and being in the county of Jefferson," etc., "bounded as follows: By lands granted to the aforesaid [grantor] as a colonist by the government of Coahuila and Texas to the north; to the west by land granted to the Williams; to the south by lands belonging to A. Horton; and to the east by the Neches marsh,—having a front on the marsh of 1,250 varas, and running back 6,000 varas for quantity; * * * containing one-half league, more or less, within the above-described limits; said land was granted by the government of Texas and Coahuila to the colonist James W. Bullock, and by said Bullock sold to" the grantor. Defendants' deed designated the land as the north half of the Bullock league. Horton was claiming the south half, and had conveyed it by deed recorded before the date of defendants' deed. It was in fact more than 1,250 varas from the north line of the league to the north line of the south half, and more than 6,000 to the west line. There was no land on the west granted to "the Williams," but there was a league on the west granted to one Charles Williams. *Held*, that the record of plaintiffs' deed was constructive notice to defendants that the land thereby conveyed was the north half of the Bullock league, and that the intention was clearly expressed to convey the entire north half.

2. TRESPASS TO TRY TITLE—IMPROVEMENTS—EVIDENCE OF GOOD FAITH.

In ejectment, upon the issue of improvements made in good faith, it was not error to permit defendants to show that they were ignorant of plaintiff's existence, and of her claim to the land.

3. SAME—PAYMENT OF TAXES.

Nor was it error to permit defendants to show that they paid the taxes on the land, and that plaintiff did not.

Commissioners' decision. Appeal from district court, Jefferson county.

Trespass to try title, brought by Maggie Polk and her husband, L. B. Polk, against Jeff Chaison and numerous others. Verdict and judgment for defendants, and plaintiffs appeal.

O'Brien & John, for appellants. *Douglass & Lanier* and *T. J. Russell*, for appellees.

COLLARD, J. The appellant Maggie Polk, plaintiff below, and the defendants, claim title from David Brown as a common source,—plaintiff under a deed from Brown to her father, M. S. Miller, of date July 26, 1840, duly recorded in Jefferson county, where the land is situated, on the 31st day of July, 1840; and defendants under a deed of Brown to William K. English, executed July 14, 1844, and duly recorded August 21, 1849. The deed to English is for the north half of the James W. Bullock league, and recites that Brown acquired it by deed from Bullock, the original grantee, of date May 8, 1835,—the same deed offered in evidence by plaintiff. It follows, then, that defendants cannot deny that Brown was the owner of the north half of the Bullock league by virtue of the deed of May 8, 1835. The record of the deed to Miller in 1840, at the date of its registration, affected English and defendants with constructive notice of the conveyance of the land therein described. Some of the defendants insisted in the lower court, and now in this court claim, that they are innocent purchasers, because the deed to Miller does not describe the land intended to be conveyed with such certainty as to have informed them or put them upon inquiry as to what land was so conveyed. Plaintiff Maggie Polk asked the court to instruct the jury to find for her, if the evidence showed she was the heir at law of M. S. Miller, and if the evidence also showed that she was married to L. B. Polk at the commencement of and during the possession of defendants. This instruction asked is predicated on the fact that this deed to Miller was executed and properly recorded before the date of the deed to English. It assumes that there is

no issue of innocent purchasers. The court refused the charge, and submitted to the jury the issue of innocent purchasers, as to all the defendants, set up only by a part of them. The refusal of the court to give the requested charge, and the submission of the issue of innocent purchasers as to all the defendants, are both subjects of error assigned by appellant. Should the question of innocent purchasers have been submitted at all? The deed to Miller conveys "all my [Brown's] right, title, and interest unto M. S. Miller, of the county of San Augustine, for and of one certain half league of land; * * * the said half league of land being situated, lying, and being in the county of Jefferson, republic aforesaid, bounded as follows: By lands granted to the aforesaid David Brown as a colonist by the government of Coahuila and Texas to the north; to the west by land granted to the Williams; to the south by lands belonging to A. Horton; and to the east by the Neches marsh,—having a front on the marsh of 1,250 Mexican varas, and running back 6,000 varas for quantity, and being two miles south of the town of Beaumont; containing one half league, more or less, within the above-described limits. Said land was granted by the government of Texas and Coahuila to the colonist James W. Bullock, and by said Bullock sold to said David Brown." This deed identified the land conveyed as half of the league granted James W. Bullock as a colonist by the government of Coahuila and Texas, and that particular half conveyed by Bullock to Brown, which the English deed designates as the "north half," of which defendants must take notice. The deed to Miller further shows that the land conveyed is on the north half of the Bullock league by bounding it on the north by lands granted to Brown as a colonist. This would be clear from the description whether the Brown league came down to the Bullock or not. It does extend down to the Bullock north line, as shown by the evidence of Ingalls, county surveyor of the county for 30 years before the trial. The evidence shows that Bullock sold the south half of his league to A. Horton on the 5th of July, 1848, but it is also shown that Horton was claiming the south half of the league long before this, and before the deed to English, as he sold it by deed to Mathew Cartright, February 15, 1842, duly recorded June 25, 1842. The deed to Miller refers to the Horton land as bounding the survey conveyed on the south. Ingalls swears it is only 1,200 varas from the north line of the Bullock to the north line of the south half. The Miller deed calls for 1,250 varas front on the marsh. It seems, though, that Ingalls was mistaken, and that there was error in the call in the deed, as the league is not so long on the north as it is on the south; and hence the distance from the north line to the north line of the south half, if correctly run, would be even more than 1,850 varas, the distance across the league from north to south being 2,700 varas. It may also be noticed that 6,000 varas west from the Neches marsh will not reach the Charles Williams league by 2,540 varas on the north line, and considerably more on the south line of the north half of the Bullock. It is seen, then, that, if we allow distance to control, the land conveyed by the deed to Miller will not reach to the north line of the south half, nor to the west line of the league survey, and that only about 1,200 or 1,300 acres would pass by the deed. We are satisfied, however, that the intention clearly expressed in the deed was to convey the north half of the league. It conveyed all Brown's right, title, and interest in a certain half league out of the James W. Bullock league. What half? The half conveyed to Brown by Bullock, which the deed to English, under which defendants claim, is declared to be the north half. How is it bounded? On the north by the Brown league; on the south by land of A. Horton, which is shown to be the south half of the league by Horton's deed to Cartright, executed and duly recorded before the deed to English; on the east by the Neches marsh; and on the west by lands granted to the Williams. It does not appear that any land was granted to the Williams, but it does appear that the Charles Williams grant of one league lies on the west of the north half and a part of

the south half of the Bullock league,—field-notes call for the south-east corner of the Williams league. The mistake in calling for land granted to “the Williams” instead of Charles Williams is patent, and could not have misled any one. The Charles Williams was evidently meant. Taking the entire description in the deed, the reference to boundaries therein, with the light thrown upon it by the deed to English, we are in no doubt but that the land conveyed was the north half of James W. Bullock league, and that defendants are chargeable with constructive notice of all facts which so identify the land. The Miller deed was on record when English bought, and with both of these deeds before them they were bound to know what land was conveyed to Miller.

There was no conflict in the evidence as to the heirship of plaintiff Maggie Polk, nor as to her coverture during and before any occupancy of defendants, except Frederica Wendt, who sustained her plea of limitation to 100 acres, and whose title was admitted by plaintiff on the trial.

The court under the evidence should have instructed the jury to find for plaintiffs against all the defendants except Frederica Wendt. This, with a submission of the issues as to improvements made in good faith, was all the charge the case called for. Upon the issues of improvements made in good faith, there was no error in permitting defendants to show that they were ignorant of the existence of Maggie Polk, and her claim to the land; nor was there error in permitting defendants to show that they paid the taxes on the land, and that plaintiff had not. The cause ought to be reversed, and remanded for a new trial.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, and judgment reversed, and cause remanded.

GALVESTON COUNTY v. GALVESTON GAS CO.

(Supreme Court of Texas. January 25, 1889.)

1. TAXATION—VOID ASSESSMENT—NOTICE—REMEDIES.

The property of a corporation was assessed by justices of the peace as provided by statute, the assessment approved by the county commissioners' court, and the tax paid. After that assessment the county assessor made what purported to be a supplemental assessment, under directions from the comptroller, on property not assessed by the justices, but in fact the corporation owned no property which had not been assessed by them, and the assessor obtained the amount of his assessment by fixing a value on the same property, and deducting therefrom the justices' valuation. The county commissioners' court approved his assessment. Afterwards the corporation applied to that court to be relieved from the assessment, which was refused, but a reduction was made. The tax on this reduced assessment was levied on the corporation's property, and paid to the collector under protest. *Held*, that whether or not the corporation had notice that the assessor's assessment would be and was made, was immaterial, the assessment being utterly void, and there being no redress from the board of equalization, whose jurisdiction extended only to questions of valuation.

2. SAME—APPOINTMENT OF ARBITERS.

For the same reason the corporation was not required to resort to proceedings, under the statute, in the commissioners' court, by selection of arbiters to pass on the question of valuation. The question was not whether the assessor's valuation was too high, but whether the same property could be assessed twice.

3. SAME—RECOVERY OF TAXES—EVIDENCE.

A statement of the value of the corporate property, found on the tax-rolls of the city in which it was located, not made or shown to have been agreed to by the corporation, could not be received in evidence against it in a suit against the county to recover county and state taxes paid under protest.

4. SAME—LIABILITY OF COUNTY.

When a county places in the hands of the person by law authorized to collect and receive taxes process directing him to collect and receive taxes for it, a collection made by such person is received by the county.

5. SAME—ILLEGAL TAX—PAYMENT UNDER PROTEST.

One who pays an illegal tax under protest is entitled to recover from the county interest thereon from the date of payment.

6. APPEAL—SECOND APPEAL—REVIEW.

Questions decided on a former appeal will not be re-examined.

Appeal from district court, Galveston county; S. W. JONES, Special Judge. *W. M. Jerdone*, for appellant. *Mott & Ballinger*, for appellee.

STAYTON, C. J. This cause was before this court at a former term on appeal from a judgment sustaining a demurrer to the petition. 54 Tex. 287. It was then reversed and remanded, and upon a trial upon the merits the judgment now before this court was rendered in favor of appellee, who was plaintiff. The cause was tried on the original petition. The facts, in substance, are that the appellee, a corporation owning property in this city, consisting mainly of real estate improved and used for the manufacture and distribution of gas, and the usual appurtenances to such a business, on March 1, 1876, under oath rendered for assessment to the justices of the peace, whose duty it then was to assess all property for state and county taxes, all the property owned by the corporation, which was by the assessors accepted at a valuation of \$141,125. The assessment was for the year 1876, and as made was approved by the county commissioners' court on June 2, 1876, and on July 8th following the tax-roll containing this assessment was duly certified for collection. The total state and county tax on this assessment was \$1,740.55, which, on February 27, 1877, was by the gas company paid to the proper collector of taxes. At the time of the adoption of the present constitution John A. McCormick was elected assessor of taxes for Galveston county, and qualified and entered on the discharge of his duties. On April 29, 1876, he was informed by the comptroller, by circular sent to all assessors and collectors of taxes, that all rolls completed prior to April 18, 1876, and approved by the county court, would be received at the comptroller's office, and that duplicates of such rolls would be delivered to collectors. The same circular instructed assessors to make supplemental assessment rolls of property that might be discovered which had not been entered on the regular rolls made from the assessments made by justices of the peace. On May 4, 1876, the comptroller informed the assessor that all property assessed by justices of the peace prior to April 18, 1876, either with or without the consent of the owner, should be placed on the roll made out for the justices, and not upon a supplemental roll to be made from an assessment to be made by the assessor, and he was again directed to make assessment only of property not rendered. On September 16, 1876, the comptroller, by circular, instructed assessors to complete the assessment of property not assessed by the justices, and to strike from their supplemental rolls all property appearing on the rolls made from the justices' assessment. Some time after May 4, 1876, the assessor, McCormick, applied to the secretary of the gas company for a list and appraisal of the company's property for that year. The secretary informed him that the company's property had already been assessed for that year, and refused to furnish a further list, whereupon, some time in the month of June, the assessor made a further assessment against the company on what he termed "balance of capital other than real estate and other property rendered," which he valued at \$418,875. This assessment he placed on his supplemental roll, which, on September 22, 1876, was accepted and approved by the county commissioners' court, and afterwards certified for collection. Of these proceedings the gas company was not notified until after the supplemental roll had been approved and certified for collection by the commissioners' court. The company, as before said, owned no other property than that placed on the roll made for the justices' assessments, nor did it have on hand any money or own any of its stock on January 1, 1876, which was then as now the date which fixed the

liability for taxes. On July 5, 1877, the gas company petitioned the commissioners' court to relieve it from the assessment made by McCormick, as before stated, which was refused, but on recommendation of McCormick the supplemental assessment was reduced to \$265,578. The county tax on this sum amounted to \$1,947.57, and to collect this the collector of taxes levied upon and advertised for sale some of the real estate owned by the gas company, whereupon, to avoid the threatened sale, the company, under protest, paid the tax claimed for the county, as well as that claimed for the state, and \$2.03, the cost of levy and advertisement. It is not pretended that the assessor knew of or that the gas company owned any other property than that listed, appraised, and returned for taxation in March, 1876, and his assessment was made by multiplying the number of outstanding shares in the company's capital stock by the sum which a broker's printed circular, published January 1, 1876, quoted the stock at, from which, however, he deducted the sum which stood against the gas company as a tax on the roll made under the assessment made by the justices.

This action was brought by the company to recover from the county the sum paid on taxes claimed by it under the assessment made by McCormick, with interest thereon. The court below rendered a judgment in favor of the gas company for the sum paid to the county under protest, but refused to allow interest. The county appeals from the judgment, and the gas company has filed a cross-assignment of error, complaining of the action of the court in refusing to allow interest. The appellant urges that the court erred in overruling a demurrer to the petition, but we do not find from the record that the court was called upon to pass upon a demurrer after the former decision made by this court. Many propositions are made in appellant's brief, based on an assignment of error above referred to, involving questions decided on the former appeal. If the court below, after the judgment was reversed and the cause remanded, had again passed on a demurrer to the original petition, the former decision of this court would be conclusive of the following questions: (1) That the threatened sale would have cast a cloud on the gas company's title to the property levied upon; (2) that the payment made under protest was so far compulsory as to entitle the gas company to recover it, if illegally demanded and received; (3) that the application to the commissioners' court for relief from the tax claimed under the assessment made by McCormick could not bar the right of appellee to recover the sum illegally claimed and paid under protest. These questions are again presented, under the first assignment of error, but there is nothing in the record to break the full force of the decision made on the former appeal, and it must be held conclusive on the same questions again presented.

The second assignment of error urges that the court erred in finding that appellee did not have notice that the assessment made by McCormick would be and was made. If the evidence would have justified or required a different finding, it is unimportant, unless the assessment made by McCormick was valid and binding except as to valuation, which ought to have been corrected through the board of equalization if appellee had notice in fact or was charged by law with notice of the assessment. As held on the former appeal, the board of equalization had no jurisdiction to grant relief to appellee. If its property had been legally assessed by McCormick, but at a value too high, that board would have had power to reduce the valuation or to declare it not too high, and its decision would have been final. McCormick was authorized to make a supplemental assessment only when the tax-payer had failed to render for assessment all property subject to taxation, and so by such supplemental assessment to reach the property not already assessed.

The evidence and findings show that the gas company had rendered for assessment all property owned by it on January 1, 1876, and that this had been received by the justices prior to the time McCormick entered upon the dis-

charge of his duties as assessor. He attempted to revalue the property already assessed under claim that the company owned property which he classed as "balance of capital" unassessed. That was in fact but the difference between the value of the property actually owned and assessed by the company, at a valuation accepted by the company, satisfactory to his predecessors, and approved by the commissioners' court, and the value he placed on the same property. The vice in his assessment termed "supplemental" was that there was no property owned by appellee on which such an assessment could again, for the same year, be made, and notice or want of notice of an attempt to assess something non-existent or not owned by the company against which the assessment was attempted was of no importance whatever.

The third assignment is that "the court erred in holding that the neglect and failure of the plaintiff to take advantage of the means and measures provided by law for the correction of errors in assessments, if any had been in fact made, to-wit, by the selection of arbiters, did not inhibit and estop it from maintaining this suit, and in this collateral way assailing the judgment of the commissioners' court, rendered on September 22, 1876, and thus turning the district court into a tribunal for the correction of errors in tax assessments." If the gas company had been dissatisfied with the valuation placed on its property by the justices, it would have been its duty, under the statute, to submit the question of valuation to arbiters; for the assessment made by them was on property owned by the company and subject to taxation. Pusch. Dig. arts. 7560, 7562; Gen. Laws 1874, p. 213. There was no controversy, however, as to that valuation, and appellee was under no obligation to seek relief through the commissioners' court from an attempt to impose taxes upon it based on property it did not own. That court had power to fix valuations, but this could be done only when there was property to be valued; and no action by it, whether in approving assessments, or refusing to relieve from assessments assumed to have been made against any one on property not owned by such person, and in fact having no existence, could be binding on the person thus sought to be charged.

Appellant proposed to offer in evidence the tax-rolls of the city of Galveston, with the valuation of appellee's property thereon, for the purpose of showing that it was of greater value than was placed on it by the assessments made by the justices. This evidence was excluded, and in allowing the bill of exception the court said: "The assessment roll of the city of Galveston showed no property belonging to the plaintiff subject to taxation under the state law other or different from that rendered by plaintiff to justices of the peace for taxation for the same year. By the charter and ordinances of the city of Galveston then in force all persons and corporations rendering property to the assessor for taxation were required to render such property as they owned on March 1st of the current year. No other evidence than said assessment roll had been offered to show that the plaintiff had actually rendered its property to the assessor for taxation for 1876, or that the values placed upon the property appearing upon the city's roll had either been fixed or agreed to by plaintiff, and by the ordinances of the city that was made the duty of the assessor, and not of the tax-payer; and the evidence thus offered was objected to on the ground that it was irrelevant and inadmissible for the purposes for which it was offered." If the question whether the valuation made in the rendition to the justices of the peace was fair had been an important inquiry in this case, this evidence would have been properly excluded. A statement as to value, found on the rolls of the city, not made or shown to have been agreed to by appellee, could not be received against it any more than can the declarations of third persons as to matters generally be received.

It is claimed that the court erred in rendering judgment against appellant in the absence of proof that the money was actually paid into the county treasury, or in some way used or appropriated by the county. This action is

for money had and received, and there can be no doubt that, in order to maintain it, it must appear that the tax was illegal and void, and not merely irregular; that it was not voluntarily paid; and that it went into the hands of such person as was the representative of the county to receive it for its use. Many cases have arisen in which the tax collector for a town was, under the law, the collector of county or state taxes, and in such cases it has been constantly held that an illegal collection of taxes by him for a county or the state would not fix liability on the town. This is simply because, in such cases, as to money so collected, the collector is not the agent of the town. We are of opinion, however, when a county or other municipal corporation, acting through the tribunal or board lawfully charged with the conduct of its fiscal affairs, places in the hands of the person by law authorized to collect and receive taxes for its such process as on its face empowers him to make collections for its own use, that a collection so made by such person must be deemed to have been received by the corporation whose agent to make the collection he was. The collector who received the sum now sought to be recovered was empowered by the law to collect taxes for the county. The commissioners' court placed in his hands process which commanded him to collect from appellee the sum paid by it, and he did so. His holding of the money when collected was as agent for the county as fully as would be the holding of the county treasurer. Neither of them, receiving money in their official capacities as agents for the county, could controvert its right on the ground that the claim for taxes on which it was received was illegal. Admitting that it was necessary for appellee to show that appellant received the money, we think this was sufficiently shown by proof that it was paid to the collector authorized by law, and by the process he bore from the county commissioners' court to collect taxes due to the county, and to collect the particular tax claimed from the appellee. Such proof makes at least a *prima facie* case entitling appellee to recover, and it was not incumbent on it to go further.

Appellee claims that judgment should be rendered in its favor for interest on the sum paid, the court below having refused to allow interest. Interest in this character of case is allowed as damages, and we see no reason why a county should not be subjected to the same measure of damages as would an individual who had received and detained the money of another. It has been held when taxes were illegally demanded and paid under protest that interest should be allowed from time of payment. *Glass Co. v. City of Boston*, 4 Metc. 190; *Shaw v. Inhabitants*, 7 Cush. 445; *Atwell v. Zeluff*, 26 Mich. 118. This seems to us the reasonable rule, and the judgment of the court below will be reversed, and judgment here rendered for appellee for \$1,949.60, with interest thereon at the rate of 8 per cent. per annum from July 13, 1877, together with all costs incurred in the court below and in this court. It is so ordered.

GALVESTON COUNTY v. GALVESTON WHARF CO.

(Supreme Court of Texas. January 29, 1889.)

TAXATION—TAXABLE PROPERTY—WHARF PRIVILEGES.

Under Gen. Laws, Tex. 1874, p. 314, requiring that "wharf privileges," as well as wharves, shall be taxed, such privileges are to be taxed as a thing separate and distinct from the real and personal property with which the business of a wharfinger is conducted.

Appeal from district court, Galveston county; S. W. JONES, Special Judge. W. M. Jerdons, for appellant. Mott & Ballinger, for appellee.

STAYTON, C. J. This case involves all the questions involved in the case of *Galveston Co. v. Gas Co.*, ante, 583, (this term decided,) and there are no facts

in this case which, on the questions in that case decided, would call for different determination. For the disposition of this case, therefore, we accept what has been said in the other case on identical questions. This case, however, differs from the other case in one particular. In the rendition of property made and received by the justices of the peace for the wharf company no assessment was made on "wharf privileges," though all its other property was assessed. After McCormick entered upon the discharge of his duties as assessor he placed on his supplemental roll an assessment as follows:

"Balance of capital other than real estate and other property,	\$728,420 00
Wharf privileges,	78,900 00"

The court below held the assessment under the first item invalid, but held that the assessment on "wharf privileges" was valid, and to the amount of the taxes paid on that item refused to render a judgment in favor of appellee. It is contended by appellee that, having rendered its wharves and property appurtenant thereto to the justices, this included its "wharf privileges," and that these could not be assessed as something other and distinct from its tangible property used for wharf purposes. The act specifying particular property, which should be taxed, enumerated things which would include all the tangible property, real and personal, owned by appellee, and in addition to this expressly required that "wharf privileges" as well as wharves should be taxed. Gen. Laws 1874, p. 214. This makes clear the legislative intention that "wharf privileges" should be taxed as something separate and distinct from the property, real and personal, with which the business of a wharfinger might be conducted. Whether the tax imposed by law on "wharf privileges" is, in this case, to be deemed a tax on appellee's corporate franchise, or a tax in the nature of a tax on the occupation or business pursued by it, is an immaterial question; for either would be legal, and no question can now be raised, or is sought to be raised, whether the valuation on appellee's "wharf privileges" fixed by the assessor was too high; that, not having been assessed by the justices, it became the duty of the assessor to assess it when he came into office, under the present constitution, and if his valuation was too high the board of equalization would have had power to reduce it. If the action of that board of July 10, 1877, can be treated as its action, appellee had the right to invoke relief from overvaluation. It does not appear, therefore, that the valuation placed by the assessor on "wharf privileges" was reduced, and if its action then had was not such as appellee could then invoke for relief from overvaluation, then no such relief was sought in any method prescribed by law, and the valuation of the assessor would stand.

We find no error in the judgment of the court below except in that it refused to award interest to appellee; but for this its judgment will be reversed, and judgment here rendered for appellee for \$3,683.07, with interest thereon at the rate of 8 per cent. per annum from August 6, 1877, together with all costs incurred in the court below and in this court. It is so ordered.

HOFF v. STATE.

*(Supreme Court of Texas. December 14, 1888.)***1. WILLS—PROBATE—EVIDENCE OF SIGNING.**

On the probate of a will the issue was whether it was signed by two witnesses in testator's presence. One witness testified that he wrote the will, saw testator sign it, and signed it himself at testator's request, and in his presence, and informed him that another witness was necessary. On re-examination he stated that, when he first saw the will after testator's death, the name of the second witness was not thereon, but was placed there while the will was out of his possession. This was contradicted by the person who received the will from him. The first attesting witness was shown to have poor memory. The second was out of the jurisdiction of the court. Another person testified that he saw the second subscribing witness sign a paper similar in appearance to the one in question, which testator said was his will, in the presence and at the request of the latter. *Held*, that it was error to refuse probate.

2. SAME—RIGHT OF STATE TO CONTEST.

While the state cannot contest the probate of a will on the ground of being entitled to the property by escheat, when it is allowed to do so without objection it is immaterial, as, it being the duty of the court to examine into the execution of the will with care, whether contested or not, it is unimportant that the facts are elicited by a person not entitled to contest.

Appeal from district court, Dallas county; GEORGE N. ALDRIDGE, Judge.

F. E. Hope presented a paper purporting to be the will of Martin Nieman, deceased, to the county court for probate, which being refused, he appealed to the district court. From an order again refusing probate proponent appeals.

W. T. Strange, Leake & Henry, and L. F. Smith, for appellant.

STAYTON, C. J. Appellants made application to the county court for the probate of a paper offered as the last will of Martin Nieman. This was resisted by the county attorney in behalf of the state on four grounds, which were (1) that Nieman was not of sound mind when the will was made; (2) that the pretended will was made under undue influence; (3) that, by reason of an injury on the head received by Nieman, his mind was affected before and at the time of making the will; (4) that the will was not wholly written by Nieman, or attested by two credible persons above the age of 14 years, subscribing their names in the presence of the testator. There was a hearing in the county court, and probate refused. From that an appeal was prosecuted to the district court, where, upon hearing, probate was again refused, on the ground that the evidence was insufficient to authorize the probate. The evidence was not such as to have justified the holding that Nieman had not sufficient mental capacity to execute a will at the time the will was executed, nor was it such as to justify a holding that it was executed through undue influence. The court below must have held that the paper was not shown to have been executed with the formalities required by the statute. The will bore date October 15, 1886, and Martin Nieman died on the 19th November following.

The testimony offered by appellants is correctly stated in condensed form in brief of their counsel as follows: "Appellants proved by R. E. Bumpass that he was an attorney; that on October 15, 1886, he wrote the will in question at the request of deceased; that deceased was of sound mind at the time; that he was over twenty-one years old, and capable of making a will; that the deceased read the will over, and said that it was as he wanted it; that deceased then signed the will, and requested witness to sign it as an attesting witness, which was done in the presence of the testator; that witness was then over fourteen years of age; that witness informed Nieman how many witnesses were required to make a will, and that they must sign in his presence;

that witness then left the will with Nieman; that Nieman died in Dallas county about November 19, 1886; that the will offered for probate is the one witness wrote for and saw Nieman read over and sign, and that he requested witness to sign as an attesting witness; that the next time witness saw said will was a short time after Nieman's death, in November, 1886, when, along with other persons, said will was found in a box where Nieman kept his private papers; that the box and will were found in a bureau drawer in the room occupied by Nieman at the time of his death, and that it then had on it the names of witness and Henry Schuhl as the attesting witnesses; that witness knows the handwriting of Schuhl, and his signature to the will is genuine; that Schuhl in October and November, 1886, was a justice of the peace in the city of Dallas, and was over fourteen years of age, and was a competent witness; that said Schuhl was absent from Dallas county and the state of Texas at the date of trial, and his place of residence unknown; that said Nieman executed said will without any persuasion or influence from any one; that said will was never revoked, so far as witness knows or believes." "Frederick Tobion testified that he knew deceased in his life-time; that he was also acquainted with Henry Schuhl; that both Schuhl and deceased resided in Dallas county in October, 1886; that during the latter part of said month witness was present and saw Schuhl sign the will of deceased as an attesting witness; that he signed it in the presence of deceased, and at his request." Besides this, there was much and uncontradicted evidence showing that Nieman was of sound mind, and that the signatures of Bumpass and Schuhl were genuine, and the only controverted fact seems to have been whether Schuhl signed the paper as an attesting witness at the request and in the presence of Nieman.

The evidence of Bumpass given before the county court was, as far as it went, substantially as above stated, but was not so minute as to other facts than the signature of the paper by Nieman and by himself as a subscribing witness.

After appellants had introduced such evidence as would have required the probate of the paper, the county attorney introduced the subscribing witness Bumpass, who, while reasserting everything to which he had before testified, stated as follows: "I first found out that Schuhl's name was on the will after I was appointed administrator. I don't know that Schuhl signed the will before Nieman's death. The name of Schuhl was not there at date of Nieman's death. It was a week or two after Nieman's death that I first saw the will,—first saw it in the possession of Hopf, one of legatees, in my office. Schuhl's name was on it then. My reason for saying that Schuhl's name was not signed at date of Nieman's death is that he was not present when I signed it. * * * Schuhl's name was signed after Nieman's death. Schuhl's name was not there when I first saw it after Nieman's death. It was there when it came into my possession. I first saw the will after Nieman's death in his box, in bureau, among his other papers. This was the same or next day after his death. I did not look at the will there then. It was then turned over to Justice Braswell. I next saw the will when I was appointed administrator. Saw it at Braswell's office. It was in Braswell's possession. I did not see then who had signed as witness, or look at the will. I carried the will to my office. Looked at it at my office. Henry Schuhl's name was not to it then. This was on same day I got the will from Braswell, and no one was present when I looked at the will in my office. I put it in the bureau from which I first got it, and put the box on the secretary in my office. Next saw will next day in my office. Schuhl's name was to it then. Hopf came to my office, and asked me about the will, and I read it to him. Schuhl's name was to it then. This was next day after I got it from Braswell. The will was out of my possession after it came to my office. I sent it to Judge Burke by Hopf next day after I got it from Braswell. It came back to my office evening of same day. Hopf brought it back. * * * I know that Schuhl's name was put to the will

the day it was sent to Judge Burke. I am administrator of the estate of Nieman now."

Judge Burke testified that after he was employed to assist in probating the will he sent Mr. Force, who was employed in his office, to Bumpass for the will, and that he soon returned with the will and other papers, and that the will then bore the genuine signature of Henry Schuhl as an attesting witness.

The witness Tobion was also examined by the county attorney, and he stated that he "knew Martin Nieman and Henry Schuhl. Nieman came up to Schuhl's office one day with a big paper, and Schuhl signed it for him. Nieman said it was a will. I do not know whether it was or not. He told Schuhl he wanted him to sign it. Schuhl signed it. Nieman took it with him. 'This was in latter part of October.'" The witness further stated that the paper presented to and signed by Schuhl resembled the paper offered in court for probate, but that he could not swear that the paper signed by Schuhl was the will of Nieman. He stated, further, that he did not hear distinctly what Nieman said to Schuhl about the instrument the latter signed, and that he did not hear any remark in Schuhl's office that indicated what the paper was, but he in no way qualified his statement that Nieman said that the paper the witness saw Schuhl sign was his will.

There is no controversy as to the genuineness of the signatures of Nieman, Bumpass, and Schuhl, found on the paper offered for probate, nor is there any evidence tending to show that the paper does not fully express the wish of Nieman as to the disposition of his estate. That the paper was signed by Nieman in the presence of Bumpass, and that the latter at request of former, and in his presence, signed it as an attesting witness, under the evidence, must be taken as established facts. That Nieman was advised another attesting witness was necessary must be conceded, as it must be that Schuhl did in the presence of Nieman sign a paper declared by Nieman to be his will, which resembled the paper offered for probate. The paper was found among the other private papers of Nieman soon after his death, and according to the testimony of Bumpass, first given, it then had the genuine signature of Schuhl to it as an attesting witness. Schuhl was shown to be beyond the reach of the process of the court, with reasonable certainty, and his exact whereabouts unknown. Under such a state of facts, in the absence of facts sufficient to preclude it, it ought to be presumed that Schuhl's name was placed on the paper as an attesting witness in the presence of Nieman, and at his request. 1 Greenl. Ev. § 38a; 2 Whart. Ev. § 889. If the witness Tobion be entitled to credence, it is difficult to resist the belief that Schuhl did sign the paper offered for probate, as an attesting witness, at the request of and in the presence of Nieman. Having stated all the testimony relied upon to defeat the probate of the paper, we have no disposition to comment on the contradictory and confused statements of the witness, nor upon his statement of facts which might make it to his interest to defeat the probate. His memory is shown to be bad, and we feel authorized to believe that the many contradictory statements made on the trial, and shown by the testimony of others to have been made out of court, ought to be attributed to that fact.

The statutes of this state provide that a will produced in court may be proved "by the written affidavit of one of the subscribing witnesses thereto, taken in open court, and subscribed by such witness." "If all the witnesses are non-residents of the county, or those resident in the county are unable to attend court, it may be proved by the testimony of any one or more of them taken by deposition." Rev. St. art. 1847. The statute further provides the mode of proof when all the subscribing witnesses are dead, or when the will was wholly written by the testator; but none of the statutory provisions on the subject forbid the introduction of other than the statutory proof, and cases may arise in which it would be the duty of a court to probate a will in opposi-

tion to the testimony of the subscribing witnesses. If from defect of memory, or from corrupt purpose, subscribing witnesses should be unable or unwilling to testify to the facts bearing on the due execution of a will, this ought not to be permitted to defeat the will, if other evidence, admissible under the ordinary rules of law to establish facts, be introduced sufficient to satisfy the court "that the testator executed the will with the formalities and solemnities and under the circumstances required by law to make a valid will." Cases have arisen in which wills were admitted to probate when the positive testimony of the subscribing witnesses would have defeated this. *In re Will of Cottrell*, 95 N. Y. 329; *Rugg v. Rugg*, 83 N. Y. 594; *Jauncey v. Thorne*, 2 Barb. Ch. 59; *Lowe v. Jolliffe*, 1 W. Bl. 365; *Thornton's Ex'rs v. Thornton's Heirs*, 6 Amer. Law Reg. 341; *Trustees v. Calhoun*, 25 N. Y. 425; *Orser v. Orser*, 24 N. Y. 52; 1 Jarm. Wills, 220; 3 Redf. Wills, 41. Several English cases are referred to in *Tarrant v. Ware*, 25 N. Y. 425. In some cases wills have been probated on proof other than that of attesting witnesses, when such witness had no recollection of having attested the will. *Jauncey v. Thorne*, 2 Barb. Ch. 59, and cases referred to; *Peck v. Cary*, 27 N. Y. 10; *In re Will of Kellum*, 52 N. Y. 519; *Brown v. Clark*, 77 N. Y. 369; *Clarke v. Dunnivant*, 10 Leigh, 13.

We have not the benefit of the conclusions of the court below from which to ascertain on what particular ground probate was refused, except from the general statement of the judgment that the evidence was insufficient. It is suggested in the brief of counsel that the court found the witnesses to the will not to be, within the meaning of the statute, "credible witnesses." There is nothing in the record to show that the court so found, nor that the subscribing witnesses were not competent witnesses at the time they signed or since. Their competency to become witnesses to the will must, of course, depend upon their condition at the time they became witnesses. If they signed as subscribing witnesses under such circumstances as the statute requires to give validity to the will, and were competent, credible witnesses, the subsequent incompetency of one or both of them would not affect the validity of the will, and it might be proved for probate by any other admissible and sufficient evidence. So far as appears from the record of the proceedings had in the county court, no effort was made to show that Schuhl did not sign as an attesting witness in the presence of and at the request of Nieman, and, from the form of the issue presented, those seeking probate most likely understood that the competency of the attesting witnesses or the genuineness of their signatures would be questioned, and did not expect that an effort would be made to show that Schuhl signed the paper after the death of Nieman. Upon the evidence offered we are of opinion the paper should have been admitted to probate, but it seems to us the facts bearing on the question of due execution of the will have not been so far developed as they may be; and as it is desirable, suspicion being thrown on the paper by one of the subscribing witnesses, to have all the evidence accessible tending to show whether the paper was executed as wills are required to be, the judgment will be reversed, and the cause remanded, that parties may have full opportunity to do this. No reasons are shown which entitle the state to contest the probate, and an escheat cannot be declared in a proceeding to probate a will. It does not appear, however, that any objection was made to the contest, nor to the introduction of evidence; and as it would have been the duty of the court, if it thought necessary, to draw out all the facts bearing upon the execution of the paper offered for probate, known to any witness brought before it, it is unimportant that this was done by a person not entitled to make the contest. It was proper that the court should consider all legitimate evidence brought before it.

It is ordered that the judgment be reversed, and the cause remanded.

CURLEY v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. February 4, 1899.)

NEGLIGENCE—INJURY TO TRESPASSER—CONTRIBUTORY NEGLIGENCE.

In an action against a railroad company for personal injuries, it appeared that defendant's servants were making up a train of empty cars. In doing this they first threw in on one of the tracks seven of these cars, and left them standing, with their doors open. Plaintiff, a lad 10 years old, with several other boys, got into one of them, and, while there, several other cars were coupled on to the standing cars, and the train thus made up started off. The boys were pushing one another around in the car, and plaintiff was pushed off by one of the boys, and fell under the wheels of the moving train. *Held*, that a demurrer to this evidence should have been sustained.

Appeal from St. Louis circuit court; GEORGE W. LUBKE, Judge.

Action by James Curley, by next friend, against the Missouri Pacific Railway Company, to recover damages for personal injuries resulting from the alleged negligence of defendant's servants. There was a verdict and judgment for plaintiff, and defendant appeals.

Bennett Pike, for appellant. *G. M. Stewart*, for respondent.

BRACE, J. In this action, the plaintiff, who is a minor, sues by his next friend for damages for personal injuries sustained by him in being shoved out of one of defendant's freight cars while in motion on the levee, near Poplar street, in the city of St. Louis. In the court below he obtained a judgment for \$3,000, from which the defendant appeals.

On the trial, the defendant, at the close of plaintiff's evidence, demurred thereto. Its demurrer being overruled, the defendant then offered evidence, and at the close of the whole evidence asked the court to instruct the jury that, on the evidence and the pleadings in the case, the plaintiff could not recover. The court refused this instruction, and submitted the case to the jury. The questions arising on the record can be determined on this ruling.

At the time of the injury the defendant had tracks laid on the levee fronting the Mississippi river in the city of St. Louis. On the afternoon of the day of the accident its servants were engaged in making up a train of empty grain cars on these tracks, to be pulled out towards the Union depot. In doing this they first threw in on one of these tracks seven of these cars, and left them standing; some of them with their doors open. They then pushed four more back into the elevator, and afterwards ran around with them, and coupled on to the seven standing cars; and the train of eleven cars thus made up started off on the trip in which the plaintiff was injured. About 20 minutes intervened between the time when the seven cars were left standing on the track and the time when the other four were coupled to them. The movements of the plaintiff, who at the time of his injury was about 10 years of age, are thus given in his testimony in chief before the trial court:

"On the morning of the accident, seven years ago, I went with some boys down to the river to see a boat-race. I got a drink of ice water on the ferry-boat there. Then went up on the river bank, where we stayed for five or ten minutes. Then we saw some boys in a car, and we got into the cars, and took a seat. The train came bumping back, and we were frightened. Don't know how many boys there were on the cars. Martin Stanley and Gus Proehl were the boys with me. We were sitting down in the car when it started up. As soon as the train started we got up, and the boys were so frightened that they began shoving one another around in the car, and, just as the car was about to turn, some one of the boys gave me a shove, and my coat caught on a nail, and I fell, and went right under the wheels. The car cut off both of my legs. Didn't see any engine when I got on the car. Didn't hear any whistle or ringing of the bell when the engine coupled on to the cars. Didn't

know that there was an engine attached to the cars until I felt the bumping. I got on the car at Chouteau avenue, and was thrown off at Poplar street, as the train was going west on Poplar, right where the track bends on Poplar street. The engine was already on Poplar street. I was pushed off of the car by some one of the boys. Don't know which one pushed me. The boys were all pushing one another around the car when it started. I was facing towards the river. I had my back to them, when some one gave a shove, and I went head first. My coat could not hold me, and turned me around. The boys were pushing one another because they were anxious to get off the car. Didn't know any of the boys except the two I spoke of."

Proehl and Stanley, the companions of the plaintiff, who testified on the trial, give substantially the same account of the accident, and both say they did not see the engine or hear the bell rung or whistle sounded.

Seven years intervened between the injury and the trial in the circuit court. In the interval the conductor and engineer died. The other two of defendant's servants who were engaged in the management of defendant's train testified. Swift, the switchman or helper, testified that he got on the rear car as soon as he coupled all the cars to the engine, and gave the signal to go ahead. That he didn't see anybody on or around the cars when he gave the signal to start. Couldn't say whether the bell was ringing or not, as the engine was blowing off steam at the time. Blinn, the fireman, testified that the bell was ringing. That he was ringing it. Didn't see anybody on the cars. Looked to see, and didn't know there was anybody in the cars.

The *gravamen* of the charge in the petition is that defendant, knowing that plaintiff was in one of its empty cars in the train, or when, by the exercise of ordinary care, it might have known that he was in one of them, without warning, coupled its motive power to and commenced moving its train, by reason whereof the plaintiff was injured. It is not pretended that there is any evidence in the case tending to prove that the defendant's servants actually knew that the plaintiff was in one of the cars; but the argument is that if they had been exercising that care and watchfulness demanded of them at the time and place, by the nature of the business in which they were engaged, they would have discovered him in the car. The disposition that the defendant's servants were making of the cars in the train would not lead them to suspect that they were to have him or any other person for a passenger on the train, and in fact he was not there for that or any other purpose legitimately connected with the operations of the train. The fact that some or all of the cars were left standing for a few minutes on the levee, with their doors open, while others were pushed into the elevator to be unloaded, was no act of negligence. No municipal regulation required them to be closed, and, standing there, they were not *per se* dangerous; they were in themselves perfectly harmless. And, however attractive a man's property may be, he is not required to guard it to keep off trespassers, unless to trespass is to meet with immediate injury from the dangerous character of the property, and from its attractiveness it may become a bait to the unwary, or for those of such tender years as not to be able to comprehend its dangerous character. The fact that this open car on the levee was an attractive place for a boy of 10 years, who wanted to see an anticipated boat-race on the river, added nothing to the duty that the defendant owed him. The servants of the defendant were not his guardian to see that he did not go into places where he might be injured. They were engaged in operating dangerous machinery in a public street, in which they had a right to move, as had every other citizen. The danger to life, limb, and property, against which duty called upon them to continually guard, arises from the movements of defendant's cars upon its track. That duty required that they should be at their posts, and on the watch that the movement of the train might not hazard the lives or property of those who had the right to cross, and doubtless were continually crossing and recrossing,

its track. Duty to their employer and to the public gave them no time for observing a boat-race, or speculating upon contingencies to be expected from it, or the circumstances attendant upon it, except as they may have thrust themselves upon their attention in their endeavor to prevent injury to persons whom it might assemble in a place of danger directly under their observation in the attentive discharge of their duties in the movement of their employer's train. When they proposed to start, it was their duty to observe the train and the track; to give signal to all when persons and property were likely to be endangered by the movement of the train on the track of their intention, that those who were in might get out, and that those who were out might not go in, the way of danger from the moving train. For a trespasser on the inside of one of the cars in the train, in a place of present safety, duty did not require them to have a thought or give a signal. Their duties to others required all their thought and all their watchfulness. To him they owed no duty other than that they owed to every human being, and that was, if they discovered him in a place of danger, to use all the means within their power to prevent injuring him; and such discovery cannot be imputed to them unless it would have been impossible for them not to have made it, had they been at their posts, and on the watch for persons at a place of danger from such movement, where the presence of some person might reasonably have been expected. *Williams v. Railroad Co.*, 9 S. W. Rep. 578, (decided at this term); *Loeffler v. Railroad Co.*, Id. 580; *Guenther v. Railroad Co.*, 95 Mo. 286, 8 S. W. Rep. 371; *Scottie v. Railroad Co.*, 81 Mo. 485; *Kelley v. Railroad Co.*, 75 Mo. 138; *Frick v. Railroad Co.*, Id. 595; *Isabel v. Railroad Co.*, 60 Mo. 480. The plaintiff was in no such place. He was not in a place where his presence ought to have been anticipated. He was not in a place exposed to danger from the movement of the train. He was not in a place where he would necessarily come under the observation of defendant's servants in the careful discharge of their duties in and about the train, or even in a place where he would be likely to incur danger from its movement. That he should be pushed from a moving train by an agency independent of their action, or the movements of the train, was a sequence not to be expected in the usual and ordinary course of things from the presence of a trespassing boy, 10 years of age, safely on the inside of a box car.

We fail to discover in the facts of this case any negligence on the part of the defendant's servants contributing to, much less causing, plaintiff's injury. It was the bitter fruit of his own wrong-doing. The demurrer to the evidence ought to have been sustained. For the error of the court in refusing to sustain it, the judgment is reversed.

All concur.

SANDERS et al. v. ST. LOUIS & N. O. ANCHOR LINE.

(Supreme Court of Missouri. February 4, 1889.)

STATE AND STATE OFFICERS—BOUNDARIES—CONCURRENT JURISDICTION.

The Missouri statute, (Rev. St. c. 25,) giving damages for injuries resulting in death, controls a case between citizens of Missouri arising from an accident on the Mississippi river, near the Illinois shore, east of the main channel; the act of congress of 1820, authorizing the admission of Missouri, and defining its eastern boundary as the middle of the main channel of the Mississippi river, containing the proviso that "said state shall have concurrent jurisdiction on the river Mississippi * * * so far as the said river shall form a common boundary to the said state and any other state or states * * * bounded by the same, such rivers to be common to both."¹

Error to St. Louis circuit court.

¹For a full discussion of the jurisdiction over the Mississippi river between Illinois and Missouri, see *Buttenueth v. Bridge Co.*, (Ill.) 17 N. E. Rep. 489. Digitized by Google

Suit by Fannie Sanders, with whom is joined her husband, William Sanders, for damages for the drowning of her minor child caused by the alleged negligence of the defendant. There was judgment for defendant, and plaintiff sued out writ of error.

James P. Dameron and Dyer, Lee & Ellis, for plaintiff in error. *GIVEN Campbell*, for defendant in error.

BARCLAY, J. The petition in this action alleges that the minor son of one of plaintiffs was drowned while in defendant's employ as a deck-hand on one of its steamboats on the Mississippi river between the states of Illinois and Missouri, east of the main channel, while the boat was at the Illinois shore; that plaintiffs then were, and now are, citizens of this state, and defendant is a Missouri corporation, with its chief office in St. Louis; that the boat was engaged in navigating the river as a carrier of freight and passengers; and that the death complained of was caused by certain negligence on the part of defendant.

It is conceded that the petition is otherwise sufficient if the place of injury is governed by Missouri laws. The circuit court sustained a demurrer to the petition. Plaintiffs have brought the case here for review by writ of error.

The decisive question presented is whether our statute giving damages for injuries resulting in death (Rev. St. c. 25) controls a case between citizens of this state arising from facts occurring on the Mississippi near the Illinois shore, east of the main channel. The act of congress of April 18, 1818, for the admission of Illinois into the Union, defined its western boundary as "the middle of the Mississippi river," and provided that the state should have concurrent jurisdiction thereon with any state or states to be formed west thereof so far as the river formed the common boundary. 3 St. at Large, 428. Afterwards the same intention was expressed with greater clearness in the act of 1820, authorizing the admission of Missouri. It defined the eastern boundary of the state as "down and following the course of the Mississippi river, in the middle of the main channel thereof," provided that "said state shall have concurrent jurisdiction on the river Mississippi, and every other river bordering on said state, so far as the said rivers shall form a common boundary to the said state, and any other state or states now or hereafter to be formed and bounded by the same, such rivers to be common to both; and that the river Mississippi and the navigable rivers and waters leading to the same shall be common highways and forever free," etc. 3 St. at Large, 545. Missouri accepted the boundary thus defined, and adopted the proviso regarding concurrent jurisdiction on the river, as part of the first constitution, (Const. 1820, art. 10, § 2.) It has remained a part of our fundamental law to this day, (Const. 1865, art. 11, § 2; Const. 1875, art. 1, § 1.)

The lawful extent of jurisdiction of different countries over the high seas, navigable waters, and especially over interstate rivers, was a subject of serious differences among publicists and of historic conflict of authority throughout the civilized world before the enactment of these acts of congress relating to the Mississippi. The latter were intended, in part, to set at rest some of the debatable questions arising in relation to that subject, so far as concerned the new states mentioned. Congress did not see fit to assume the exclusive regulation of, and jurisdiction over, public waters; yet the peace and good order of the people of the states bordering thereon demanded the extension of local laws and of authority to enforce them over such waters. So Illinois and Missouri were given jurisdiction upon the Mississippi, and their boundary line was established as the middle of the main channel.

The practical difficulty of locating, with reference to such a line, transactions requiring the application of state laws was, however, obvious to the law makers. Rather than create the contingency of a failure of justice in any

-case on that account, the proviso was enacted giving this state "concurrent jurisdiction" with other states so far as the stream formed the boundary, and declaring the river "to be common to both."

"Jurisdiction," as applied to a state, signifies the authority to declare, and the power to enforce, the law, as well as the territory within which such authority and power may be exercised. Those were its meanings in the language from which we derived the word, and are its present meanings in our own.

The jurisdiction of a state is co-extensive with its sovereignty. By conferring "concurrent jurisdiction," congress intended by the act in question to declare that, subject to the other laws of the United States, transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either according to its laws, and that where a court of one state assumed jurisdiction in a particular case the same should be exclusive therein until relinquished. Missouri having accepted the terms of the act of congress, her sovereignty extends to the limits sanctioned by that act. We have no doubt that her laws reach and control the facts here disclosed arising between citizens of this state.

The same construction now announced was placed by this court, in 1850, upon these laws in *Sinearingen v. The Lynx*, 18 Mo. 519. It was then held that our statutes governed a collision on the river between this state and Illinois, and that it was immaterial on which side of the channel the injury took place. Since that ruling was made two revisions of our constitution have occurred. If it had been intended to restrict the jurisdiction of the state within narrower bounds on the Mississippi than those sanctioned by the act of congress, that intention would have been expressed in the constitutional revisions since the decisions above mentioned. But it was not. On the contrary, the same language was re-enacted at each revision.

A prior construction of the law by the courts will be regarded, in the absence of any evidence of a different intent, as adopted by a re-enactment of the law in the same terms as when so construed. This principle applies as well to the fundamental law of a state as to other laws.

The conclusion we reach is reinforced by the opinion of the supreme court of Iowa construing precisely the same language applicable to that state. That court has held that the laws of Iowa apply to a criminal offense committed on the Mississippi, east of the main channel, on a boat moored to the Illinois shore, a state of facts identical with that alleged in the case at bar. *State v. Mullen*, 35 Iowa, 199.

The demurrer to the petition in the present cause should have been overruled. The judgment is therefore reversed, and the cause remanded for further proceedings in conformity to this opinion.

The other judges concur.

KEITH *et al.* v. JOHNSON *et al.*

(Supreme Court of Missouri. February 4, 1889.)

1. WILLS—PROBATE IN FOREIGN STATE—VALIDITY OF DEVISE—RES ADJUDICATA.

The probate of a will in one state, devising land in another, is not binding upon the courts of the latter state as an adjudication of the validity or effect of such devise, under the federal provisions requiring such faith and credit to be given to the judicial proceedings of the courts of other states as they have in their own state, inasmuch as the court of the former state had no jurisdiction to make such adjudication, if it had attempted to do so.

2. SAME—RECORDING—CONSTRUCTIVE NOTICE.

A will probated in another state, affecting land in Missouri, and not recorded there, as provided by Rev. St. Mo. §§ 3993, 3994, is not constructive notice of its provisions affecting such land.

1. APPEAL—SECOND APPEAL—REVIEW.

As a general rule, where a case has once been decided by the supreme court, and comes up the second time, only such questions will be noticed as were not determined on the former appeal.

Error to circuit court, La Fayette county; JOHN P. STROTHER, Judge.
Graves & Aull, for plaintiffs in error. *Wallace & Chiles*, for defendants in error.

BLACK, J. This is a suit between the children and grandchildren of James M. Keith for the partition of 280 acres of land in La Fayette county. John Johnson is a defendant because of a deed of trust held by him on 240 acres of the same land. On the first trial the court held the deed of trust to be a valid lien on the land. That judgment was reversed on an appeal prosecuted by the parties opposed to Johnson, (80 Mo. 125.) On the second trial the circuit court held the deed of trust to be of no validity as against the children and grandchildren of James M. Keith. No bond having been given on the first appeal, the property was sold, and the proceeds, to the amount of \$1,782, were applied to the payment of Johnson's debt, and the balance divided among the other parties according to their interests in the land. While the ultimate question now is whether Johnson shall make restitution, still that question must be determined by a trial of the rights of the parties to the property.

The facts are these: James W. Keith, who was the father of James M. Keith, died a resident of the state of Kentucky, leaving a last will, which was probated on the 26th May, 1851, in the county court of Clark county, in that state. James M. Keith then resided on the land in suit, but it is admitted that the title was in James W. Keith at the time of his death. The will, after giving a description of the land in suit, disposes of it by the use of these words: "I hereby will and direct that a good and sufficient deed for said land shall be made by my executors to my said son James for and during his life, and at his death in fee to his children." The nominated executors declined to act, and the court granting the probate appointed Houston and Downing administrators, with the will annexed, who made a deed to James M. Keith, giving him a life-estate, remainder to his children. This deed of the foreign administrators bears date May 13, 1858, but was not recorded in La Fayette county until April 17, 1879, and nine or ten days after the death of James M. Keith. The deed was found among his papers after his death. The deed of trust from James M. Keith to Tutt, trustee for Johnson, was executed some two years before the death of James M. Keith, and was made to secure money then loaned Keith. The will was never probated in this state, nor was an authenticated copy ever recorded in La Fayette county.

The deed from the foreign administrators to James M. Keith is an instrument which comes within the provisions of our recording acts, and should have been recorded. As it was not recorded when Johnson made the loan and took the deed of trust, he cannot be charged with constructive notice of it. It is not shown that he had actual notice. As to him, then, there was no such deed, and it is therefore unnecessary to determine the question whether these foreign executors had or had not the power to make a valid deed to lands in this state. The deed, good or bad, is out of the case, so far as the appellant Johnson is concerned. But if Johnson is to be charged with constructive notice of the will, then it is immaterial whether he had notice of the deed or not, for the will shows that James M. Keith was to have a life-estate only in the land.

The question, then, is whether Johnson is to be charged with constructive notice of this foreign will. Our statute provides that any person owning real property in this state may devise the same by last will, executed and proved according to the laws of this state. Section 3993 enacts: "Authenticated copies of such wills, and the probate thereof, shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in

evidence in the same manner and with like effect." Section 8994 is in these words: "Any such will may be contested and annulled, within the same time, and in the same manner, as wills executed and proved in this state." Other sections provide that wills proved in this state shall be recorded by the clerk of the probate court in a book to be kept for that purpose. It was not necessary that this will should have been proved anew in La Fayette county, but, the will being executed and probated in Kentucky in a manner complying with our law, it was sufficient to record it here as domestic wills are required to be recorded.

It was held in *Lewis v. St. Louis*, 69 Mo. 595, that a certified copy of a foreign will, and its probate, could be used and read in evidence in this state for the purpose of showing a transfer of title to land in this state, though not recorded here. That ruling was followed in this case when it was here before, and in the subsequent case of *Drake v. Curtis*, 88 Mo. 644, and in some intermediate cases. The question of constructive notice from a foreign will, not recorded here, was not considered in any of these cases, but it is presented on this appeal, and determines the appellants' rights in this case.

No principle of law is better established in the United States than this: that the transfer of title to real estate must be in accordance with the law of the state where the property is situate. So a will, to be of any validity as a transfer of title to land, must be executed, attested, and probated in the manner prescribed by the law of the state where the land is located. *Cabanne v. Skinner*, 56 Mo. 357; Story, Conf. Law, § 474; *McCormick v. Sullivant*, 10 Wheat. 192, and cases cited; *Lucas v. Tucker*, 17 Ind. 41; 1 Jarm. Wills, 1; 1 Redf. Wills, (3d Ed.) 398; Whart. Conf. Law, § 537. It would seem to follow from this general principle that, if the laws of this state dispense with proof anew of a foreign will, then such laws must be complied with in order to give the foreign will the force and effect of a proved domestic will, and this is the clear ruling in the case of *McCormick v. Sullivant*, *supra*; and it is also the deduction to be drawn from what was said in *Cabanne v. Skinner*, *supra*. In the *McCormick-Sullivant Case* the contest was over lands located in Virginia and Ohio. Says the court in that case: "We are all of opinion that the probate of a will in Pennsylvania cannot be considered as constructive notice to any person of the devise of the lands in controversy." The supreme court of Texas uses this language: "We hold, therefore, that the probate of the will in Tennessee, in 1865, was not notice of the contents of it to parties in Texas dealing together in buying and selling the Texas lands." *Slaton v. Singleton*, 9 S. W. Rep. 876.

But we are met with the argument that because the federal constitution, and the act of congress, and the statute of this state, (section 2321, Rev. St. 1879,) all provide that the records and judicial proceedings of the courts of other states shall have such faith and credit here as they have in the courts of the states from whence they are taken, therefore we must give to this foreign probate full force and effect; and for this reason the will may not only be read in evidence here, but is constructive notice to persons dealing with lands in this state, though not recorded here. It is conceded that the probate of a will made in conformity with our law is a judicial act. This we have often held. *Jourden v. Meier*, 31 Mo. 40; *Creasy v. Alverson*, 43 Mo. 19; *Dilworth v. Rice*, 48 Mo. 131; *Smith v. Estes*, 72 Mo. 312. It was assumed in *Bright v. White*, 8 Mo. 421, and decided in *Haile v. Hill*, 18 Mo. 613, that the probate of a will was a judicial act, within the meaning of the act of congress. But in both of these cases the contest was over movable property, and the wills had been probated at the domicile of the testator; so that those cases have no bearing upon this case. When the Kentucky court admitted this will to probate it adjudged it to be executed according to the laws of that state, and we accept that adjudication as conclusive upon that subject; but it did not undertake to say that the will transmitted the title to the Missouri land. That court

did not assume to make any such adjudication. The probate of the will, then, does not have the credit in that state of affecting the title to land in this state, and hence we are not called upon to give it a credit here that it does not have in the courts of the state where the probate is declared. The force and effect which we must give to this Kentucky probate does not depend upon the said act of congress, nor our statute relating to the same object, so far as real property located in this state is concerned, but it depends wholly upon the statute before quoted, dispensing with proof anew, and declaring what force and effect shall be given to a will properly executed, probated in another state, and recorded here. Moreover, the courts of that state are without jurisdiction over the titles to land located in this state. The clause of the federal constitution and the act of congress, before referred to, apply only so far as the courts of the other states have jurisdiction. This principle of law is too well settled to call for further discussion. The same is true in respect of our statute before noted, relating to the same subject. Says the supreme court of New Jersey in a recent case, when speaking of this clause of the federal constitution: "Hence the probate of a will in one state, though conclusive as to title to personality, if probate be made at the domicile of the testator, is of no force in establishing the sufficiency or validity of a devise of land in another state. It can obtain such force only in virtue of some law of the state in which the lands are situate." *Nelson v. Potter*, 15 Atl. Rep. 376. The court of appeals of Kentucky also holds that the act of congress has no application to the probate of wills, as to lands in that state, the will having been probated in another state. *Williams v. Jones*, 14 Bush, 418.

It follows from what has been said that in no event can this unrecorded will have any greater force and effect than an unrecorded deed, which would be constructive notice to no one. So far as defendant Johnson is concerned, James W. Keith is to be deemed to have died intestate, and the deed of trust will hold whatever interest James M. Keith would have as an heir at law of James W. Keith; what that interest is does not appear.

The general rule is that where a case has been decided by this court, and again comes here by appeal or writ of error, only such questions will be noticed as were not determined on the former appeal. *Overall v. Ellis*, 38 Mo. 209; *Chambers v. Smith*, 80 Mo. 156; *Bank v. Taylor*, 62 Mo. 338; *Hamilton v. Marks*, 63 Mo. 167; *Boone v. Shackelford*, 66 Mo. 494. These cases show that exceptions have been made to the general rule. The present case, however, comes within the general rule, for the question here decided was not considered on the former appeal. Of course, the will may yet be recorded, but the recording of it now cannot affect Johnson's rights.

The judgment is therefore reversed, and the cause remanded, to be proceeded with in accordance with this opinion.

BARCLAY, J., not sitting. The other judges concur.

HICKMAN v. LINK et al.

(Supreme Court of Missouri. February 4, 1889.)

1. ADVERSE POSSESSION—ACTS OF OWNERSHIP—EVIDENCE.

Where a part of a single uninclosed tract is sold, and the grantee fails to pay the purchase price, and abandons possession and claim of right, the grantor's possession of the remainder of the tract, and his exercise of acts of ownership over the part sold, are constructive possession of that part, under Rev. St. Mo. 1879, § 3223, providing that the possession of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising the usual acts of ownership over the whole tract, shall be deemed a possession of the whole.

2. SAME—EVIDENCE OF ABANDONMENT.

It is competent to show that before the grantee abandoned possession suits were prosecuted against both him and the grantee to recover the land, as showing a cause and reason for his abandonment, and refusal to pay the purchase price.

3. SAME—VACANT PROPERTY—ACTS OF OWNERSHIP.

The grantor's defense of possession, and assertion of title to the whole tract, in a suit by third persons claiming a superior title, is a sufficient act of ownership where the property is in a state of nature.

4. SAME—EVIDENCE—RECORDS OF FORMER SUIT.

The record of that suit in which the plaintiffs were nonsuited, while not color of title, is admissible to prove the required act of ownership.

5. HUSBAND AND WIFE—ADVERSE CLAIM TO WIFE'S LAND—PURCHASE BY HUSBAND.

The purchase by a husband of an adverse claim to his wife's lands, inures primarily to the benefit of her title, and to his benefit only so far as his marital interests are concerned.

6. SAME—DEFENSE IN EJECTMENT—GENERAL DENIAL.

In ejectment by one claiming under the purchase of such adverse title by the husband, the defense that his purchase inured to her benefit is available under a general denial.

7. ADVERSE POSSESSION—TACKING.

The possession of the widow before assignment of dower, and that of the deceased husband's heirs, may be tacked to complete the statutory period of limitation.

Appeal from circuit court, St. Louis county; W. W. EDWARDS, Judge.

Ejectment by Joshua Hickman against Mary I. Link and Martin Link. There was a trial to the court, who, at plaintiff's instance, gave the following instructions:

"(1) Plaintiff has shown a complete paper title to the land in controversy; and is entitled to recover, unless the defense set up [of title acquired by Ann McCourtney, under the statute of limitations] be sustained by the evidence.

"(2) There is no evidence that Ann McCourtney, in person or by tenant, ever had actual possession of any part of the 245 acres [embracing the land in controversy] conveyed by Martin McCourtney to Goodwin by deed in evidence, dated January 26, 1841.

"(3) There is no evidence that Ann McCourtney, in person or by tenant, had for ten consecutive years actual possession of any part of the 245 acres [embracing the land in controversy] which was conveyed to Goodwin by deed read in evidence, dated January 26, 1841.

"(4) The tract of 480 arpents conveyed to Martin McCourtney by the deed [in evidence] dated January 21, 1822, was, by operation of the deed [in evidence] dated January 26, 1841, subdivided into two several and separate tracts; and after such subdivision, even if the proceedings in the case of *Walker et al. vs. Bacon et al.* had given Ann McCourtney color of title to the original tract of 480 arpents, yet, in order to disseise the owner of the true legal title to the tract of 245 acres of his legal constructive possession thereof, it was essential that, under such color of title, Ann McCourtney should have made an entry upon, and taken actual possession of, some part or of the whole of such 245-acre tract; and, in order to make title thereto under the statute of limitation, it was further essential that she should have had such actual possession for ten consecutive years. And as there is no evidence that Ann McCourtney ever entered into or held the actual possession of said tract of 245 acres, or any part thereof, for ten years, or for any time, the evidence fails to sustain the claim of title set up by defendants, and the finding and judgment of the court must be for the plaintiff, whether Ann McCourtney had color of title to the 480 arpents or not.

"(5) There is no evidence of any actual or constructive disseisin by Ann McCourtney of plaintiff (or any under whom his paper title is derived) of the whole or any part of the land in controversy; and therefore the defendants have failed to sustain their defense of title acquired by Ann McCourtney, under the statute of limitations; and plaintiff is entitled to recover upon his paper title."

To the giving of which instructions defendants excepted.

The court refused the following instructions asked by defendants:

"(1) If the court, sitting as a jury, finds the facts to be that, after the death of Martin McCourtney in May, 1853, one Sloan and the heirs of one Krepps claimed title to a tract of land that included the premises here in controversy; that, after the death of the said McCourtney, his widow, Ann McCourtney, claimed as her own and rented the premises then in controversy to James E. Bacon, who went upon the same as her tenant; that while her tenant was in such possession an action of ejectment was brought against him by the said claimants for a tract of land that includes the premises here in controversy; that the said Bacon claimed no other interest in the premises than as such tenant; that the said Ann McCourtney became a party defendant to said suit, and that there was a final judgment rendered in favor of the defendants therein; that the said Ann McCourtney continued to occupy the premises in controversy in that suit, claiming the same as her own until her death in 1866, and during a period of more than ten years; that Henry H. Goodwin, under whom plaintiff claims, did not, during that time, occupy any of the premises in controversy in that suit, or in this suit, or cause himself to be made a party thereto,—then the defendants have shown title to the premises in controversy on the ——— day of August, 1866, in Ann McCourtney, by adverse possession and limitation of time, as against said Goodwin and those holding under him. And if the court further finds from the evidence that the said Ann McCourtney died on the ——— day of August, 1866, leaving as her sole heirs, her two sons and two daughters, to-wit, John M., Andrew J., Mary I., and Sarah A. McCourtney; that the said John M. and Andrew J. McCourtney left this state about the year 1864, and have never returned, or been heard from by their friends or relatives since that time, or for more than seven years next before the commencement of this suit; that the said Mary I. intermarried with George W. Link previous to the death of Ann McCourtney, and remained a married woman, and the wife of the said Link, up to within less than three years next before the commencement of this suit; that a partition of the premises embraced within the boundaries of the land recovered by the said Ann McCourtney in said cause was made about the year 1879 in the circuit court of St. Louis county, among the then surviving heirs of Ann McCourtney, and that the lots in controversy in this suit were assigned by the commissioners and the judgment of the court to the defendant Mary I. Link,—then the finding ought to be for the defendants.

"(2) If the court, sitting as a jury, believes from the evidence that at the time Geo. W. Link caused the quitclaim deed from Henry H. Goodwin, read in evidence, to be made to himself and John F. Howell, the said Link was the husband of the defendant Mary I. Link, and that she claimed an interest in a tract of land that includes the premises described in said deed, either by inheritance from her then deceased mother, or in any other manner, and no person was in possession of the same or any part thereof, holding adversely to her, then at the time of the execution and delivery of the said deed the said Link occupied such a fiduciary relation to the defendant Mary I. Link as prohibited him from purchasing an outstanding title against her; that such attempted purchase transferred no title to him, but, if any title did pass, it inured to the benefit of the defendant Mary I. Link, and the plaintiff cannot recover in this action.

"(3) The court declares the law to be that open, notorious, uninterrupted, and adverse possession of land for the period of limitation, under a claim of ownership, is as effectual to give title to the same against the true owner as a written conveyance from him. If, therefore, the evidence shows that Ann McCourtney, under whom the defendants claim title, took possession of a tract of land, which includes the premises in controversy, about the year of 1853, and lived upon it, cultivated the portions that were inclosed, successfully defended it from other claimants in the courts of the state; and that all this was done under a notorious claim of ownership up to the time of her

death in 1866, during a period of more than ten years; and that during all that time no other person was in possession of any part of the tract, or asserted any claim thereto,—then her claim had ripened into a complete title, which could only be defeated by a subsequent possession of the same, or some part thereof, by another, for a sufficient length of time to ripen into a title under the statute of limitations against her or her heirs. And the court further declares the law to be that no hostile or adverse claim of George W. Link could effect [affect] the title of defendant if the evidence shows that she is a daughter of the said Ann McCourtney, or stop the statute of limitation from running in her favor, or start it running against her; that in law his possession was her possession.

“(4) The court declares the law to be that, if the evidence shows that Henry H. Goodwin, under whom the plaintiff claims title to the premises in controversy, obtained the deed from Martin McCourtney, read in evidence, in 1841, and paid only a part of the purchase money at the time, and gave his two notes for the balance; that in 1842 an action was brought against him for possession of the premises by an adverse claimant of the land, which continued until 1853; that Goodwin hauled logs, or caused them to be hauled, to put up a building upon the premises described in his deed, but suffered them to remain where they had been hauled, and was not a party to any litigation concerning the premises thereafter, but removed from the county, and never paid the balance of the purchase money,—then the court, sitting as a jury, may well find an abandonment of the premises by Goodwin after the year 1853, for more than the entire period of limitation. And the court declares the law to be that the purchase or attempted purchase of the premises by George W. Link, on account of his fiduciary relations to the defendant, could not have the effect of reviving the title so abandoned by Goodwin.

To the ruling of the court in refusing said instructions, defendant excepted. Under the instructions the court found for the plaintiff, and entered judgment accordingly. Defendants appeal.

A. McElhinney, for appellants. *Crews & Booth*, for respondent.

BLACK, J. This is an action of ejectment for certain parcels of land which constitute a part of 245 acres of a larger tract of 480 arpents. Mary I. Link is the real defendant. John McCourtney owned the 480 arpents, and in 1822 conveyed the same to his son, Martin McCourtney, who conveyed the 245 acres to Henry H. Goodwin, by deed dated 21st January, 1841. Martin McCourtney died in 1852, leaving a widow, Ann McCourtney, and four children. The evidence tends to show that the two boys died without descendants. The daughters, Mary I. and Sarah, were married, the former to George W. Link, and the latter to Howell. The widow had actual possession of the part of the land not sold to Goodwin, from the death of her husband to 1866, at which date she died. Thereafter, and in 1867, George W. Link and Howell procured a quitclaim deed from Goodwin to the 245 acres, and in 1872 they made a division of the land between themselves. The land in suit is a part of that quitclaimed by Howell to Link. In 1876 Link made a deed of trust on his part to secure debts which he owed to the plaintiff and others, and the plaintiff purchased the land at a sale under this deed of trust. He, at a subsequent date, purchased the same land at a sale under an execution on a judgment against Link. The defendant was not a party to the deed of trust, nor to the division of the land between Howell and George W. Link. In a suit of partition between the heirs of Sarah Howell and the defendant, commenced in 1878, one-half of the 480 arpents was set off to Mary I. Link. Before the commencement of this suit she was divorced from George W. Link, because of his fault. When Goodwin purchased the 245 acres in 1841, he gave Martin McCourtney two notes of \$500 each for part of the purchase price of the land; and the evidence tends to show that he then, or about that date, took possession of the

land purchased by him. Sloan and Krepps claimed to have acquired the 480 arpents under an execution sale against John McCourtney; and Sloan set up this claim against both Martin McCourtney and Goodwin, and much litigation ensued down to the death of Martin McCourtney, in 1852. Soon, thereafter, and in 1853, Sloan and the heirs of Krepps commenced another suit in ejectment against Bacon, the tenant of Ann McCourtney, and to which she was a defendant, for the possession of the whole 480 arpents. Goodwin was not then nor thereafter in possession of the 245 acres. The defendants in that case set up the statute of limitations as a defense, and on the trial the plaintiff took a nonsuit, which judgment was affirmed in this court in 1862.

George W. Link, whose deposition was taken by plaintiff, but read by the defendant, says the old notes were not paid up on account of a suit by Sloan; that they ran out of date, and were never paid; that he got possession of them and gave them to Goodwin; that he and Howell gave these old notes and five or six hundred dollars to Goodwin for the quitclaim deed; and that he went to Shelby county, where Goodwin resided, and got the deed. The evidence before recited tends strongly to show that Goodwin had abandoned his purchase of the 245 acres even before the death of Martin McCourtney. It was admitted on the trial that Ann McCourtney never had actual possession of the 245 acres or any part thereof, though she resided on the inclosed portion of the 480 arpents not by her husband sold to Goodwin, and she claimed to own the whole 480 arpents down to the date of her death, a period of some 13 or 14 years.

1. We deem it unnecessary to recite the instructions given and refused. It is sufficient to say that the court refused all that were asked by the defendant, and gave a number at the request of the plaintiff. The theory of the defendant's refused instructions is, that the record in the ejectment suit of Sloan and others against Ann McCourtney and Bacon, her tenant, gave her color of title to the 480 arpents; that she acquired the title to the whole by the statute of limitations, and at her death the property descended to her heirs. The theory of the plaintiff's instructions is that, even if the record in that ejectment suit does constitute color of title, still defendant must fail in this defense because Ann McCourtney had no actual possession of any part of the 245 acres sold to Goodwin. Since Ann McCourtney did not have actual possession of the 245 acres, it must be shown that she had color of title to the larger tract, in order to give her constructive possession of the part sold to Goodwin. Much is said in the books as to what will and what will not constitute color of title; and many of the cases are exceptional in their character. Generally it may be said that any writing which purports to convey the title to land by appropriate words of transfer, and describes the land, is color of title, though the writing is invalid, actually void, and conveys no title. *Fugate v. Pierce*, 49 Mo. 441; *Hamilton v. Boggess*, 63 Mo. 234. But the judgment in the action of ejectment upon the nonsuit taken by the plaintiffs is that suit does not give or even purport to give title. Ann McCourtney did not go into possession of any part of the large tract of 480 arpents under or by virtue of that judgment. She was in actual possession of the part not sold by her husband to Goodwin, when that suit was commenced, claiming the whole. The record in the ejectment suit is good evidence to show that she made claim to the whole. She asserted possession of the whole, and defended that possession for a period of eight or nine years in the different courts, and this act was an act of ownership on her part, and the record in that case is good proof of that act, but it cannot be regarded as color of title. Her claim to the 245 acres is based upon the ground that Goodwin failed or refused to pay the purchase price, and abandoned his possession, and she resumed the claim of ownership of her late husband. When one quits possession the seisin of the owner is restored. Here, it is true, Goodwin was still the owner; but we conclude that where a vendor sells a part of a tract of land, being in possession of the whole,

and the vendee refuses to pay the whole or a part of the purchase price, and abandons his possession taken under the purchase, and the vendor takes control of the whole, his claim is to be ascribed to his former ownership. It is the limits of his former title that define the boundaries of his claim. So here Ann McCourtney had color of title, but it was the title by which her husband held the 480 arpents, and not the record in the ejectment suit.

The next question is, was it essential to the defense that Ann McCourtney should have had actual possession of some part of the 245 acres? This is the most important question on this branch of the case. It is to be remembered in the consideration of this question that the proof is that from 1852 to 1866 Ann McCourtney resided in a house on the part of the 480 arpents not sold to Goodwin, being about one-half of the whole, and that during all that time Goodwin did not have actual possession of any part of the 245 acres. All the circumstances in evidence tend to show that during this time he made no claim to it. The evidence leads to the conclusion that there was nothing in the nature of a division fence between the two parts. The principle of law has been applied in several cases in this court that where a large tract embraces several smaller ones, actual possession of one of the smaller lots only by the person claiming the large tract will not be a defense against a superior title to any one of the other small lots. *Schultz v. Lindell*, 30 Mo. 310; *Tayon v. Ladew*, 33 Mo. 205; *Leeper v. Baker*, 68 Mo. 400. So it is said: "A distinction is also made by many of the courts between lands laid out into distinct lots and those which are not; and in the former case it is held that an entry upon and possession of one lot, under a conveyance which embraces several, cannot be extended by construction to other lots not actually occupied." Wood, Lim. § 262, p. 547. In the first two cases cited the lots were common field lots, the title to which was vested in the former occupants by an act of congress, and the larger tracts were subsequent New Madrid locations. We do not question the principle of those cases as a general rule, but we think it does not apply to a case like the one in hand, where the vendor is in possession of a large tract of land, and sells off a part, and the vendee fails or refuses to pay for the land so purchased, and abandons the possession which he took under the purchase. The statute enacts that "the possession of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising, during the time of such possession, the usual acts of ownership over the whole tract so claimed, shall be deemed a possession of the whole of such tract." 2. Rev. St. 1855, p. 1046, § 5. Under the guide of this statute, the person invoking it must, under color of title, have actual possession of some part of the tract in the name of the whole, and he must exercise the usual acts of ownership over the whole tract during the period of 10 years. See same section (3223) Rev. St. 1879. What will be usual acts of ownership must depend upon the situation of the property and the uses to which it would usually be put in connection with the whole. Here the part in dispute seems to have been unimproved, and largely in a state of nature; not even inclosed. The fact that Ann McCourtney did assert and defend her possession to the whole tract against the assaults of the alleged superior title of Sloan and Krepps is an act of ownership. In view of the condition of the property and the evidence of abandonment of actual possession by Goodwin, the defendant made a showing upon which Ann McCourtney would have been entitled to go to a jury.

The question remains whether the defendant can avail herself of the possession by her mother. Ann McCourtney's claim came to her through her deceased husband. Under the law as it then stood she was entitled to her quarantine in the whole plantation until dower was assigned, which it appears was never done. Her possession of the estate of her deceased husband was not adverse to his heirs. *Brown v. Moore*, 74 Mo. 633; *Roberts v. Nelson*, 87 Mo. 229. She held these 245 acres as a part and parcel of the whole tract of

480 arpents, and by the same right. The position that defendant acquired the property by inheritance from her mother is untenable. She takes by inheritance from her father. While Ann McCourtney's possession was not adverse to the heirs, it was evidently adverse to all the world, except those who may be entitled to the property on the expiration of her estate. If the full period of adverse possession—10 years—expired before the death of Ann McCourtney, then the title of Goodwin was barred, and Link and Howell took nothing by the quitclaim deed.

Whether there was such a privity between the widow, whose estate was but a life-estate, and the heirs of the deceased husband, as to permit the heirs to tack their possession to that of the widow, presents a more difficult question. Speaking of what will constitute such privity, it was said in *Crispen v. Hannavan*, 50 Mo. 549: "There must be a privity of grant or descent, or some judicial or other proceeding that shall connect the possession, so that the latter shall apparently hold by right of the former. Not even a writing is necessary, if it appear that the holding is continuous, and under the first entry." The test question, it is said, is "whether the occupation of the subsequent tenant is referable to the same entry, and under the same 'claim of right,' as it is called, as that of the prior occupant; in other words, whether the occupation of the one constitutes but a continuation of the possession of the other." Sedg. & W. Tr. Title Land, § 747.

In a late case in Massachusetts the court made use of the very pertinent observations: "It is claimed that there is no such privity between the life-tenant and the remainder-man, because the latter in no sense claims under the former. But the answer is that both claim under the same will, or by one title. The disseisin, which was commenced by the testatrix, is continued by each in accordance with that title, and is referred by each only to the entry of the testatrix." *Haynes v. Boardman*, 119 Mass. 415. Here Ann McCourtney and the children of herself and her former husband hold by the same right. The disseisin which was commenced by Ann McCourtney is continued by the children. When her estate ends, that of the children begins. Both estates take their origin in and by virtue of the same color of title, and there is no interruption of the disseisin; so that there can be no restoration of seisin of the true owner. While there are cases and statements in text-books which would lead to a different result; still we believe the authorities before cited assert the correct rule, and it follows from them, as well as from right reason, that the possession of the heirs and that of the widow may be tacked for the purpose of making up the statutory period of limitation. It therefore follows that if Goodwin failed or refused to pay the notes which he gave in part payment for his purchase of the 245 acres, and that he abandoned the possession thereof, and that Ann McCourtney, or she and the heirs of Martin McCourtney, for a period of 10 years had actual possession of a part of the 480 arpents, and during that period claimed the whole, and exercised over the whole the usual acts of ownership, then the defendant should prevail, and appropriate instructions should be given on this theory of the case. The plaintiff's fourth instruction should be refused; for under it and the admission as to want of actual possession in Ann McCourtney the finding could only be for the plaintiff on the statute of limitations.

2. It is competent to show that suits were prosecuted against Goodwin and McCourtney for the land prior to the one commenced by Sloan and the heirs of Krepps, for they show a cause and reason why Goodwin left the property and failed or refused to pay the notes, namely, that he abandoned the property because of that litigation. Should proper objections be made to secondary evidence, the records of those suits will be the best evidence of what was done. No more need be said in respect to the opinion of the court in *Sloan et al. v. Bacon et al.*, now agreed into this record.

3. A further question is whether the plaintiff, claiming as he does under

George W. Link, can recover on the title acquired by Link from Goodwin by the quitclaim deed, or whether that title inured to the benefit of Mary I. Link, the then wife of George W. Link. It is a rule of equity everywhere that a person placed in a situation of trust and confidence with respect to the subject of a purchase cannot retain the purchase for his own benefit. He cannot hold onto the purchase when he has a duty to perform inconsistent with his position of purchaser. No more confidential relation is known to the law than that of husband and wife. It would be a sad commentary on our laws if the husband were permitted to buy up an old claim to his wife's property, which had been abandoned for 18 or 14 years, and with it turn her out of possession. In *Swissheim's Appeal*, 56 Pa. St. 475, a married woman purchased an undivided interest in certain lands subject to liens thereon, and in which lands her husband was a joint owner. Her interest was sold under the liens, in her absence, and purchased by the husband, without her consent. Says the court, in respect of this purchase by the husband: "No court of law or equity could ever permit so gross an abuse of the marriage relations. The only effect of the purchase by the defendant was to preserve the estate for his wife, the plaintiff, and the court below were clearly right on this point." In *Young v. Adams*, 14 B. Mon. 107, one theory of the case which the evidence tended to show was that the husband took possession of a tract of land of his wife, her claim of title extending to the whole tract. He then purchased a claim to an undivided one-third, which claim so purchased was adverse to the claim of the wife to the whole. He sold off parts of the tract to different persons. The wife did not join in these deeds, and after his death she brought ejectment against the persons to whom the husband had sold parts of the land. It was held that if the husband took possession of the whole survey under the claim of his wife, and claimed the whole of the land as hers, then the purchase of the outstanding claim of one-third inured to her benefit, even as against the husband's grantees. As a general rule of law, if one tenant in common purchase an outstanding adverse title, he cannot use it to evict the other co-tenants, and the purchase will inure to the benefit of all of the tenants in common. *Jones v. Stanton*, 11 Mo. 433; *Picot v. Page*, 26 Mo. 416. "So a release of a right made to a particular tenant for life, or in taile, shall aid and benefit him or them in the remainder." Co. Litt. § 453.

Now, the evidence in this case tends to show that Goodwin refused to pay the notes which he gave to Martin McCourtney for part of the purchase price of the 245 acres; that Goodwin abandoned the possession of the land; that Ann McCourtney, the widow of Martin McCourtney, claimed the whole 480 arpents, and defended her claim thereto against adverse claims. She was in possession of a part at least, claiming the whole from 1852 to 1866, when the defendant, as one of the children of Ann and Martin McCourtney, became entitled to her share of the lands of her deceased parents. It was the duty of George W. Link as the husband of the defendant to protect, and not destroy, his wife's inheritance. He had a marital right and curtesy initiate in his wife's lands. When he purchased this adverse claim from Goodwin, the claim thus acquired inured to the benefit of himself and wife, according to their interests in the land before the purchase. He and his grantees, as against her, had no other interest in the property than he had before the purchase. It remained but a marital interest; and, as the divorce was for his fault, he forfeited all right to her real estate. It follows from what has been said that the defendant's fourth instruction should have been given.

The court also erred in giving the plaintiff's first instruction, for it deprived the defendant of all of her defenses save that "of title acquired by Ann McCourtney under the statute of limitations." To the defense we have been considering it is not necessary that Ann McCourtney should have had 10 years' adverse possession. It is enough to entitle this defense to prevail to show that Goodwin, in 1853 or prior thereto, declined to pay the notes, and

abandoned the possession of the property, and that Ann McCourtney thereafter and to her death claimed the land, and defended the title against the adverse claim of Sloan and the heirs of Kreppa. If we are correct in saying that the purchase of this adverse claim by George W. Link inured to the benefit of himself and his wife, and to himself only to the extent of his marital interest in his wife's property, then this defense is available to defendant in an action of ejectment under the general denial. The judgment is therefore reversed, and the cause remanded for a new trial.

BARCLAY, J., not sitting. The other judges concur.

MASON, Sheriff, v. GITCHELL *et al.*

(Supreme Court of Missouri. February 4, 1889.)

TAXATION—TAX SALE—WIFE'S SEPARATE PROPERTY—RIGHT TO SURPLUS.

Under Rev. St. Mo. 1879, § 3295, providing that the rents, etc., and proceeds of, and the husband's interest in, the wife's realty, shall be exempt from seizure for his debts, except debts for family necessities, and that no conveyance thereof by the husband shall be valid unless the wife joins, the husband's interest in the wife's land does not pass by a sale under a judgment in a suit for taxes, to which the husband, but not the wife, is a party; and, as against the purchaser at such sale, the wife is entitled to the surplus arising from a subsequent tax sale of the land. Following *Gitchell v. Messmer*, 87 Mo. 131.

Appeal from St. Louis circuit court; W. H. HORNER, Judge.

Bill of interpleader by I. M. Mason, sheriff, against Charles E. Gitchell and Lina V. Newman. Gitchell appeals. Rev. St. Mo. 1879, § 3295, provide: "The rents, issues, and products of the real estate of any married woman, and all moneys and obligations arising from the sale of such real estate, and the interest of her husband in her right in any real estate which belonged to her before marriage, or which she may have acquired by gift, grant, devise, or inheritance, during coverture, shall, during coverture, be exempt from attachment or levy of execution, for the sole debts of her husband; and no conveyance made during coverture by such husband, of such rents, issues, and products, or of any interest in such real estate, shall be valid, unless the same be by deed executed by the wife jointly with the husband, and acknowledged by her: * * * provided, such annual products may be attached or levied upon for any debt or liability of her husband created for necessities for the wife and family, and for debts for labor or materials furnished upon or for the cultivation or improvement of such real estate."

S. Hermann, for appellant. Joseph S. Dobyns, for Lina V. Newman, respondent.

RAY, C. J. This is the same case, in another form, as the ejectment case of *Gitchell v. Messmer*, reported in 87 Mo. 131. In said ejectment suit the plaintiff, Gitchell, claimed title under a judgment recovered in a suit by the collector in 1878, to enforce the lien against the property for unpaid taxes for the years from 1871 to and including 1876, to which Lina V. Newman was not a party, although her husband was. Since the institution of, and during the pendency of, said suit in ejectment by said Gitchell against Messmer, who was the tenant in possession under Mrs. Newman, the collector brought, it seems, another suit for unpaid taxes, for other and subsequent years, the defendants therein being the said Gitchell and said Lina V. Newman, (who are the interpleaders in this cause.) and Socrates Newman, the husband of said Lina V. Newman. Under a judgment duly rendered, and an execution regularly issued thereunder, the lot was sold for the taxes of these subsequent years, and at this sale, which was the second sale thereof for taxes, Mrs. Lina M. New-

man (who, it seems, is a different person from Mrs. Lina V. Newman, formerly Lina Vitalis) became the purchaser, at and for a sum which was more than sufficient to satisfy the judgment and costs. The surplus in the sheriff's hands, arising from this sale, which amounted to some \$2,600, was claimed by both Gitchell and Mrs. Lina V. Newman. The said Mason, sheriff as aforesaid, filed the present bill to require these parties to interplead and settle the title to this money. Upon a trial of the issues the court found for Mrs. Newman, and the interpleader, Gitchell, has appealed from the judgment in her favor.

There is no dispute as to the facts in the present record, but an agreed statement thereof, which, in brief, shows the claims of the parties upon the funds in question to be in accordance with their respective titles, which are the same as those heretofore litigated in the said ejectment suit, and reviewed by this court in 87 Mo. *supra*.

The position and claim of interpleader, Gitchell, in the cause now before us, is in hostility to the views entertained by this court in the ejectment suit, as to the interests acquired by the said Gitchell under the tax-suit proceedings and judgment. He asserts a claim on this fund now in controversy, upon the theory that he acquired an interest as purchaser at the first tax sale, and that the purchase price bid by Lina M. Newman at this second sale of the lot for taxes was paid for his said interest so acquired in the said former tax proceedings. It appears in this record, as in the said ejectment suit, that Mrs. Lina V. Newman, who was the owner in fee of the property, was not, as before stated, made a party defendant in said first tax suit, but that said Bigelow, Hilton, and Socrates Newman, the husband of Lina V. Newman, were. It is apparent from the record that said Bigelow and Hilton had no interest in the lot when the first tax suit was brought. Indeed, this is conceded on all hands; but the claim for Gitchell, made in this case, is that the husband's interest in the wife's land was vendible on execution, and that he acquired it by the first sale.

We are not dissatisfied with the views heretofore held, as to the meaning, scope, and effect of section 3295, Rev. St., and are not at all inclined to overrule our prior decision thereon, which we would, in effect, have to do, to sustain the position of counsel for Gitchell on this appeal. It can serve no useful purpose to again go into the learning upon the subject, as to the nature, character, and extent of the right of the husband, if any, under said statute. It is sufficient to refer to, and again approve, what has been said by us in that behalf in *Gitchell v. Messmer, supra*; *Burns v. Bangert*, 92 Mo. 167, 4 S. W. Rep. 677, and cases cited; *Mueller v. Kaesmann*, 84 Mo. 318. Of the several defendants in this second tax suit, Mrs. Lina V. Newman was the only one who had the ownership and substantial and real interest in the land, and, as the purchase money paid by said Lina M. Newman at the tax sale arose therefrom, Mrs. Lina V. Newman is clearly entitled to the surplus, after satisfying the judgment and costs. As to the alleged hardships suffered in this behalf by the state and said Gitchell, it is, we think, sufficient to say that the collector omitted to make the owner of the property a party defendant in the first tax suit, and said Gitchell was notified and warned, at the sale and prior to his purchase, that the defendant in the execution had no interest in the property, and he therefore bought with knowledge and at his peril.

This leads to an affirmance of the judgment, and it is accordingly so ordered. All concur.

v.10s.w.no.10—39

NALL v. WABASH, ST. L. & P. RY. Co.

(Supreme Court of Missouri. February 4, 1889.)

COURTS—SUPREME COURT—JURISDICTION—AMOUNT—FEDERAL QUESTION.

A petition alleged that defendant, a railway company, received and agreed to carry plaintiff's goods to a given point, but lost them; the action being based on common-law liability, and not on Rev. St. Mo. § 598, allowing a recovery against the carrier receiving the goods, if lost by the negligence of a connecting carrier, with a right of action over by the receiving carrier against the latter. The answer alleged the contract to be for the delivery of the goods at the terminus of defendant's line to a connecting railroad, of which it averred performance. The court, trying the case without a jury, rendered judgment for plaintiff for less than \$100, but upon what ground did not appear. No instructions were asked or given referring to any federal question, and the motion for a new trial was made on several grounds, one being that the statute on which the court based its finding was unconstitutional, and interfered with commerce between citizens of different states. *Held*, that no federal question was presented, and that the supreme court had no jurisdiction.

Appeal from circuit court, Macon county; ANDREW ELLISON, Judge.

Action by J. M. Nail against the Wabash, St. Louis & Pacific Railway Company, to recover for the loss of certain freight delivered to defendant by plaintiff for transportation. Trial by the court, judgment for plaintiff for \$81.66, and defendant appeals; the record being first sent to the Kansas City court of appeals, and thence, on the motion of defendant, transferred to the supreme court, on the ground that a federal question was involved. Rev. St. Mo. § 598, provides that a common carrier shall be liable to the consignor for loss of or injury to goods received for transportation, though it occurs through the fault of another carrier through whose hands it passes, and that the former carrier may maintain an action against the latter for what it may be required to pay by reason of its negligence.

W. H. Blodgett and Geo. S. Grover, for appellant. *Matthews & Spencer*, for respondent.

RAY, C. J. This cause was appealed from the Macon circuit court, and the record sent to the Kansas City court of appeals, where, upon motion of defendant, the cause was transferred to this court, for the alleged reason "that the issues in said cause involved a construction of the federal constitution." Whether that be so or not depends upon the proper construction of the pleading in the cause.

The petition is as follows: Plaintiff states and alleges that on the 26th day of February, 1888, he owned certain goods and chattels, to-wit, one cook stove and one box of household goods; that the defendant is a railroad corporation, under the laws of the state of Missouri, and a common carrier of persons, goods, and merchandise, and was such at the time the said corporation undertook to ship and carry the property and goods of plaintiff, hereinafter mentioned; that on the 26th day of February, 1888, the defendant owned and operated a railroad, known as the "Wabash, St. Louis & Pacific Railway," running through the city of Macon, upon which road the defendant ran and operated its engines and cars, and transported and carried goods, wares, and merchandise as a common carrier; that on said 26th day of February, 1888, the plaintiff delivered to the defendant one cook stove and one box of household goods, in good condition, for transportation from the city of Macon, aforesaid, to Corinth, Ky.; that plaintiff paid them the price demanded for carrying said goods, to-wit, \$7.70; and that in consideration of said price, paid as aforesaid, the defendant, as such common carrier, undertook and agreed to carry and transport said goods from the city of Macon to Corinth, Ky., and deliver the same in like good order, within a reasonable time. Plaintiff states that defendant has failed to perform its undertaking as such common carrier, and has failed to deliver said goods, as aforesaid, at said

point of delivery, and the same have been a loss to this plaintiff of the whole thereof; that the value of said goods was \$100, and plaintiff has been damaged by reason of the premises in the full value thereof; and he therefore asks judgment for the same, with costs of this action.

The answer of defendant was as follows: (1) It admitted that it was a railroad corporation under the laws of the state of Missouri; (2) that on the 26th day of February, 1883, it owned and operated a railroad known as the "Wabash, St. Louis & Pacific Railway," running from and through the city of Macon; (3) it denied each and every other allegation in plaintiff's petition. For further answer, it averred that it received from one J. M. Nall, at Macon City, Mo., on or about the 26th day of February, 1883, one box, said to contain certain household goods, and one cook stove, marked "J. M. Nall, Corinth, Ky.," to be transported by it to St. Louis, Mo., and there delivered to a connecting line, for the consideration named, and only upon the terms and conditions stated in a certain special printed and written contract or bill of lading, then and there executed by it, and delivered to said J. M. Nall; which special contract or bill of lading was in words and figures as follows, to-wit:

"MACON STATION, February 26, 1883.

"Received of J. M. Nall, by the Wabash, St. Louis & Pacific Railway Company, the following property, in apparent good order, (except as noted,) to be forwarded to same, connecting line, St. Louis station, on its line, upon the following conditions and limitations, by notice or otherwise, defining the liability or undertaking of this company, and the right of any owner or consignee hereunder: * * *

"It is further agreed that this company shall not be held accountable for any damage or deficiency in packages, after the same shall have been receipted for in good order by consignees or their agents, and that the liability of this company as a common carrier hereunder shall cease on the arrival of the goods or property at the station or depot of delivery. After such arrival the relation shall be that of warehouseman simply, and freight carried by this company must be removed from the station, during business hours, within twenty-four hours after its arrival, or it will be stored at the owner's risk and expense. * * *

"In the event of the loss of any property for which this company may be responsible under this receipt, the value or cost of the same at the point and time of shipment is to govern the settlement of the same.

"NOTICE. In accepting this contract, the shipper, or the other agent of the owner of the property carried, expressly accepts and agrees to all its stipulations, exceptions, and conditions. * * *

Marks and Destination.	No. Pk'gs.	Description of Articles.	Weight, Subject to Correction.
J. M. Nall, Corinth, Ky.	1 1	Box H. H. Goods Cook Stove. O. R. Rel. Paid on acct., \$7.70. McROBERTS, Agent."	570 lbs.

Defendant says that it safely transported said box of household goods and said cook stove from said Macon, Mo., to the terminus of its line of railroad at St. Louis, Mo., and there delivered said goods, on or about March 3, 1883, to a connecting line for transportation to the place of destination, as aforesaid. Wherefore, having fully answered, defendant asks to be discharged, with its costs in this behalf expended.

It appears by the record that the cause was tried before the court, sitting as a jury, on the 8th of March, 1884. It also further appears that both parties, at the trial, relied on the special contract or bill of lading set up in and made a part of defendant's answer, as hereinbefore set out, but differed, it seems, as to its proper construction.

It further appears that plaintiff testified in his own behalf, as follows: "I shipped one box and one cook stove on the Wabash, St. Louis & Pacific Railway from Macon City, Mo., on the 26th day of February, 1883, to be delivered at Corinth, Ky. * * * The articles amounted in value to the sum of \$81.66. * * * I delivered the goods and stove above mentioned to defendant's agent, at their depot, in Macon City, Mo. I paid \$7.70 freight charges to defendant's agent, and took his receipt for the same. I sent that receipt to R. L. Matthews, my attorney, at Macon City, Mo. I have never received said goods, or any part of them. I have never received any compensation for the loss of said goods, or any part of them. I have frequently inquired for said goods at the railway depot at Corinth, Ky.; the last time about three months ago."

I. W. Nall, for plaintiff, testified, as follows: "* * * I saw the plaintiff deliver one cook stove and one box at the depot of the Wabash, St. Louis & Pacific Railway in Macon City, Mo., in February, 1883. I saw the goods marked. They were marked to Corinth, Ky. I can't state what all was in the box. It was household plunder of various kinds. The plaintiff has never received said goods, or any part of them, or any compensation for them."

The testimony on the part of defendant, as shown by the record, shows very clearly that, at the date of this transaction, defendant owned and operated a line of railroad from Macon City, Mo., to St. Louis, Mo.; that the latter point was the terminus of defendant's line in that direction, and that it did not own or operate any line of railway extending southward or eastward from St. Louis to Corinth, Ky.; that the connecting lines between St. Louis, Mo., and Corinth, Ky., were the St. Louis Transfer Company and the Cairo Short Line; and that the usual route of shipment of goods from Macon City, Mo., to Corinth, Ky., was over the Wabash Line to St. Louis, Mo., and from thence over the St. Louis Transfer Co. and Cairo Short Line to Corinth, Ky.

The testimony also shows that the goods in question were promptly shipped from Macon City, Mo., to St. Louis, Mo., and there delivered to the St. Louis Transfer Company, and by it to the Cairo Short Line, for further transportation to Corinth, Ky., the point of destination, but were lost, and never came to hand, although frequently demanded.

This was the substance of the evidence in the cause. The plaintiff, it seems, asked no instructions, and the court gave none of its own motion. The defendant, however, asked the following instructions: "(1) The court, sitting as a jury, declares that, under the pleadings and evidence in this case, the plaintiff is not entitled to recover, and the finding and the verdict must be for the defendant. (2) The court declares the law to be that a common carrier may, by special contract, limit either its common-law or statutory liability as such common carrier; and if the court finds from the evidence that the defendant, as a common carrier, entered into a special contract with the plaintiff, on or about the 26th day of February, 1883, to transport over its line of road, for a certain reward or hire, the goods of plaintiff named in said special contract or bill of lading, from the city of Macon, Mo., to the city of St. Louis, Mo., and there deliver said goods to a connecting line, to be by it forwarded to Corinth, Ky., their ultimate destination, and further finds from the evidence that the defendant properly performed all on its part to be performed under the terms of said contract, then the plaintiff cannot recover in this action, and their verdict must be for the defendant,"—which the court refused. The defendant thereupon duly excepted to the ruling of the court in this particular, and this was the only exception made or saved to the rulings of the

court at the trial of the cause. The court thereupon found for the plaintiff, and assessed his damages at the sum of \$81.66, and entered judgment accordingly. The defendant, after unsuccessful motions for new trial, and in arrest of judgment, took an appeal, and the case is here, as aforesaid.

A careful examination of the pleadings in the cause, as we understand them, will, we think, show that the issues in the cause do not involve a construction of the federal constitution or other federal question, and that consequently we have no jurisdiction of the case; the amount involved being \$100 only. The petition, as we understand it, sets out the ordinary action at common law; alleging the delivery of certain goods to the defendant, as a common carrier, at Macon City, Mo., for shipment to Corinth, Ky.; the subsequent loss thereof; and the failure of defendant to redeliver them to plaintiff at their destination, to his damage in the sum of \$100.

The petition makes no reference whatever to section 598 of the Revision of 1879, either by reference to its title, the date of its passage, subject-matter, or otherwise; nor does it state the facts necessary to evoke the liability or duty imposed by that statute, or in any way show that the same was in the mind of the pleader. The statute, therefore, has nothing whatever to do with the case made by the pleading, and is wholly foreign to the case at bar. The answer of defendant, in substance, alleges that, by its contract of shipment, it was only bound to carry the goods to the end of its line at St. Louis, Mo., and then forward the same to plaintiff by connecting lines; and avers that it fully performed its contract in that behalf, and is not responsible for their subsequent loss.

The record, as we understand it, fails to disclose, with certainty, upon what the court below based its finding, in its determination of the cause. It gave no instructions whatever, and the only exception made or saved to its rulings, at the trial, was its refusal to give the instructions asked by the defendant. That refusal may be accounted for upon either of several conjectures. The court, it is true, may have held that a common carrier could not limit its statutory liability as such carrier; or that the action was an ordinary common-law action, upon a common-law contract, not based upon or having any connection whatever with the statute in question; or it may have construed the contract of shipment to be a through contract, as claimed by plaintiff, and not a limited one, as contended by defendant. Indeed, one of the reasons in defendant's motion for a new trial was: "(5) Because the court erred in its construction given the contract of shipment or bill of lading between plaintiff and defendant." It is true, another was: "(7) Because the statute on which the court based its finding is unconstitutional, against public policy, and interferes and obstructs commerce between the citizens of different states."

From the view we have taken on the question of jurisdiction, it may not be our province to determine the theory on which the court below refused the instructions in question. But it is familiar law that, in a case like the present, an issue not made by the pleadings or some other appropriate way cannot be thrust into the cause by the instructions asked by a party, (*Buffington v. Railroad Co.*, 64 Mo. 246; *Waldhier v. Railroad Co.*, 71 Mo. 517, 518; *Edens v. Railroad Co.*, 72 Mo. 213;) and that a question not passed upon by the lower court, at the trial, cannot afterwards be injected into the cause by motion for new trial in the lower court, or by assignment or brief in the appellate court; much less by a motion to transfer the cause from one court to another.

For the reasons hereinbefore stated we are of opinion that the cause should be retransferred to Kansas City court of appeals for its adjudication, and it is accordingly so ordered.

All concur.

STATE v. STILTZ.

(Supreme Court of Missouri. February 4, 1889.)

1. HOMICIDE—MANSLAUGHTER—INSTRUCTIONS.

In a prosecution for murder, where the evidence showed that the defendant and the deceased had been engaged in a quarrel, and that deceased was advancing upon the defendant in a threatening manner, with a rock in his hand, when the defendant shot him, *held*, that an instruction on manslaughter in the second degree, based on the theory that the killing was without design to effect death, "but in a cruel or unusual manner," was improper, but that an instruction on manslaughter in the fourth degree should have been given.

2. SAME—SELF-DEFENSE.

An instruction in such case that if the defendant brought on the difficulty terminating in the homicide by his own willful and unlawful act, or of his own free will and inclination, he could not set up the plea of self-defense, no matter how imminent his peril, is erroneous.¹

RAY, C. J., dissenting.

Appeal from circuit court, Hickory county; W. I. WALLACE, Judge.

C. D. Essex, A. S. Smith, J. H. Childers, and B. J. Emerson, for appellant. The Attorney General, for respondent.

BRACE, J. The defendant was indicted by the grand jury of Hickory county for murder in the first degree, for killing one Thomas Moore. Upon his trial in the circuit court of that county, at the May term thereof, 1888, he was convicted of murder in the second degree, and sentenced to 10 years' imprisonment in the penitentiary. His motion for a new trial and in arrest of judgment having been overruled, he has brought his case here by appeal.

1. After a careful examination and consideration of the objections urged against the action of the court in refusing to discharge the panel of jurors selected to try the case, and in accepting and rejecting evidence on the trial, we find nothing in them that would warrant a reversal of the judgment.

2. The evidence of the first witness for the state, and of the first witness for the defendant, will sufficiently present the facts connected with and attendant upon the homicide to enable us to determine the questions raised upon the instructions.

For the state, M. C. Wheeler testified: "I am acquainted with defendant and Moore. Remember the difficulty between them at Quincy on Saturday morning. About 10 o'clock I and Moore and L. Stiltz and Wm. Wheeler and Johnson went to barn to have game of cards. Had few games. Stiltz claimed he wanted to quit. Moore said Stiltz always jumped the game when he got a little advantage. Stiltz said: 'It don't matter; I'll quit.' They got into dispute. Stiltz ran to back of barn, and got rock. Wm. Wheeler stopped the racket. We went to town. Met in town. We were there a while. Returned to barn about 2 or 3 o'clock. I and Geo. Nowell went to barn. Moore and Stiltz were quarreling. Nowell and I went in barn. Moore said: 'Come and see the fair thing.' We went out. Geo. Nowell said: 'I'll do the fighting, if any is to be done.' We got boys stopped. A few minutes after that Moore went walking along. Stooped down and took hold of a rock. Don't know whether he picked it up or not. Tom walked towards Stiltz. Stiltz said: 'Haven't we settled that?' Moore said: 'Have I said anything to you?' Stiltz said: 'What did you pick up that rock for?' Tom said: 'I did not pick up a rock.' Stiltz said: 'You are a damned liar; you did.' When Stiltz called him a d—n liar, Tom started toward him. Stiltz just raised his pistol out of his pocket; just so it could be seen. Then the boys crowded up, and stopped racket. The next I heard was some one of them called d—n liar.

¹For circumstances under which defendant may invoke the plea of self-defense, though he himself brought on the difficulty, see *Johnson v. State*, (Tex.) ante, 335, and note; *State v. Herrell*, (Mo.) ante, 387.

Moore said: 'Did you call me a d—n liar?' Stiltz said: 'Yes; you are a d—n black son of a bitch.' Tom said: 'I won't take that; would you, boys?' and started towards him. When he got up towards Stiltz the shot was fired. Geo. Nowell said: 'Lyman, you've done something you'll hate all your life.' Stiltz said: 'I don't give a d—n.' Moore said: 'I'm shot.' Moore and Stiltz were 5 or 6 feet apart. Geo. Nowell was standing between parties, facing Stiltz. Stiltz shot over left shoulder of Nowell. I was 10 or 12 feet from Moore. I never saw anything in Moore's hand at time he was shot. I was in a drug-store after first and before second difficulty. Lyman said: 'If Moore fools with me any more, he'll get hurt.' I did not see Stiltz have any weapons. After Moore was shot, they took him out to his father's,—I and others. This all occurred in Hickory county, Mo., at Quincy. *Cross-Examination.* I don't know Moore's age. Suppose him 24 or 25 years of age. I don't know defendant's age. Have known him ever since he was a small boy. He was under age at time. Moore would have weighed 165 pounds. Stiltz would have weighed 130. Was 35 or 40 pounds difference in weight. Moore was a healthy, stout man. Moore was right smart quarrelsome when drinking. Often occurred when drinking that Moore would get in difficulty. In morning some controversy arose. Moore accused him (Stiltz) of jumping game. Stiltz spoke in pleasant manner. Can't say how Moore spoke. Stiltz said: 'I am going to quit.' Moore went to cursing. Lyman got rock. Moore was swearing. They went to town. I did not see Moore get rock and put in his pocket. It was about 15 minutes before shooting that Moore stooped to pick up rock with right hand. Can't say whether he got rock or not. There were rocks lying around there. Don't think Moore had overcoat on. He did not have rock in hand at time of shooting. He might have had one in pocket; don't know. I saw Moore drink 2 or 3 times. I was noticing Stiltz at time of firing. Moore was going towards Stiltz the last I noticed him before firing. I didn't see Moore's hand at time of firing."

For the defendant, John Ferguson testified: "Jim Murphy, Tom Brown, and myself were going down to the carding-machine. Jim Murphy was going home, and asked me to go down to the foot of the hill with him. As we got opposite the old Phillip and Carter barn, Lyman Stiltz ran out of the barn crying, followed by Tom Moore. Stiltz said to Moore: 'You have been running over me all day.' Moore said: 'You are a damned liar.' Stiltz replied: 'You are a damned liar if you say you have not been running over me.' Jim Murphy, Tom Brown, and myself got the row stopped, and started off with Stiltz. We got off about 20 feet, and we happened to look back, and saw Tom Moore picking up a rock, which he put in his left-hand overcoat pocket. Stiltz saw him, and said: 'Better pick up another; one is not enough to whip a boy like me with.' Moore says: 'I will, and will be damned apt to keep them;' and Moore says to Stiltz: 'If you say I have been running over you all day, you are a damned liar.' Stiltz says: 'I thought we had agreed to drop this.' Moore says: 'If you say I have been running over you all day, you are a damned liar.' Stiltz says: 'If you say you ain't been running over me, you are a d—n lying son of a bitch;' and Moore, taking a rock out of his pocket, started towards Stiltz with the rock in his hand. Just as they had about got together, Jim Murphy, Tom Brown, and Geo. Nowell started to get in between them. As Moore went to throw the rock, one of them grabbed Moore and the other Stiltz. Moore tried to throw the rock, and Stiltz jerked out his pistol, and fired over or near the shoulder of the one holding him, and shot Moore in the mouth. Geo. Nowell and myself started off with Stiltz."

3. The court instructed the jury on murder in the first and second degree, and manslaughter in the second degree, and on self-defense. The instructions, except those hereinafter referred to, were in proper form, and applicable to the facts in the case.

4. We find no evidence in the case upon which to base the instruction given on manslaughter in the second degree. There was not only no evidence upon which to predicate the theory that the defendant shot the deceased "without a design to effect death, but in a cruel or unusual manner," but all the facts and circumstances negative such an idea; and the defendant himself testified: "I shot because he was coming at me with a rock, and I knew he would hit me; I did it in self-defense."

5. On the evidence proper instructions on the law of self-defense and on manslaughter in the fourth degree ought to have been given. The court failed to give an instruction on that degree of manslaughter. Gave three on the law of self-defense; two of which—one for the state and one for the defendant—are unobjectionable. The other is as follows: "No. 8. The court instructs the jury that if Stiltz and Moore had a difficulty which resulted in the death of Moore, and that defendant commenced the difficulty in order to wreak his vengeance on Moore, or brought it on by any willful or unlawful act of his, or of his own free will and inclination entered into the difficulty, then there is no self-defense in the case, and the jury cannot acquit on that ground; and it makes no difference how imminent the peril in which defendant may have been placed during the affray." This instruction is condemned, and must be held to be fatal error on the authority of the following cases: *State v. Parker*, 9 S. W. Rep. 728, (decided at this term;) *State v. Gilmore*, 95 Mo. 554, 8 S. W. Rep. 359, 912; *State v. Berkley*, 92 Mo. 41, 4 S. W. Rep. 24; *State v. Parlow*, 90 Mo. 608, 4 S. W. Rep. 14. The erroneous principle involved in it has been so recently and so thoroughly discussed in these cases that further argument would be unprofitable. The proper formula for instructions on the law of self-defense and on manslaughter in the fourth degree in a case of this kind is given in *State v. Gilmore*, *supra*.

For the error of the court in giving instruction No. 8 for the state, and in neglecting to give a proper instruction on manslaughter in the fourth degree, the judgment is reversed, and the cause remanded for a new trial. All concur, except RAY, C. J., who dissents.

JORDAN v. BUSCHMEYER *et al.*

(Supreme Court of Missouri. February 4, 1889.)

1. FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—PLEADING.

A petition in an action to set aside a conveyance to a wife of land by her husband, as made with intent to defraud creditors, need not aver actual fraud on the part of the wife; such a conveyance of property, obtained with her husband's means, being constructively fraudulent.

2. SAME—ANSWER—REPLICATION.

An answer to such a petition, alleging that the land was purchased with the separate estate of the wife, amounts only to a denial of the petition in that particular, and needs no replication.

3. SAME—VERDICT—DECREE.

On such petition and answer, if justified by the evidence, a decree for the relief prayed may be rendered on a general finding that plaintiff is entitled to the relief sought.

Error to circuit court, Gasconade county; A. J. SEAY, Judge.

This suit was brought by Michael Jordan, defendant in error, against the plaintiffs in error, for the purpose of divesting plaintiff in error Caroline Buschmeyer from the title to 120 acres of land in Gasconade county, and for general relief.

The petition alleges that in July, 1880, Henry Schuch owned the land described, and conveyed it to plaintiff in error Caroline Buschmeyer, for \$1,150; that Caroline was the wife of Henry L. Buschmeyer, (also a defendant;) that, at the time of the said conveyance, Henry L. Buschmeyer owed Jordan \$300;

that, on the day said conveyance was made, Henry Buschmeyer obtained from Jordan \$50, upon the representation that he (Henry) was about to buy said land from Schuch, and that said \$50 was to be paid as a part of the purchase price of said land; that said Henry L. paid a further sum of \$100, and that for the balance of the purchase money plaintiffs in error executed to said Schuch a mortgage for \$1,000 on said land, which mortgage has since been paid by Henry Buschmeyer; that afterwards, in 1884, Jordan obtained judgment against Henry L. Buschmeyer for \$425, (which judgment included said sums of \$300 and \$50,) and that the sheriff sold said land under said judgment, and Jordan became purchaser at sheriff's sale; that plaintiffs in error had fraudulently procured the deed from Schuch to be executed in the name of Caroline Buschmeyer for the purpose of defrauding the creditors of Henry L. Buschmeyer, and particularly Jordan; that, in fact, Henry L. Buschmeyer became the equitable owner of the land; that F. J. Langendoerfer, co-defendant below, holds a mortgage on the land for \$1,100, and the monthly rents and profits of the land are worth \$25 a month.

The plaintiffs in error, in their answer to Jordan's petition, denied all the facts set forth in the petition, except that they admitted that Schuch had owned the land, and that he conveyed the same to Caroline Buschmeyer. They admitted that the Schuch mortgage is paid, and that the Langendoerfer mortgage is unpaid, but alleged that all the payments for said land were made by plaintiff in error Caroline Buschmeyer out of her own separate means and estate. There was no replication filed to the answer.

Upon a trial, the circuit court rendered judgment for Jordan as prayed, without stating specific findings of facts, except that it "finds that plaintiff, Jordan, is entitled to relief prayed for in his petition, subject to the payment by plaintiff, Jordan, to defendant Caroline Buschmeyer the sum of fifty dollars, with interest at six per cent. from July 3, 1880." The evidence was not preserved by bill of exceptions. The cause is brought here upon writs of error to determine the sufficiency of the petition and the correctness of the judgment.

Louis Hoffman, for plaintiffs in error. *E. M. Clark*, for defendants in error.

BARCLAY, J., (*after stating the facts as above.*) 1. The petition undoubtedly states sufficient facts to justify the relief granted. It was not necessary to allege any fraud in fact on the part of Caroline Buschmeyer. As against an existing creditor of her husband, a conveyance for and to her, obtained with his means, would be constructively fraudulent, in the absence of any satisfactory showing to the contrary.

2. No reply to the answer in this case was necessary. The petition alleged that the consideration for the conveyance to Caroline was furnished by the husband, Henry L. Buschmeyer. The answer asserted that the consideration was furnished from the separate means of Caroline. This latter statement amounted to no more than a denial of the petition in this particular, and required no reply.

3. It was not essential that the court should enter a special finding of the facts necessary to support the decree it passed. The general finding, that plaintiff was "entitled to the relief prayed for in his petition," was sufficient. The decree was within the scope of the case made by the petition. In the absence of any showing to the contrary, it will be assumed to have been predicated upon sufficient evidence.

There is no error in the record, and accordingly the judgment is affirmed. The other judges concur.

SCHONHOFF v. JACKSON BRANCH R. Co.

(Supreme Court of Missouri. February 9, 1889.)

HIGHWAYS—INJURY FROM DEFECTS—CONTRIBUTORY NEGLIGENCE.

A traveler on a public highway who falls into an excavation cannot recover for the injuries thereby sustained, if he was lacking in ordinary care and prudence, although such excavation may have been left unguarded.¹

Appeal from Cape Girardeau court of common pleas; ROBERT L. WILSON, Judge.

This action is for personal injuries sustained by plaintiff by the alleged negligence of defendant in excavating a cut through a public highway at Jackson, Mo., in the course of the construction of its railroad, and in leaving the cut unguarded and unprotected, in consequence of which plaintiff, while traveling the highway after dark in a buggy, fell in. The answer was a denial, and plea of plaintiff's contributory negligence, which was, in turn, put in issue by a reply. At the trial there was evidence tending to support the plaintiff's cause of action, and other evidence supporting the defense thereto. There was sufficient testimony to sustain a finding in favor of either. Among the instructions given by the court was the following: "The court instructs the jury that the law imposes upon every one traveling upon public highways the use of ordinary care and prudence, and that although you may find, from the evidence, that plaintiff fell over an embankment made in the gravel road by defendant in constructing its railroad, yet if you shall further find from the evidence that plaintiff at the time was guilty of negligence, and did not use ordinary care and prudence in driving, and that such negligence and want of ordinary care contributed in causing the accident by which plaintiff claims to have been injured and damaged, the plaintiff cannot recover, *unless you should further find that defendant could have prevented said damage by care and diligence in erecting and maintaining safeguards or lights to give warning of danger.*" The italicized words in this instruction were added (against the exception of appellant) by the court of its own motion, the residue having been requested by appellant. There was a verdict for respondent, and, after the proper steps for review, the case was brought here by appeal.

T. J. Portis and Wilson Cramer, for appellant. J. B. Dennis, for respondent.

BARCLAY, J., (after stating the facts as above.) In making the excavation necessary for the construction of its railroad across the public highway where the injury occurred, it was the duty of the railway company to protect and guard the same so as to prevent injury and danger to persons passing and exercising ordinary care. A failure to observe that duty would render it liable to any one injured in consequence. But this obvious rule of law does not dispense with the obligation resting on all persons using the road to exercise ordinary care on their part to avoid injury. No one could negligently drive into such an excavation, and then claim damages because it had been left unguarded.

It is a matter of regret that a contrary rule was declared by the court in the instruction given on its own motion, since the judgment must be reversed on that account, though in the main the cause was, in other respects, correctly tried. The rule of law announced, in the instruction referred to, is (in brief) that if the jury found that plaintiff at the time did not use ordinary

¹Respecting contributory negligence in the use of defective highways, and instructions on that subject, see *City of Kinsley v. Morse*, (Kan.) 20 Pac. Rep. 217; *Village of Jefferson v. Chapman*, (Ill.) 20 N. E. Rep. 38; *Morrison v. Shelby County*, (Ind.) 19 N. E. Rep. 316, and note; *City of Austin v. Ritz*, (Tex.) 9 S. W. Rep. 884, and note.

care in the premises, and that such negligence contributed in causing his injury, the plaintiff could not recover, unless defendant "could have prevented said damage by care and diligence in erecting and maintaining safeguards or lights to give warning of danger." This instruction permitted a verdict for respondent even though the jury found him grossly negligent at the time of the injury. The facts and circumstances of the present case are not such as justify the application of that principle. A person injured by falling in an excavation in a public highway, in such a case as is here presented, cannot recover unless he exercised ordinary care to avoid the injury. This has long been the law. *Butterfield v. Forrester*, 11 East, 60; *Smith v. St. Joseph*, 45 Mo. 449; *Craig v. Sedalia*, 63 Mo. 417.

As a retrial will be necessary, it may properly be remarked that the first instruction given for plaintiff would be improved by adding, as a fact to be found, that plaintiff at the time of, and just before, the injury, was exercising ordinary care.

The judgment of the circuit court is reversed, and the cause remanded for further proceedings.

The other judges concur.

MCALLISTER v. BARNES.

(Supreme Court of Missouri. February 9, 1889.)

Appeal from circuit court, Scotland county; BEN. E. TURNER, Judge.

McKee & Jayne and *A. H. Smith*, for appellant. *J. D. Smoot* and *N. M. Pettingill*, for respondent.

PER CURIAM. It appears from the papers in this cause that it involves a controversy which neither by reason of its nature nor of the amount involved comes within the jurisdiction of this court, by the terms of the constitution. It is therefore ordered that it be transferred to the St. Louis court of appeals for such further proceedings as may be proper.

HARRISON WIRE CO. v. HALL & WILLIS HARDWARE CO.

(Supreme Court of Missouri. February 9, 1889.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

A finding of the trial court that defendant is entitled to nominal damages only for breach of contract by plaintiff to sell him goods, set up as a counter claim, will not be reversed where the evidence as to whether the market price of such goods at the time in question was above or below the contract price is conflicting.

Appeal from St. Louis circuit court; AMOS M. THAYER, Judge.

Action by the Harrison Wire Company against the Hall & Willis Hardware Company. Defendant appeals. The cause was transferred from the St. Louis court of appeals.

Dyer, Lee & Ellis, for appellant. *S. Hermann* and *Valle Reyburn*, for respondent.

RAY, C. J. The plaintiff herein is a corporation dealing in wire fencing, at St. Louis, Mo., and defendant herein is also a corporation engaged at Kansas City, Mo., in the hardware business and trade. The petition is in two counts for goods and merchandise sold and delivered by plaintiff to defendant.

As to the first count, there is no controversy; the judgment thereon in plaintiff's favor being conceded to be correct. The second count in the peti-

tion is for goods and merchandise sold and delivered by plaintiff to defendant in January, A. D. 1883, and the amount for which plaintiff obtained judgment thereon is \$1,897. The answer of defendant, in addition to a general denial, sets up two distinct and separate counter-claims, in two separate counts. If we have not misapprehended the record, and the positions and claims of the parties in this court, the second counter-claim is, with respect to this appeal, wholly immaterial. As we gather the facts, the amount for which defendant claims that judgment should have been given in its favor, by way of counter-claim, arises upon and grows out of the first counter-claim exclusively. The first counter-claim is set up in the first count of the answer as follows:

"*First.* Defendant, for a counter-claim against the plaintiff, states that heretofore, to-wit, on the 2d day of November, 1882, the plaintiff entered into a contract, in writing, with the defendant, which is herewith filed, marked 'Exhibit A,' and by which the plaintiff promised and agreed to sell and deliver to the defendant fifty car-loads of barbed fence-wire, four-point licensed wire, one-half galvanized, if desired, at six and one-half cents per pound for painted, and seven and one-half cents per pound for galvanized, price guaranteed on unfilled orders, 'f. o. b.' in St. Louis, to be taken by July, 1883, with the privilege of cancellation; and which contract was then and there mutually agreed to and accepted by both of the aforesaid parties. That, in accordance with the terms of said contract, the defendant did order and direct the plaintiff to ship and deliver to the defendant fifty car-loads of barbed fence-wire, as described in said contract; but the plaintiff failed, neglected, and refused to deliver said fifty cars of barbed fence-wire, as required by their contract, with the exception of one car-load; whereby defendant says that it was damaged by the non-performance of said contract of plaintiff in the sum of \$3,000."

Exhibit A, referred to in this answer, is as follows:

"KANSAS CITY, MO., November 2, 1882.

"*Harrison Wire Co., St. Louis, Mo.*—GENTS: Enter our order for fifty cars barbed fence-wire, four-point licensed wire, one-half galvanized, if desired, at six and one-half cents per pound for painted, and seven and one-half cents for galvanized, price guaranteed on unfilled orders, f. o. b. in St. Louis, to be taken by July, 1883, with the privilege of cancellation."

The contract, we may observe, was executed by both parties, plaintiff and defendant.

The reply of plaintiff denied generally the allegations of the counter-claims, and a second reply alleges that said Exhibit A, attached to the counter-claim, is so vague and indefinite that the minds of the parties never met, and that the terms were never fully agreed upon.

At the trial, which was had before the court without the intervention of a jury, and without any declaration of law being asked by either party, the plaintiff had judgment upon both counts of his petition, as already indicated, and defendant had judgment on its said counter-claims for nominal damages.

Controversy and differences arose, it seems, between the parties, subsequent to the giving and acceptance of said order of November 2d, designated as "Exhibit A," for said 50 cars of wire, as to the true meaning thereof, according to mercantile usage and custom, and a large portion of the evidence at the trial was directed to the explanation and proper construction of certain words and phrases employed therein. This issue, thus raised, was upon the evidence at the trial found by the court in defendant's favor, as the finding on the counter-claim for defendant, for nominal damages, manifestly shows; so that the propriety of the finding for nominal damages upon said counter-claim is the main question now before us,—the position of defendant being, if we correctly apprehend the same, that upon the evidence in the cause it

should have had judgment on its said first counter-claim in the sum of \$2,641.98, instead of nominal damages, as found by the court.

The said claim of defendant, in this behalf, is based upon the evidence of Mr. Willis, its president and chief officer, briefly and in substance to the effect that during the period covered by the said contract of November 2, 1882, defendant, for the purpose of supplying its trade and filling its orders, ordered from time to time of plaintiff some 31 cars of said wire, 4 of which only were furnished by plaintiff; and that, in consequence of plaintiff's neglect and refusal to furnish the remaining 27 cars, it was compelled to buy the same of other parties, at prices in excess of the said contract price with plaintiff; and that said excess amounted, in the aggregate, to the sum of \$2,641.98. Under the agreement of counsel, Mr. Hall is to be understood as testifying to like effect. Mr. Willis testified that the price paid for wire, bought of outside parties, in lieu of that contracted for of plaintiff, was less than the market price, though he seems unable to state what the market price was at the times of purchase, except to say that it was higher than the price paid. This sum, if paid for wire of like description, quality, and value as that called for by the said contract, would manifestly be the measure of damages as applicable to this particular case. Ordinarily the rule of damages is the difference between the contract price and the market price, for this usually compensates and makes the injured party whole; but when the party is able, and in fact does, purchase at less than the market price, the difference between the price he in fact pays and the contract price is manifestly the just and true measure of damages. Such difference in values and prices is manifestly general damages, admissible and receivable, under the general allegation of damages, such as is contained in the answer and said counter-claim of defendant.

But the evidence as to the market price of wire, as we gather it, is by no means uniform or definite. Some portions thereof tend, we think, to show that during the said period covered by said contract the market price was lower, and that the wire bought might have been bought at or for less than said price fixed therefor in the said contract between the parties of date November 2, 1882. Mr. Willis testifies as to this matter that from and after the date of said contract to about December 1st following the market price was declining; that wire was at this time constantly offered him at less than the contract price; and he mentions, we believe, the purchase by his company of some 10 cars of other parties at less than the contract price. He also states, and the correspondence shows, that shortly after the said order of November 2d was given for the said wire to plaintiff other parties offered defendant the same wire upon similar, if not better, terms. He says, further, that for a period of time between said December 1, 1882, to March 1, A. D. 1883, wire advanced in price; but that on March 10th the price of wire was lower than on November 2, 1882, and that wire declined in price during the balance of said year 1883. In the course of his examination in respect to the Thomas wire, which was ordered, we believe, in January, 1883, he says he cannot remember the market price, and that he does not know what the prices were at that time.

Again, the following occurs in the testimony of Mr. Morton, an experienced dealer in wire in St. Louis, introduced in defendant's behalf: "*Question.* Isn't it a fact that from November 2, 1882, through the balance of that year, and through the year 1883, the tendency of wire was downwards, with some fluctuations? *Answer.* As a rule; yes, sir. *Q.* The tendency was downwards constantly? *A.* As a rule. *Q.* In other words, you could buy wire cheaper later on than you could at that date in the market? *A.* I think so." There are perhaps some other features in the evidence in this behalf, but this is, we think, sufficient to show the conflict and doubt therein as to what the market price for the wire in question was during the said period of defendant's purchase thereof covered by the said contract between the par-

ties. The weight of evidence, and the credibility of witnesses, as to whether defendant bought at less than the market price, but in excess of the contract price, and could have bought in the market at or for less than the contract price, were for the trial court, which manifestly held by its said finding for nominal damages only that defendant had not satisfied the burden of proof devolved upon it under the issues on trial in the cause, as to the substantial damages claimed by reason of the breach or breaches of said contract.

Under numerous decisions of this court we cannot reverse judgments upon questions involving the preponderance of evidence only, whatever our view in that behalf may be.

This leads to an affirmance of the judgment, and it is so ordered.

All concur.

ROGERS v. YARNELL et al.

(Supreme Court of Arkansas. February 2, 1889.)

1. INTEREST—RUNNING ACCOUNT—REBATE.

Defendant kept his office in plaintiffs' counting-room, and was engaged in money-lending and farming. His tenants drew their supplies from plaintiffs' store, on defendant's credit. The latter also kept a private account with plaintiffs, and plaintiffs borrowed money from him from time to time. The crops raised on defendant's lands or by his tenants were turned over to plaintiffs year after year on account, while defendant sometimes got advances of cash from plaintiffs. The items of debit and credit were entered from 1871 as one continuous account, without rest or balance, until closed in 1884. *Held*, that the account should be regarded as unsettled, and no interest should be computed on the items thereof.

2. SAME.

But interest was payable on a note given by plaintiffs to defendant for money loaned in the course of their mutual dealings, which, by its terms, bore interest.

3. PAYMENT—APPLICATION—PARTIAL PAYMENTS.

The note entering into the mutual account, the items of the account which were demands in favor of plaintiffs against defendant should be applied to the payment of the interest and principal of the note after first extinguishing the earlier demands of defendant against plaintiff, as in ordinary cases of partial payments under the statute. *Mansf. Dig. § 4758.*

4. EQUITY—JURISDICTION—RUNNING ACCOUNT.

The subject of controversy being a complicated, disputed, mutual account current, covering a period of 18 years, the transfer of the case to equity was properly made.

Appeal from circuit court, White county, in chancery; M. T. SANDERS, Judge.

Yarnell et al. sued one Rogers for an accounting. Defendant appeals from the decree.

W. B. Coody, for appellant. J. N. Oypert and Saunders & Watkins, for appellees.

COCKRILL, O. J. The subject of controversy was a complicated, disputed, mutual account current, covering a period of 18 years. The transfer to equity was not therefore error. *Trapnall v. Hill*, 31 Ark. 345; *Conway v. Reyburn*, 22 Ark. 301; *State v. Churchill*, 48 Ark. 426, 3 S. W. Rep. 352, 880. The Yarnells have prosecuted no appeal, and our inquiry is limited to the errors complained of by Rogers. The master's report of the allowance against him of items of the account, to which he excepted, is sustained by the proof, and it is useless to recount it. The only questions presented by the appeal that are worthy of consideration are whether the account, or any of its items, bore interest, and, if so, on what part, at what rate, and for what time. To decide these questions it is necessary to understand what was the agreement between the parties, and, if there was no express agreement, what must have been understood to be the contract between them about interest. It is the rule in this state to allow interest on open accounts after the term of credit

has expired. *Roberts v. Wilcoxson*, 36 Ark. 355; *Railway v. Donnelly*, 46 Ark. 87; *Tatum v. Mohr*, 21 Ark. 355. And according to common custom, accounts between farmers and merchants are due annually. *Higgs v. Warner*, 14 Ark. 192. But if the dealings of the parties show that they have not been conducted with reference to such a custom, there is no presumption that the accounts mature annually.

The facts in this case are in substance as follows: The Yarnells were merchants at Searcy, in White county. Rogers kept his office in their counting-room, and was engaged in money-lending and farming; the latter business being carried on mainly by his tenants, who drew their supplies from Yarnell's store, upon Rogers' credit. He also had an account with the Yarnells for goods and merchandise furnished himself. The Yarnells borrowed money from him from time to time. The proceeds of crops raised on Rogers' lands or due from his tenants were turned over to them year after year, to be credited on the account, while Rogers sometimes got advances of cash from the Yarnells, to aid him in his operations. The account was opened on the Yarnells' books in 1871. The items of debit and credit were entered as one continuous account, without rest or balance, until it was closed, by a cessation of dealings, in 1884. The only effort at a statement of the account was a footing of the total debits and credits at the bottom of each page, which were carried forward at the top of the next, regardless of the dates and years, and from which an approximate idea of the shifting balances might be obtained at any time. Rogers kept no account of the transactions, but had constant access to Yarnell's books, and the proof shows that he availed himself of the opportunity to examine them when he desired. It does not appear that any communication which would shed light upon the questions under consideration ever took place between the parties respecting the account from its commencement to its close. Occasionally a charge or credit of interest upon a cash advance appears in the account, and the evidence shows that these items were probably agreed upon at the time of entry. Rogers testified that it was not his intention to claim or charge interest on advances made by him except when he departed from the usual course of dealing, and took an evidence of indebtedness in the form of a note; and the Yarnells testified that when they gave a note they did not specify that it should bear interest after maturity, because they expected the indebtedness to be extinguished at maturity by the items of their account against Rogers.

The manner of keeping the accounts between the parties, acquiesced in for so long a time, shows a reciprocity of dealing, which is confirmed by the testimony above detailed. Charges upon the one side were evidently intended to be credited or set off *eo instanti* against the charges upon the other; and the account was permitted to run for mutual convenience, the balance to be paid by the party against whom, upon final adjustment, it should be found to exist. The delay in settlement was mutual and voluntary. There were strong reasons for it on both sides,—each was enjoying advantages offered by the other,—and until the dealings ceased, or one party was called upon to account, neither could claim a balance. Until such an event, the account was unsettled, the term of credit had not expired, and there was nothing upon which interest could be computed, either by virtue of an implied agreement or operation of law. Interest is allowed only when a debtor is in default. *Adams v. Bank*, 36 N. Y. 255. There was no foundation, therefore, for the basis of annual rests which the court fixed in its order of reference to the master for the computation of interest, or in the computation which was subsequently made by the court, when the report of the master was set aside, and the account restated. That would be proper only upon the hypothesis that the dealings of the parties indicated that it was their intention to strike a balance annually. See *Pickett v. Bank*, 32 Ark. 355, 356; *Langdon v. Castleton*, 30 Vt. 285; *Davis v. Smith*, 48 Vt. 53.

As a general rule interest is allowable on cash advances from the time they are made, though they rest in the form of mutual, current, unliquidated accounts. *Liotard v. Graves*, 3 Caines' Cas. 226; *Reid v. Renselaer*, 3 Cow. 393; 4 Wait, Act. & Def. 130. As we have seen, the parties did not so intend in this case. But there is no presumption of a want of intention to charge interest on the note for \$1,100, given for loan of money, which the court found entered into the mutual dealings of the parties, and for the amount of which Rogers was entitled to credit. By its terms the note bore 10 per cent. per annum before maturity, and thereafter, according to the established rule, 6 per cent. *Newton v. Kennerly*, 31 Ark. 626. The note was barred by the statute of limitations, unless it entered into the mutual account; and as Rogers can recover upon it only upon the theory adopted by the court, and which the Yarnells have not undertaken to controvert by prosecuting an appeal, it follows that the items of the account which are demands in favor of the Yarnells against Rogers should be applied to the payment of the interest and principal of the note after first extinguishing the earlier demands of Rogers against Yarnell, as in ordinary cases of partial payments under the statute. Mansf. Dig. § 4738. The very essence of a mutual account current is that the indebtedness on one side, at the instant of its creation, liquidates *pro tanto* the subsisting indebtedness on the other. *Higgs v. Warner*, 14 Ark. 192; *McNeil v. Garland*, 27 Ark. 343.

The decree of the circuit court is reversed and a decree will be entered here when the account is restated. The account will be referred to W. P. Campbell, as master, for a statement of the balance due. He will take the account as kept between the parties as a basis, deduct therefrom the items that were disallowed by the chancellor on hearing the exceptions to the master's report, give Rogers credit as allowed by the chancellor for \$1,100 and interest at 10 per cent. per annum from the date of the note executed by Yarnell, for that sum until its maturity, and 6 per cent. thereafter until it is extinguished by charges against Rogers, the credit to be entered as of the date of maturity. He will compute no interest upon any other item of the account, but take the items as stated in the account after the corrections made by the chancellor, allowing the several cross-demands to operate as payments *pro tanto* from their respective dates, and strike the balance. Interest will be computed on that balance so found from the 1st day of January, 1885, to the confirmation of the report and entering of the final decree herein.

STATE, to Use of BENTON COUNTY, v. WOOD.

(Supreme Court of Arkansas. February 3, 1889.)

1. BONDS—ACTION ON COUNTY TREASURER'S BOND—OBLIGEE.

It is no defense to an action by the state to the use of a county, on a county treasurer's bond, that the bond names no obligee; the conditions of the bond being that the treasurer shall well and truly account for and pay over all moneys coming into his hands by virtue of his office. The requirement of Mansf. Dig. Ark. § 1187, that the treasurer shall execute a bond to the state, is not a matter of substance; the statute merely contemplating that the state shall stand as trustee for the parties beneficially interested.

2. SAME—STATE PARTY PLAINTIFF.

Under section 1067, allowing the state to sue for the use of the county where the latter has a demand to be enforced, the state is a proper party plaintiff in an action to compel the treasurer to replace in the county treasury money never legally drawn therefrom.

3. SAME—BREACH OF BOND.

It having been made to appear that the county court, upon its settlement with the treasurer, found him in default for funds of the county which had been lost by the failure of a local bank in which he had deposited them, and charged him with the amount, a sufficient breach of the bond was shown; the settlement being conclusive as to the state of his accounts.

Appeal from Benton chancery court; J. M. PITTMAN, Judge.

Action by the state, to the use of Benton county, against Wood and others, on a county treasurer's bond. Judgment for defendants, and plaintiff appeals. *J. Frank Wilson and E. P. Watson*, for appellant. *L. H. McGill*, for appellees.

COCKRILL, C. J. It is argued with great earnestness that the treasurer's bond which is the foundation of the suit is void, upon the ground that it names no obligee. The fallacy lies in the assumption that the obligation has not been assumed by any one.

A bond is construed like any other contract or instrument of writing,—it is enough that the intent plainly appears, though it be not fully and particularly expressed. *Partridge v. Jones*, 38 Ohio St. 375. "If ever there was a time," says the court in the case cited, quoting from another case, "when courts listened to trivial and verbal inaccuracies in contracts when the real meaning and intention of the parties was plain, that time has gone by; and the only object of the court is that, when the meaning and intention of the parties are perfectly plain, no grammatical inaccuracy, or want of the most appropriate words, shall render the instrument unavailing."

It was never regarded as necessary that the obligee in a bond should be specified *eo nomine*. It was enough if he was so designated that he might be certainly ascertained. *Preston v. Hull*, 12 Amer. Law Reg. (N. S.) 699, and note; *Fellows v. Gilman*, 4 Wend. 419. It needs no statute to enable an officer to give a valid bond for the faithful payment of money that may come to his hands, and, if we regard the bond in suit as a common-law obligation without looking for aid to the statute which the parties undertook to follow in drafting it, it will be seen that the fair import of the language used is that the bond was intended for the benefit of all whom it might concern; that is, any one who should be injured by the treasurer's official delinquency. The bond, among other things, provides that the treasurer shall truly account for and pay over all moneys coming to his hands by virtue of his office, and the principal and sureties, by the terms of the bond, bound themselves to the faithful discharge of this duty. The obvious intention of this was to protect and give indemnity to all persons who might be damnified by the officer's neglect legally to keep and pay out the public funds. That is the primary object of all such bonds. *Huffman v. Kopplekom*, 8 Neb. 347, 1 N. W. Rep. 248; *Crook Co. v. Bushnell*, 18 Pac. Rep. 886. The condition which shows the design of the bond is the important requirement in such an undertaking, and when that is properly found, as it is conceded it was in this instance, "the naming of an obligee is," as Judge COOLEY expressed it in delivering the judgment for the supreme court of Michigan, "the merest formality possible, so that, if the instrument omitted to name one, * * * the substance of the undertaking would still remain." *Bay County v. Brock*, 44 Mich. 45, 6 N. W. Rep. 101. The substance remaining, how can the bond be void for informality?

A bond, upon the condition that an officer should make amends to every person who should be injured by his breach of official duty, was enforceable at the suit of any one who was damaged by his official default, when the rules of procedure required that only the party in whom the contract vested the legal interest could maintain an action on it. *Fellows v. Gilman*, *supra*. The reason is stronger for its enforcement, since the change in the law enables the party for whose benefit the contract was primarily executed to sue in his own name. *Hunnicut v. Kirkpatrick*, 39 Ark. 172; *Hecht v. Caughron*, 46 Ark. 192. And it is immaterial in such cases that the party beneficially interested is not mentioned in the instrument, but is undisclosed or unknown. Pom. Rem. § 177. There is, then, not even a technical objection to the enforcement of the bond in suit. The question was, simply, who should be per-

mitted to stand as plaintiff in the action, the state not being the party in whose name the contract was executed, nor the party in interest? The statute contemplates that the state shall stand as trustee for the parties who have the beneficial interest in such cases, as is evidenced by the requirement to execute the bond to her. *Mansf. Dig. § 1187*. This is not required as a matter of substance, but only as a part of the machinery of convenient administration, and it would impose no new condition upon the obligors to presume that it entered into their contract that the bond should be enforced the usual way. *County Treasurer v. Bunbury*, 45 Mich. 79, 7 N. W. Rep. 704. But aside from this consideration, another provision of the statute allows the state to become the plaintiff for the use of a county where the latter has a demand to be enforced. *Mansf. Dig. § 1067*. The object of this suit is to replace in the county treasury money which has never been legally drawn therefrom. The defaulting treasurer was still in office when this was instituted, and the county was the proper party to move in the matter. *Hunnicut v. Kirkpatrick*, *supra*; *Pettigrew v. Washington Co.*, 43 Ark. 33. Moreover, no objection was taken in the lower court to the state's capacity to sue. *Pettigrew v. Washington Co.*, *supra*.

It is argued that no breach of the bond is shown. At a regular annual settlement, the county court audited the treasurer's accounts, and upon counting the money brought into court by him found that he was in default. His excuse for not bringing the other funds into court, as he was required by law to do, was that the money had been lost by the failure of a local bank in which he had deposited it. The court refused, as it should have done, to allow him credit for the amount thus lost, but charged him with the full amount. These facts are made to appear from the county court's order of settlement. They show a failure to keep the public funds to be paid to those entitled to receive them. That was a breach of the bond. *State v. Croft*, 24 Ark. 550. The money was lost to the county, and the measure of damages was the amount found due by the county court, with legal interest from the date of auditing the account. That settlement concluded any further inquiry into the state of the officer's accounts. *Hunnicut v. Kirkpatrick*, *supra*; *Jones v. State*, 14 Ark. 170; *Wycough v. State*, 50 Ark. 102, 6 S. W. Rep. 598; *George v. Elms*, 46 Ark. 260. No issue was made against the recovery, except upon the points mentioned. These were technical and formal, rather than substantial. No objection was made upon the right to proceed in equity, and, according to the established practice, judgment should have been rendered for the plaintiff. *Freed v. Brown*, 41 Ark. 495; *Smith v. Hollis*, 46 Ark. 17.

The judgment of the circuit court is reversed, and judgment will be entered here in accordance with this opinion. It is so ordered.

EVANS v. ENGLISH.

(Court of Appeals of Kentucky. January 24, 1889.)

1. MORTGAGES—FORECLOSURE—ANSWER—DEMURRER.

To a bill to foreclose a mortgage defendant answered that at the time of its execution he was living on one of the tracts of land described therein as his homestead, and that he had refused to sign a mortgage embracing the homestead right; that the plaintiff wrote another mortgage, and handed it to him to sign, stating that it did not embrace the homestead right, which he signed without reading. *Held*, that a demurrer to the answer should have been overruled.

2. SAME—SETTING ASIDE SALE—FRAUD.

The plaintiff having become the purchaser at the commissioner's sale, for a price not exceeding a third of its value, and having by the demurrer admitted the fraud, will not, under the circumstances, be permitted to avail himself of the purchase, though in ordinary cases the sale would not be set aside.

3. SAME—ESTOPPEL BY DEED.

A recital in the mortgage that the agreement was between defendant, "party of the first part, of the city of L.," etc., does not estop him from saying that he was at that time living on his homestead in M., (the tract in question.)

4. APPEAL—REVIEW—PLEADING—OBJECTIONS WAIVED.

The demurrer to the answer having been sustained, the appellate court will not look into the record to see whether the answer was true or false.

Appeal from circuit court, Meade county; T. R. McBEATH, Judge.

Bill by J. H. English against D. C. Evans, to foreclose a mortgage, and for judgment on certain notes. Demurrer to answer sustained. Judgment for plaintiff, and sale had and confirmed. Defendant appeals.

John C. Walker, for appellant. *J. W. Lewis*, for appellee.

PRYOR, J. The demurrer to the answer filed by the appellant should have been overruled. The appellant was indebted to the appellee in a sum of money evidenced by note, and to secure the payment gave to the appellee a mortgage on the real estate in the city of Louisville, and on a tract of 100 acres of land in Meade county. In a suit to foreclose the mortgage, the appellant, by way of defense, said that at the time of its execution he was living on the tract of land in Meade, with his family of three children; was a *bona fide* housekeeper, and refused to execute a mortgage embracing his right to a homestead; that a mortgage was written and presented to him that passed the homestead right, and he declined to sign it for that reason; that the appellee then wrote another mortgage, handing it to him, and stating that it did not embrace this homestead right; that upon this representation of the appellee, and relying on it as true, he signed the mortgage without reading it, and did not know until this action was instituted but that the agreement had been in good faith carried out, and his homestead exempted from the operation of the mortgage; that the representation was made to deceive, and with the fraudulent intent to include the homestead within its terms. The demurrer was sustained to this answer, and the property sold. Exceptions were filed to the report of sale because the property was sold at a sacrifice. There is proof that the property was worth \$2,000, and it sold for not exceeding one-third of its value, and the homestead was purchased by the plaintiff.

If the facts alleged are true, the plaintiff should not be permitted to avail himself of the purchase under the circumstances. While an ordinary sale by order of the chancellor, under the proof in this case, would be sustained, although the plaintiff was the purchaser, when the fraud is admitted, as it is on demurrer, the purchaser, if a party to it, cannot avail himself of an advantageous bargain, and will not be protected by the chancellor. We are asked to look to the facts of the record with a view of determining whether the answer is true or false. This cannot be done, as the mouth of the defendant was closed as to his defense, by sustaining the demurrer to his answer. The mortgage recites that the agreement was entered into between the appellant, party of the first part, of the city of Louisville, etc. It is therefore insisted that the appellant is estopped from saying that he lived in Meade when the recital in the mortgage is that he is of the city of Louisville. The mortgage may have been written in Louisville, and doubtless was; but, whether so or not, the answer is express and positive in the statement that at the time of its execution the appellant was living with his family in Meade, and there is no such inconsistency between the recital in the mortgage and the statements of the answer as would preclude the defense.

The judgment is reversed, with directions to set aside the sale, to overrule the demurrer, and for further proceedings consistent with this opinion.

WILLIAMS *et al.* v. GAITSKILL'S ADM'R *et al.*

(Court of Appeals of Kentucky. December 20, 1888.)

LIENS—ENFORCEMENT OF EQUITABLE LIEN—PRIORITIES.

Land was purchased by A. under an execution against J. for much less than its value, and conveyed by A. to H. in consideration of the payment by H. of certain named debts, among them a debt to G., for which A. was liable as surety for J. H. gave his note for the debt to G., but, becoming bankrupt, never paid it. After commencement of a suit to enforce the lien of G.'s debt, H. conveyed the land back to J., who was also bankrupt, in consideration of payment by him of certain named debts owing by H., among which was the debt to G.; the deed reciting that a lien is retained to secure compliance with the conditions by J., "but it is not intended to give a lien to any one but" H. Held, that G. was entitled to a lien prior to the debts of H. mentioned in the last conveyance.

Appeal from circuit court, Montgomery county; JOHN E. COOPER, Judge.

Action by John Gaitskill against Josiah Anderson, P. A. Howard *et al.*, on a note executed to plaintiff by defendant Anderson as principal, and Howard and J. J. Anderson as sureties. Plaintiff sought judgment against defendants, and an enforcement of his alleged equitable lien on 400 acres of land, to secure payment of said note. Said lien was created by a conveyance of said land by J. J. Anderson to P. A. Howard in consideration that Howard would pay certain debts for which Anderson was bound, Gaitskill's being one of them. After this suit was commenced, Howard conveyed the said land to Josiah Anderson, on condition that the latter would pay certain of Howard's debts, Gaitskill's being mentioned as one of them. This last conveyance also obligated Josiah Anderson to pay an alleged note for \$400 due to Williams & Trimble. Pending these proceedings, the land was sold, and, as it did not bring a sum sufficient to pay both Gaitskill's and the Williams & Trimble claim, judgment was entered in favor of Gaitskill, ordering the whole of the proceeds of sale paid to Gaitskill and certain other creditors of the same class. Of this judgment Josiah Anderson and Williams *et al.* complain, and prosecute this appeal. Gaitskill having died, the suit is now pending against his administrator.

Cornelison & Mitchell, for appellants. *B. J. Peters* and *W. H. Holt*, for appellees.

PRYOR, J. A tract of 400 acres of land was purchased by J. J. Anderson under an execution against Josiah Anderson, for much less than its value. In November, 1872, J. J. Anderson conveyed this land to P. A. Howard, in consideration that he (Howard) would pay certain debts therein named, and among them a debt to John Gaitskill for several thousand dollars. These debts J. J. Anderson was liable for as the surety of Josiah Anderson. Howard gave his notes for some of the debts, among them the debt to Gaitskill, but never paid it, and became a bankrupt. A suit was then instituted to enforce a lien on the land for the Gaitskill debt and other debts secured by the deed to Howard. Howard, in December, 1874, conveyed the land back to Josiah Anderson in consideration that Anderson would pay certain debts upon which Howard was bound, naming them, the debt to Gaitskill being one of them. The deed from Howard to Anderson recites that a lien is retained to secure a compliance on the part of Josiah Anderson, but it is not intended to give a lien to any one but Howard. Josiah Anderson had become a bankrupt shortly before the reconveyance was made to him by Howard, and it is not pretended that the Gaitskill debt has been paid. This debt was a lien by the deed of 1872, and also a lien by the deed of Howard to Josiah Anderson, and Josiah Anderson, the appellant here, or his assignee, is now claiming the absolute right to the land, without having complied with his agreement with Howard. It is not necessary to comment on the facts of

this case. The execution of the note to Williams & Trimble that has never made its appearance, and the obligees, or one of them, ignorant of the fact that such a note was in existence; the relation of the parties who are antagonizing the claim of Gaitskill in this case towards each other, and the peculiar nature of the lien reserved in the deed by Howard,—leave but little room to doubt the real purpose of this reconveyance. The judgment below is affirmed.

HOLT, J., not sitting.

WILHITE'S ADM'R v. BOULWARE *et al.*

(Court of Appeals of Kentucky. January 24, 1889.)

1. MORTGAGES—LIEN—PRIORITIES—LIEN OF DEBT TO PARTNER.

Members of a partnership purchased land, each taking an undivided interest by separate conveyance, paid for out of his own funds. The property was used for the partnership business, and after it ceased each used and enjoyed his undivided interest for his own benefit, and mortgaged it to secure his individual liabilities. *Held*, that the surviving partner's interest was not impressed with an equitable lien for the balance due the deceased partner, as against a mortgagee of the survivor's interest for the latter's individual debt.

2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

In an action by the administrator of the deceased partner to enforce the alleged lien for the balance due his intestate, the survivor is a competent witness in reference to the *status* of the real estate, as it is not properly testimony in his own behalf, his personal liability for the balance being neither increased nor diminished thereby; the contest, as to the *status* of the property, being between plaintiff and the survivor's mortgagee.

Appeal from circuit court, Daviess county; L. P. LITTLE, Judge.

Thomas A. Martin, for appellant. W. N. & J. J. Sweeney, for appellees.

BENNETT, J. The appellant, as the administrator of W. M. Wilhite, brought this action in equity in the Daviess circuit court against the appellee C. Boulware, as the surviving partner of the appellant's intestate, for the purpose of obtaining a settlement of the partnership, which consisted in distilling whisky in Daviess county, Ky., and subjecting the alleged partnership property, consisting of nine acres of land, and distillery and fixtures thereon, to the payment of the balance that the firm of Boulware & Wilhite was indebted to said Wilhite.

The appellee C. Boulware, in his answer, denied, among other things, that said property was partnership property, but he and Wilhite owned each an undivided half of said property in common; that he had mortgaged his undivided half to the Deposit Bank of Owensboro. Thereupon the Deposit Bank was made a defendant. The bank, in its answer, set up its mortgage on said property, and claimed that it was not partnership property, but was held by the members of said firm, Boulware & Wilhite, as tenants in common; and also, if it should turn out that the property was in fact partnership property, it at the time it took the mortgage had no notice of that fact. Afterwards the bank instituted its action against C. Boulware, and M. Boulware, his surety, on the note executed by them to the bank, and also sought to enforce its mortgage lien upon said property. That action was consolidated with this one. Thereafter M. Boulware paid off said debt, and the bank, in consideration thereof, assigned to him said note and mortgage. He then claimed that he should be subrogated to the lien of the bank upon said property. The lower court gave personal judgment against the appellee C. Boulware, for one-half of the balance found due to the estate of W. M. Wilhite by the firm of Boulware & Wilhite, but refused to allow said sum as a superior lien to that created by the mortgage in favor of the bank. The administrator has appealed to this court.

The principle is universally recognized that at law real estate owned by a partnership, even if purchased in the name of the partnership, and with partnership funds, is held by the members of the firm as tenants in common, and is subject to all the incidents of land held in common. But in equity the partners may, by agreement express or implied, impress real estate, which by law they owned in common, with a trust as partnership property, and render it in equity subject to the rules applicable to partnership property. Real estate may be thus impressed in equity in the interest of commerce, whereby an equitable trust is separated from the legal estate. The latter is held and passes according to the law that controls such property held in common; the former is held subject to the rules of personal property held in partnership. The trust or equitable lien impressed upon such real property is for the benefit of the partners alone, with the exception of such third persons as may be equitably entitled to be subrogated to the rights of one partner as against the other.

It must, however, always be understood that the basis of this equitable trust or lien is the agreement and intention of the partners, which may be either express or implied. The agreement to hold such estate as partnership property may be expressed in the articles of partnership, or in the writing evidencing its purchase, or verbally. The agreement may be implied from the circumstances of the purchase, and the conduct of the parties. If the land has been bought with partnership money, and has been brought into the business of the firm, and used for its purposes, it will be considered as partnership property; but even in this case it may be shown by distinct evidence that it was the intention of the members of the firm to hold it as real estate, in which each should have his interest in common with the others. On the other hand, if the real estate was not paid for with partnership funds, but each partner purchased his interest and paid for it with his own funds, the presumption from these conditions arises that the parties did not intend to hold it as partnership property, but as real estate, subject to all the incidents of a tenancy in common. This presumption, however, is rebuttable.

By applying the facts to the foregoing rules, it will be seen that the real estate in question was not impressed with an equitable lien in favor of the appellant's intestate over that acquired by the mortgage. The facts are that the real estate was not purchased with partnership funds; that each partner held his undivided interest in the land by a separate conveyance; that after making whisky one season, which ended in the spring of 1882, the partners, as a firm, ceased to make any more, and the appellant's intestate that summer sold his half of the whisky to Thixton & Slaughter, and the appellee C. Boulware retained his half; that said intestate that summer rented his half of the land, distillery, and fixtures to Thixton & Slaughter for the purpose of making apple brandy, and the appellee subleased said half interest from them for the term of three years, and paid the intestate rent therefor; that the intestate in August, 1882, mortgaged his undivided half interest to Monarch, etc., to secure his individual liabilities; that in 1884 the appellee mortgaged his half interest to Calhoun, etc.; in 1885 he mortgaged the same interest to the bank.

So we have the fact that each partner held his undivided interest in said property by a separate conveyance, which interest was paid for out of his own funds, as creating the presumption that the property was held and owned as real estate, and not as partnership property. We have the further fact that each partner, after the partnership business ceased, used and enjoyed his undivided interest in said property for his exclusive use and benefit, and mortgaged it as security for his individual liabilities; thereby treating his interest as real property, not impressed with the trust or equities of partnership property.

It is also contended that C. Boulware was not a competent witness in his own behalf against his deceased partner. So far as his testimony was given

in his own behalf in relation to the state of the partnership accounts between him and his partner, the objection was well taken; but these matters of account were settled by the chancellor, and there is no serious contention about them here. His testimony, however, in reference to the *status* of the real estate, was not properly testimony in his own behalf, because his personal liability for one-half of the balance found due the intestate's estate was neither increased nor diminished by the decision of that question; nor was his property relieved from the burden of a lien by the decision of the question. The decision of the question in favor of the bank increased the lien burden. The contest in reference to the *status* of the property was between the appellant and the appellees, M. Boulware and the bank. They, beyond all question, were entitled to C. Boulware's evidence.

The judgment is affirmed.

KING v. OHIO VAL. R. CO.

(Court of Appeals of Kentucky. January 24, 1889.)

1. APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.

The supreme court of Kentucky will not refuse to consider an appeal from the circuit court on the ground that no order was entered on the record of the latter court refusing appellant's motion for a new trial, where the bill of exceptions filed in that court recites that such motion was refused, and that appellant excepted thereto.

2. JUDGMENT—ENTRY—RES ADJUDICATA.

Where the evidence shows that a judgment was entered in conformity to an oral agreement of the parties not made in open court, such judgment is binding, though one party was not in court at its rendition, and had no notice thereof until after expiration of the period allowed for appeal.

Appeal from circuit court, Union county; MCGIVENS, Judge.

Ken. Chapeze, for appellant. *Hughes & Hughes*, for appellee.

HOLT, J. The appellee, the Ohio Valley Railway Company, being authorized by its charter to do so, instituted proceedings in the county court under the general law of April 11, 1882, (Gen. St. 281,) to condemn a right of way through the land of the appellant, Lou King. After the commissioners had filed their report, but before its confirmation, the agent of the appellee and the appellant by way of compromise agreed that it was to be treated and considered as amended in certain respects. They now differ as to the extent and character of the modifications then agreed upon by them. The appellant also claims that by the agreement the prosecution of the proceeding was to cease, and nothing more was to be done until the time arrived, when she was to be paid the agreed compensation for the right of way. Upon the other hand, the appellee claims that the proceedings were at once to progress, the appellant not making any resistance by reason of the compromise as to the commissioners' report. The agreement was verbal, and not made in court. The appellee, acting upon its understanding of the matter, thereafter obtained a judgment, which recites that it is a consent one, and which conforms to its version of the agreement. The appellant was not in court, either in person or by attorney, when it was rendered, and had no notice or knowledge of it until more than 30 days, the period allowed for an appeal in such a case, had elapsed. She thereupon, and before the second term of court after the discovery, filed a petition in the county court for a new trial. This was authorized by sections 344 and 700 of the Civil Code. Issues were formed, and upon hearing the county court dismissed her petition. She appealed to the circuit court, where the matter was heard *de novo*, and it affirmed the judgment of the lower court.

It is urged that we cannot consider her appeal to this court, because no order was ever entered upon the record in the circuit court overruling her mo-

tion for a new trial. The bill of exceptions filed in that court, however, recites that it was done, and that she excepted to the ruling. We will not therefore refuse her relief upon this ground.

Conceding that the appeal from the county court to the circuit court of the action for a new trial in effect brought up the entire case; also that the latter court had appellate jurisdiction of the proceeding, and that the circuit court had a right to hear the evidence, and try it *de novo*, as it did do, and that a bill of exceptions from the county court was not required, and the circuit court not confined by law to hearing it upon the record from the lower court, —yet it is manifest that the judgment which was rendered in each court was sustained by the evidence. So that, considering the case as presented by the appellant herself in the circuit court, she was entitled to no relief as against the judgment of condemnation. It was entered, as the decided weight of the testimony shows, in conformity to the agreement of the parties. It is true, it was oral, and not entered into in open court. But the judgment embodies the contract of the parties as to what it should be, according to the burden of the evidence, and is therefore binding. If the appellee has failed to comply with it, it can be made to do so.

Judgment affirmed.

MAGOWAN *et al.* v. McCORMICK.

(Court of Appeals of Kentucky. January 26, 1939.)

TRUST—SALE OF TRUST LANDS—FORM OF DECREE—LIEN.

Gen. St. Ky. c. 118, § 23, provides that a purchaser of land sold under a trust is not bound to look to the investment of the purchase money "unless so expressly required by the conveyance or devise." A testator devised lands to his son for life, remainder to his children, and gave the son power to sell the lands and invest the proceeds in other land, "to pass in the same way," and provided that "the purchaser must see to the investment of the purchase money, or the lands * * * must be held responsible." *Held*, that where a chancellor, on application by a purchaser of such land from the son, orders a conveyance of the land to the purchaser, and the investment of the proceeds in other lands, he should retain a lien on the land sold, until the investment is made.

Appeal from circuit court, Montgomery county; J. E. COOPER, Judge.

Bill by B. F. McCormick against Jennie B. Magowan and others, children of James A. Magowan, and against James A. Magowan's trustee, to secure specific execution of a trust. Decree for complainant, and Magowan's children appeal.

Peters & Tylers, for appellants. *Wood & Day*, for appellee.

PRYOR, J. James P. Magowan died in the county of Montgomery, leaving a last will and testament, with his widow and several children surviving him. Under this will his children held the land devised to them for life, remainder to their children, etc., with the power on the part of his children to sell the land devised to each. He had a son, James Asa Magowan, who is now dead, leaving his widow, and several children, who are infants, and defendants to this proceeding. The power conferred on each child—naming them—to sell his or her part of the land devised, is in this language: After giving the land to Asa Magowan for life, remainder to his children, the testator proceeds: "If my said son, James Asa Magowan, should be of the opinion that it would be to his interest to sell said lands, or any part thereof, he has full authority and power to do so, provided the proceeds of said sale be invested in other lands, and the title thereto be so taken as to secure to him a life-estate in said lands, and upon his death said lands pass to the same person, and in the same way, that the lands herein given him are to pass; and the purchaser must see to the investment of the purchase money, or the lands here given my said son by me

must be held responsible." On the 2d of January, 1885, James Asa Magowan, by a regular conveyance, conveyed this land, or a part of it, devised to him, to the appellee, B. F. McCormick, and put him in possession. The parties Magowan and McCormick knowing the provisions of testator's will in this regard, by an agreement made at the time between them, McCormick deposited the first payment in a bank at Mt. Sterling until James Asa Magowan could make the investment as required by his father's will. Magowan, by reason of bad health, became unable to attend to business, and by a certain deed of trust attempted to empower James W. Brooks to make the investment for him; and, Magowan becoming both mentally and physically unable to make the investment, or to ratify it when made, the purchaser, McCormick, has gone into a court of equity for relief, asking the chancellor to execute the trust conferred on the son by the testator. It is manifest from the provisions of the will of the testator that the purchaser, McCormick, is entitled to have the contract enforced, and equally certain that the children have a lien on the land sold McCormick to secure the investment of the purchase money in other land. No investment has been made, but a conveyance under the order of the chancellor made to McCormick, the latter having paid all the purchase money into court. The chancellor has directed the investment made; and, as none has been made, and the money loaned out, it might be insisted that the confirmation of the sale by the chancellor, in the event the money is lost, releases the land conveyed the purchaser from the lien retained by the will to secure the investment, and this may be the cause of complaint by the children, who are all infants, but who appear in this court without any brief or an assignment of errors. The object of the testator was to secure these children, by having their money invested in land, and to secure this the testator requires the purchaser to see to it that the investment is made. By section 23, c. 113, Gen. St. tit. "Wills," a purchaser is not required to look to the investment of the purchase money for land sold under a general or special trust, unless so expressly required by the conveyance or devise." The trust is required to be executed by the trustee and the purchaser, or the latter at least remains bound until the investment is made. When the chancellor undertakes to execute the trust he should retain a lien until the investment is made; and if the purchaser wants to pay the money into court, let it be loaned out as his money, and not that of these infants.

The judgment rendered may have the effect of releasing the lien, and for that reason it is reversed and remanded, with directions to so amend the judgment or order as to retain a lien on the land sold McCormick until the investment is made and approved by the court. If the investment has already been made, there will be no necessity of modifying the judgment.

MASONIC SAV. BANK v. BANGS' ADM'R *et al.*

(Court of Appeals of Kentucky. January 24, 1889.)

1. INTEREST—CLAIMS OF PARTNERSHIP AGAINST DECEDENT'S ESTATE.

On the death of a partner insolvent, who had used large sums of the firm's money for private purposes, the surviving members presented a statement of the amounts so used, as shown by the accounts, including charges of interest. The claims, especially the interest, being disputed, a sum was agreed on, with the stipulation that no additional sum should be allowed unless presented within 30 days. Afterwards additional claims were presented. *Held*, that interest should be allowed on the additional claims as on all other claims against the decedent's estate of the same character.

2. SAME—ON ACCOUNTS BETWEEN PARTNERS.

The rule that interest should not be allowed on partnership accounts until after a balance is struck, on a settlement between the partners, has no application where a partner has withdrawn greatly more than he was entitled to from the firm assets, applying it to his own use, to the detriment of his co-partners.

8. EXECUTORS AND ADMINISTRATORS—PAYMENT OF DEBTS—OVERPAYMENT.

It having been shown that the commissioner, in making distribution of the assets of the decedent's estate, converted into money, had paid more to the other creditors in proportion to their demands than to the firm, the court ordered the commissioner to first make the firm equal in the *pro rata* distribution of any other assets collected. *Held*, that this was not such a final order as would preclude the firm, upon ascertaining that the undistributed assets were insufficient to make it equal, from compelling the other creditors to refund.

Appeal from Louisville chancery court; I. W. EDWARDS, Chancellor.

Settlement of the insolvent estate of John B. Bangs, deceased. From a decree allowing interest on the claim of Morton & Co. the Masonic Savings Bank, a creditor of Bangs, appeals; also a cross-appeal by Morton & Co. from an order directing distribution.

Helm & Bruce, for appellant. *John K. Goodloe* and *John Roberts*, for Morton & Co.

PYOR, J. This action involves the settlement of an insolvent estate, and the distribution of the assets between creditors. The decedent, John B. Bangs, was a member of the firm of John P. Morton & Co., and had been for a number of years. At his death the surviving partners were John P. Morton, Alexander Griswold, and H. M. Griswold, who continued the business after the death of Bangs without any settlement of the partnership business. The capital invested belonged to John P. Morton and the net profits were divided between the partners; the two Griswolds owning one-fourth, Bangs one-fourth, and Morton one-half. An approximate statement of the value of the stock of the firm was made, and a statement of the accounts of Bangs with the firm, with a view of showing his indebtedness. They were engaged in selling books, stationery, binding, etc., and did a large business. During the existence of the partnership, Bangs, who was the active partner of the firm, drew largely upon its assets for his individual use, and used the firm name in obtaining money that was applied to his individual purposes. The estate of Bangs was indebted to the firm upon the statement made in a sum exceeding \$34,000, the most of which consisted of the appropriation of money to his own use over and above his part of the profits during a period of nearly 20 years. The personal representative of Bangs protested against the statement of accounts made out against his intestate by the surviving partners, particularly the charge of interest, that swelled the account to the amount claimed, conferred with Morton & Co. on the subject, and the result was a compromise, that was confirmed by the chancellor on the 17th of December, 1876, by which the indebtedness of Bangs was reduced to \$28,645.

The agreement was in writing, and contains this clause: "But this agreement is not to prevent the surviving partners from proving and claiming any additional indebtedness arising to them out of the partnership, not entering into the claim already filed, provided they do so within 30 days from this date; and provided, further, upon their failure to prove or claim any additional indebtedness, not included in their accounts already filed within 30 days from this date, then the foregoing sums are to constitute the entire indebtedness from said estate to them as the surviving partners, and no additional claim shall ever be presented by or allowed to them, or either of them, on account of said late partnership."

After this compromise it was ascertained that Bangs had drawn from the firm, or used the firm's name in obtaining, \$2,000 at one time, and about \$10,000 at another time; and these sums, the firm having to pay, were presented as additional claims, and about which there is no controversy, except as to the question of interest. The administrator of Bangs qualified on the 9th of August, in the year 1884, and the claims against the estate, where no written promise to pay appeared, were all made to bear interest from that day. Where there were written obligations to pay, those written promises

controlled, of course, the question of interest. So the commissioner, the court below confirming his report, allowed interest on the claim of Morton & Co. as was allowed on other claims bearing no interest on their face. The Masonic Savings Bank, a creditor of the estate of Bangs, filed an exception to the interest allowed the firm of Morton & Co. on their account, and, the exception having been overruled, brings the case to this court. The appellant insists that the agreement of compromise embraced all claim for interest that had accrued before the compromise was made. The appellees contend that the agreement only fixed the indebtedness of Bangs to the firm at his (Bangs') death, simply reducing the claim from \$34,471 to \$28,645. The appellant also maintains that no interest should be allowed, for the reason that, under the rule with reference to the settlement of partnership accounts, it is not proper to allow interest until after a balance is struck on a settlement between the partners, unless there is a different agreement between them.

While this is the general rule, it is by no means universal, as there may be many reasons why, in certain cases, it would be unjust to refuse to charge interest against a partner who has withdrawn greatly more than he was entitled to from the firm assets, applying it to his own use, to the detriment of his copartners. It seems to us in the present case, as the insolvent estate is unable to pay its debts, the question is, would it be equitable to allow other creditors interest upon their claims from the time of administration, and deny the same to the appellees, whose claims are equally meritorious?

It is evident, from the manner in which this deceased partner handled and used the assets of the firm, that he would and ought to be charged with the interest on these large sums drawn out by him, and to which he was not entitled; and, unless the agreement of compromise settles this question, the judgment below should be affirmed. Here was certainly a delinquent partner using recklessly the assets of the firm for his own purposes, and such a case is an exception to the general rule, as settled by many reported cases. *Honore v. Colmesnil*, 7 Dana, 199; *Taylor v. Young's Adm'rs*, 2 Bush, 428; *Bowling's Heirs v. Dobyns*, 5 Dana, 434. "Except, however, where there has been a fraudulent retention or an improper application of money of the firm; it is not the practice of the court to charge a partner with interest on the money of the firm in his hands." 2 Lindl. Partn. 788.

The compromise may well admit of two constructions, but, when looking to the subject-matter of settlement, we think the intention of the parties can be readily ascertained. The firm of John P. Morton & Co. were claiming that the deceased partner was owing the firm at his death a sum exceeding \$30,000. The account was presented, and resisted by the administrator, resulting in a compromise by which \$28,645 was the sum agreed on, with the stipulation that no additional sum should be allowed unless presented within 30 days. The recitals in the agreement are that the claims of the surviving partners are reduced from the one sum to the other, and the less sum is substituted for the larger amount. Nothing was said about interest, and while the original claim of the firm included interest, and swelled the amount to a sum exceeding \$34,000, interest being charged both before and after Bangs' death, still that fact does not control the question in this case.

The chancellor to whom the compromise was submitted has construed the agreement as not determining the question of interest, and we think it plain that the parties were only fixing the amount due the firm by the deceased partner at his death; and besides, in a settlement of such an estate, to allow interest on all other claims of the same character, or coming within the same class, and denying interest on the claim of the surviving partners, because it originated from the partnership, would be unjust and inequitable, as between these creditors.

It seems that the commissioner, in making payments to creditors out of the assets converted into money, had paid more to the other creditors in propor-

tion to their demands than to John P. Morton & Co.; and, the attention of the court being called to that fact, the commissioner was directed to first make the firm equal in the *pro rata* distribution of any other assets collected; and the firm, conceiving that such an order might be final, has prayed a cross-appeal, alleging that the uncollected assets will not be sufficient to make them equal, and the order, if final, would preclude them from compelling the other creditors to refund. The order is not a final order. There has not been a complete settlement or a final distribution, and the order entered was proper; for, if the assets uncollected are sufficient to equalize the firm with the other creditors, it would be useless to compel the creditors to refund. It will be time enough to do this when it is ascertained that there is not enough left of the estate to produce the equality contended for.

The judgment below is affirmed on the original and cross-appeal.

ATCHER *et al.* v. SMITH.

(Court of Appeals of Kentucky. January 26, 1889.)

SPECIFIC PERFORMANCE—CONTRACT—TITLE OF VENDOR.

In an action to enforce a contract for the sale of land, plaintiff alleged that he owned seven-twelfths of the land, and had a life-estate in the remainder, owned by his infant children, who, with the vendee, were made defendants. The record, on appeal from a decree enforcing the sale on plaintiff's statement that it was for the children's benefit, and awarding him nearly all the purchase money, showed that he had no interest in the land except his curtesy, the deed to the entire tract having been made to his wife. *Held*, that the decree should be reversed, and the petition dismissed.

Appeal from circuit court, Hardin county; T. R. McBEATH, Judge.

Suit by William Smith against William Atcher and William Smith's infant children, to specifically enforce a contract for the sale of land to defendant Atcher. A decree was rendered directing Atcher to execute his notes for said land, payable nearly all of them to Smith for his interest therein, and the remainder to be payable to Smith's infant children. Atcher and Smith's children appeal.

Montgomery & Posten, for appellants. *R. L. Stith*, for appellee.

PRYOR, J. In this case the appellee, Smith, sold by title-bond to Atcher a tract of land containing 92 acres, Atcher executing his notes for the purchase money. Smith instituted his action making Atcher, and his (Smith's) children, who were infants, defendants, and asked that the contract be enforced; alleging that he owned in his own right seven-twelfths of the land, and his children five-twelfths, and that in his children's interest he had a life-estate, the title in them having been derived by descent from their mother; the chancellor sold the land under the statement that his sale to Atcher was for the benefit of the infants; and asking that the sale be confirmed, and the land sold for the purchase money.

An inspection of this record shows that the appellee, Smith, the father, had no title to any of the land sold, except his curtesy. The deed to the entire tract of land was made to his wife by her father, yet the contract with Atcher is enforced, and nearly all the purchase money awarded the father as his own, on the idea that he owned seven-twelfths of the tract, and had a life-estate in the remainder. This does not appear from the record. There is no evidence of title, verbal or written, to support such a claim, even if the chancellor had the power to enforce contracts of sale made by the father of the infants' real estate, instead of following the statute, where the rights of the infants in the sale of their real estate are fully protected.

This judgment is reversed, and remanded, with directions to dismiss the petition.

COMMONWEALTH v. GREEN.

(Court of Appeals of Kentucky. January 24, 1889.)

CRIMINAL LAW—TRIAL—EXAMINATION OF WITNESSES.

When the attorney for the state was concluding a case, he learned of an important witness near the place of trial, and told the court of his purpose to have him examined. The judge said that when the defendant was through he would determine the question. When the defendant was through, the state offered to examine the witness upon a material point, but the court declined to permit him, on account of laches. *Held* that, while the witness should have been permitted to testify, it was in the discretion of the trial court, and, a clear abuse of discretion not appearing, the case would not be reversed therefor.

Appeal from circuit court, Henderson county; M. C. GIVENS, Judge.

Indictment against Triplett Green for feloniously breaking into an out-house belonging to a dwelling, and stealing therefrom. The accused was acquitted, and the commonwealth appeals.

P. W. Hardin and J. H. Powell, for appellant.

PRYOR, J. This court, in a case like the one before us, can establish no definite rule by which the courts below are to be governed as to the number of witnesses to be examined as to any one point, or as to the right of a litigant by counsel to re-examine a witness in rebuttal or in chief, or to have called and examined a witness after the case is closed, who has not been examined by either party. Such questions are addressed to the discretion of the trial court, and, while that discretion is seldom abused, it sometimes happens that its improper exercise necessitates a reversal by this court.

In the present case the attorney for the commonwealth ascertained during the examination of a witness that the testimony of another in or near the place of trial was important for the prosecution, and announced to the court his purpose to have the witness brought into court and examined. As the attorney was about to conclude the case for the state, so far as the examination of the witnesses was concerned, the judge said the defendant could proceed, and when through he would determine whether the witness should be examined. When the defendant was through he offered to examine the witness to a point material to the prosecution, but the court declined to permit the witness to testify, as the county attorney knew what this same witness had testified to in the examining court, and, as the court held, was guilty of laches in not having the witness summoned.

While, under the circumstances, the court should have permitted the witness to testify, as there seems to have been no unnecessary delay caused by the action of the attorney for the state, and for the additional reason that his testimony was of vital importance to the prosecution, still the trial judge may have supposed, as we think the record clearly shows, that the commonwealth had made good its complaint, and there was therefore no necessity for further testimony, and for that reason closed the investigation.

The verdict, however, resulted in an acquittal, and, while the examination of the witness might have affected the result, we are not disposed to make this case a precedent upon which to base a rule governing the discretion of the trial court.

O'DANIEL v. O'DANIEL.

(Court of Appeals of Kentucky. January 29, 1889.)

1. EASEMENT—PRESUMPTION FROM USER—OBSTRUCTION.

In an action to compel the removal of obstructions from a private passway from plaintiff's land over the land of defendant, where it appears that the passway was plain at the time both parties bought their lands, and that it had been in use more than 50 years, and was the only passway from plaintiff's land, the presumption is that its use was under claim of right, and the burden is on defendant to show that the use was merely permissive.

2. SAME—ABANDONMENT OF CONDEMNATION PROCEEDINGS.

Dismissal without prejudice, before judgment, of a proceeding in the county court by plaintiff to condemn the route as a private passway, is no bar to his action to compel the removal of the obstructions.

3. SAME—EVIDENCE OF ABANDONMENT.

The fact that plaintiff's vendor had allowed other passways appurtenant to his land, but leading in another direction, to be closed, is no evidence of an abandonment of the way in question.

Appeal from circuit court, Marion county; W. E. RUSSELL, Judge.

Bill in equity by Sim O'Daniel against H. F. O'Daniel, to compel defendant to remove certain obstructions placed by him on a private passway through his land, which plaintiff averred he was entitled to use. Judgment for defendant, and plaintiff appeals.

Samuel Avritt, for appellant. *J. R. Thomas* and *Lewis Edelen*, for appellee.

PRYOR, J. This controversy between the appellant and the appellee arises from the use by the appellant, and those under whom he claims, of a private passway; the appellant alleging that its use has been obstructed by the appellee by placing logs and constructing water-gaps across the way, that prevent travel upon it. The chancellor is asked to have the obstruction removed that the appellant may exercise his right of passage over it. It is alleged that this passway has been used by the public and by the owners of the farm upon which appellant resides, under a claim of right, for more than half a century; that the use has been constant and continued by the vendors of the appellant and the appellant during this entire period, and is the only way from the farm of the plaintiff to the public highway and turnpikes leading to his county-seat; that this private way is appurtenant to his farm, and was at no time obstructed until the wrongful act of the defendant complained of, which occurred shortly before the bringing of this suit. The appellee admits the use, but insists that it was only permissive; that the passway used was up Hardin's creek, and, in building fences on either side of the creek, the owners of the land could not erect them near the water's edge on account of high water, and this left a space of 50 to 100 yards between the fences on each side, and this space has been used by the public for many years, not under a claim of right, but by mere permission, the road being changed from time to time in the space mentioned by the change in the channel of the creek, or by reason of high water. It is further alleged that the plaintiff (appellant) is estopped from asserting any right, as he applied to the county court of Marion to condemn this route as a private passway, and was defeated; that his vendors, who lived on the land, and from whom he derived title, had caused other passways to be closed up that were appurtenant to the premises, and, having done so, the appellant, having had possession of this land for a period of less than 15 years, cannot now assert his claim; that he advised the vendor of the appellee to close up the passway, and stood by when the water-gaps were made, without making any objection.

A man by the name of Beauchamp owned the land of which both tracts owned by the appellee and appellant are composed; and when he owned it,

which was in the year 1820, this passway was used by the public and by himself as a passway to the county-seat. Mills, Hayden, and Thompson, who were nearly 86 years of age when they testified, say that this way in dispute was located in or near the branch when they were boys, and the land fenced on either side; that it was used as a passway from this land, and by the neighborhood, before Marion county was formed. Beauchamp sold this land in the year 1820 to William Russell and William Mudd, Russell purchasing the one farm, and Mudd the other. The two farms adjoin and border on the creek; and divers witnesses, all of whom are uncontradicted, say that this passway has been used by these farms during the entire period. Some of them, being old men, state that its use extends as far back as they can recollect, and has remained uninterrupted, except the slight changes that would now and then be made by reason of the high water. Fences were all the time on either side of the creek, at least for 30 years; and the constant use of the passway is not in fact controverted. It does appear that a passway from the farm of appellant leading down a branch called "Meat Home Branch" to the Lebanon and St. Mary's road was stopped up by the consent of the owner of the land upon which appellant now lives, prior to appellant's purchase; but this outlet, while it led to the county road, was not in the direction of Lebanon, but was a convenient outlet when going in the opposite direction. The closing of this passway is no evidence of the abandonment of the way up Hardin's creek, nor was the closing of the lane, through which a wagon could not pass, leading in the direction of the Cecil pike, an estoppel. It plainly appears that the passway in the creek bordering on the land owned by the appellant and the appellee was the only direct passway from appellant's farm to his county-seat, and had been for half a century. It also appears that when the present passway was closed by the appellee it left the appellant with no outlet whatever from his home to the county road; and, if constant use for so long a period can give a claim of right such as is urged here as belonging to the plaintiff, it seems to us this passway should be opened.

The proceeding in the county court, by which an effort was made to condemn this route for a passway, is no bar to this action, because the proceeding, before judgment, was dismissed without prejudice; the appellant preferring to seek his remedy in a court of equity. There never was any abandonment of the use, or act done by the appellant that would estop him from asserting this right.

It is argued that there was never any assertion of right by those who traveled over this passway but such as consisted in its use, and it must therefore be presumed the use was merely permissive. We cannot concur in such a conclusion. When appellant purchased this land the passway from the farm to the county-seat was plain and unmistakable, and when appellee purchased his farm, it was equally as manifest, and there was no reason for inquiring as to the duration of the time the passway had been used. It was the only passway; and while its use for a less time than 15 years conferred no right, the appellant could at his peril rely upon its use for so long a period as to make it appurtenant to his farm, and as vesting in him the right of way. At common law, the long enjoyment of an easement gave the right to the easement; and the use, continuing undisturbed for 20 years or longer, when unexplained, created the presumption that the claim or use was adverse. Under our statute of limitation the continued use for 15 years, unexplained, would create the presumption as to the right; and in this case the use for more than half a century certainly establishes the right to the passway, and it was not necessary to show by positive testimony that the appellant had claimed this use as a matter of right, and so proclaimed to his neighbors. The burden was in fact on the defendant, (appellee,) after such a long user of his premises, to show that the use was merely permissive.

The case of *Bowman v. Wickliffe*, reported in 15 B. Mon. 84, is relied on

by counsel for the appellee. In that case the passway was through uninclosed woodland, and in this same wood divers other passways ran that had been changed and stopped from time to time by the owner at his pleasure. "Besides," says the court, "it is perfectly evident that the use of this passway was at no time, or not until within a few years past, claimed as a right, but was regarded by all parties as a mere privilege allowed by the owners of the land, which they had a right to withdraw at pleasure." The necessity for this passway from the farm of the appellant, and its constant use for so long a time by its occupants, undisturbed, until a few years since, is convincing that the appellant and his vendors claimed the right to use this passway as their own, and against the wishes of the appellee. It followed the land, and was indispensable as an outlet to the enjoyment of the premises, and, having been used from time immemorial, the grant to the use should be implied.

The judgment below is reversed and remanded, with directions to require the appellee to remove the obstructions, and for proceedings consistent with this opinion. See *Thomas v. Bertram*, 4 Bush, 817.

ORR'S ADM'R v. ORR'S EX'R.

(Court of Appeals of Kentucky. January 26, 1889.)

1. GIFT—INTER VIVOS—PRESUMPTIONS—RESULTING TRUST.

A claim was filed by an administrator of a deceased wife against her husband's estate, for money advanced by her to him in their life-times. It was alleged that in 1858 she allowed him to use her money in the erection of a house on his land, under the agreement that it should belong to her, and descend to her heirs. When her husband died, in 1886, he devised no part of his estate to the claimant, who was his wife's only heir, she having died in 1878. There was evidence that testator, about the time the house was built, stated that he received the money under the agreement as alleged. No demand was made for the money until the claim was filed. *Held* that, in view of the long period of acquiescence by the wife and her representative, the evidence was insufficient to rebut the legal presumption that the money was a gift, and not a loan.

2. EXECUTORS AND ADMINISTRATORS—AUDITING CLAIMS.

It is not essential that such a claim be presented to the executor before it can be audited and allowed in a suit to sell realty to pay debts of the testator.

Appeal from chancery court, Bracken county; J. W. MENZIES, Chancellor. Suit in equity by the executor of William W. Orr, deceased, against his heirs, devisees, and creditors, to settle his estate. From an order refusing a claim presented by John G. Lyon, administrator, etc., of Amanda G. Orr, deceased, said Lyon appeals.

J. R. Minor, for appellant. J. B. Clark, for appellee.

Lewis, C. J. William Orr having died in 1886, leaving a widow, but no children, the executor brought this action for a construction of the will, and division accordingly of the residue of the estate left after payment of debts against it, to do which it appears a portion of the realty will have to be sold; and an order was made referring the action to the master commissioner of the court to settle with the executor, report the personal and real estate, and debts proved and allowed against the estate.

At the April term, 1887, the commissioner reported, amongst other matters, that a claim against the estate for \$4,800 had been filed by the administrator of Amanda G. Orr, deceased, the question of allowing which was referred to the court. Thereupon the executor filed both a general and special demurrer, and also moved to dismiss and disallow the claim, because no demand for the payment of it had been made upon him; and at the same term judgment was rendered dismissing the claim, without prejudice as to any independent proceeding the administrator may hereafter institute.

When a personal representative has not in his hands sufficient assets to pay the debts against the estate of a deceased person, and institutes an action for a settlement, which has been referred to a commissioner to audit, and report upon claims filed and proved by creditors, as provided in chapter 3, tit. 10, Civil Code, a demand by a creditor of payment from the personal representative is not, as has been heretofore held, indispensable.

The nature and consideration of the claim of appellant is stated in his affidavit, in substance, as follows: That Amanda G. Orr, then the wife of William Orr, died in 1878, leaving appellant, John G. Lyon, her only brother and heir at law, who in 1887 was appointed administrator of her estate; that she and William W. Orr were married in 1849, and in 1850 they made a verbal contract, by which she agreed that the proceeds of her share of the estate of her father, consisting of land and slaves, some of which was sold in 1850, and the residue in 1853, her husband uniting with her in the deed, the whole amounting to \$4,300, might be appropriated to the construction of a dwelling-house upon a farm owned by him, and it was so applied, and the house was built in 1853, and in consideration thereof he agreed said dwelling-house should belong to her, and descend to her heirs; that William W. Orr died in 1886, leaving no descendants, but owning an estate of the value of \$20,000, which he disposed of by will, not giving any part thereof to appellant, the only heir of Amanda G. Orr. He makes further affidavit that the said sum of \$4,300 is a just demand, etc.

The affidavits of two persons are filed in support of the claim, which tend to show that William W. Orr stated, about the time the house was built, in 1853, he had received the money under the agreement as stated in the affidavit. The contract, as therein set out, was that, in consideration of the use of the wife's money in building the dwelling-house, the husband agreed it should belong to her, and descend to her heirs. But the claim, as presented, is in the nature of a demand for the money so applied. It cannot be supposed they intended or contemplated that the title of the dwelling-house should be literally in the wife, and at her death pass to her heirs, while the land on which it is situated would remain to the husband, and go at his death to his heirs or devisees. Even if such had been the intention, no trust resulted which she in her life-time, much less her brother, nine years after her death, could enforce; because it is not claimed either that the deed was in the name of the husband without her consent, or that he violated any trust in purchasing and taking the title of the land to himself, which he had acquired and paid for before the money was furnished to erect the dwelling-house.

If she was entitled to anything in virtue of the alleged post-nuptial contract, it was to an equitable settlement upon her of the money invested in the dwelling-house. But the presumption of law is the money so used was by the husband reduced to possession, and was a gift, and not a loan; and that presumption, it seems to us, is too strongly supported by acquiescence, and failure of the wife to assert any claim for a period of 25 years, and up to her death, to be overcome by vague and unsatisfactory testimony of verbal admissions by the husband 35 years ago. Moreover, if the appellant could, as her heir at law and administrator, recover at all, it is a strong reason against the interposition of a court of equity, in his behalf, that he delayed nine years after the death of William W. Orr before asserting his claim or administering upon her estate.

In our opinion, the alleged post-nuptial contract cannot be now, if it ever could be, enforced for the benefit of appellant, and the lower court properly dismissed and disallowed it.

Judgment affirmed.

v.10s.w.no.10—41

PEOPLES v. COMMONWEALTH.

(Court of Appeals of Kentucky. January 26, 1889.)

CRIMINAL LAW—COSTS ON APPEAL.

Crim. Code Ky. § 361, provides that "on affirmance of a judgment, if the appeal be taken by the defendant, and on the reversal of the judgment, if the appeal be taken by the commonwealth, a judgment for costs shall be rendered against the defendant." *Held*, that this statute authorizes a judgment for costs against one convicted of a felony.

On motion to quash execution for costs.

For original opinion and response to petition for rehearing herein, see 9 S. W. Rep. 509, 810.

Baker, Kinney & Kinney, S. M. Bernard and Ben. S. Robbins, for the motion. *Frank Parsons*, *contra*.

HOLT, J. The appellant, Mary A. Peoples, being under conviction for a felony, appealed to this court, where the judgment was affirmed. A judgment for the costs in this court was rendered by it against her. She now claims that it was unauthorized by law, and is therefore void. The motion now made is to quash the execution upon it for this reason.

It is of course true, as counsel contend, that a judgment for costs cannot be rendered without warrant of law. The General Statutes, which went into force December 1, 1878, are silent upon the subject. The chapter upon "Costs" merely provides: "A defendant convicted of a misdemeanor shall be adjudged to pay the costs." Chapter 26, § 11. The Criminal Code, which became operative January 1, 1877, is not silent however. Section 361 provides: "On the affirmance of a judgment, if the appeal be taken by the defendant, and on the reversal of the judgment, if the appeal be taken by the commonwealth, a judgment for costs shall be rendered against the defendant." It is clear the statute authorized the judgment in question. The other sections in the same article show that it cannot be construed as not applying to a felony. We see no reason why this should not be the law. When the conduct of the accused, whether it be felonious or of a less degree, causes the cost, his property, if he have any, should answer for it. But, let the matter of policy be one way or the other, the legislature has furnished the rule, to which we must adhere.

The motion to quash the execution is overruled.

MAKIBBEN v. ARNDT *et al.**(Court of Appeals of Kentucky. January 29, 1889.)*

MORTGAGES—FORECLOSURE—REDEMPTION—RESALE.

Notwithstanding Gen. St. Ky. c. 63, art. 8, § 3, provides that sales under judgment of foreclosure shall be "null and void" from the time of redemption, the lien of a mortgage is extinguished by sale under the judgment, and the mortgagee cannot have a resale after redemption, to recover the balance of the judgment not satisfied by the first sale. The sale is declared a nullity from the time of redemption, so far as it affects the title of the redemptioner, but the mortgage lien is not revived.

Appeal from chancery court, Campbell county; J. W. MENZIES, Chancellor. *Chas. J. Helm*, for appellant. *George Washington* and *J. Creutz*, for appellees.

HOLT, J. The mortgage lien of the appellant, T. P. Makibben, was inferior to that of the building association. The property was sold under the judgment on November 24, 1885, and for the satisfaction of both liens. The

appellant purchased it at \$2,200, being less than two-thirds of its appraised value, but a little more than the debt of the building association, and the sale was confirmed. He took no steps, either by further proceedings in the suit or an execution upon his judgment, to sell the equity of redemption during the year of its existence following the sale. It was redeemed upon the last day allowable; the mortgagor then conveying it to a third party, who mortgaged it, and thus obtained the money to redeem it from the appellant. Shortly after the year for redemption had expired, the appellant filed a supplemental petition asking a resale of the property to satisfy the unpaid portion of his judgment. After one or more amendments to this pleading, it was dismissed, upon demurrer, and he has appealed. He now contends that the redemption from the sale, although it was made to satisfy both mortgage debts, left the unsatisfied portion of his judgment in full force as a lien upon the property. This contention is based upon the fact that the statute declares the sale "null and void" from the time of the redemption. Gen. St. c. 68, art. 8, § 8. We cannot assent to it. His lien was of contract. The legal title to the property was merely in pledge to him for the payment of his debt, and in pledge for what it might bring merely, when sold. In such case the creditor may sell once, and then may also subject the equity of redemption, if there be any. The statute gives him this latter right. He, cannot, however, sell and resell and sell again, and so on *ad infinitum*, by virtue of the mortgage lien. He cannot thus, in effect, cut it up into slices. The redemption is a recovery of the legal title, and it, by reason of it, repasses to the mortgagor. The mortgage lien ceases to exist whenever the sale is made enforcing it. The right to the property passes to the purchaser, subject to confirmation by the court, and subject also to be divested in favor of the debtor by redemption within the time allowed, if it be a case where the right exists. The fact that the statute declares the sale shall be a nullity in case of redemption, does not reinvest the mortgagee with his mortgage lien, and therefore with the title, by way of security for his debt. The redemption restores the title to the mortgagor, and to this end the law declares the sale a nullity. If the effect were to revive a lien already exhausted, there would be little effort by the debtor in this direction. If, however, the sale extinguishes the lien, then the debtor may be able to raise the money to redeem his property by putting it in pledge. It gives him a chance. The parties to the mortgage contract understand at its inception that the property is liable to be sold once by virtue of it, and it is not for a court to make a contract for them of greater continuing force. Its right and power to sell are based upon the mortgage lien alone, and one exercise of the power is an exhaustion of it. The lien cannot survive the sale for its enforcement. A. sells the land of B. under a mortgage lien. A portion of the judgment is unsatisfied, and, the property not having brought two-thirds of its appraised value, there is an equity of redemption. If C., another creditor of B., subjects this right of redemption to sale under his execution, as he may do, certainly A. cannot claim that, notwithstanding the foreclosure sale, he still has a mortgage lien for the unsatisfied part of his judgment.

It was said in *Todd v. Davey*, 60 Iowa, 532, 15 N. W. Rep. 421: "By the sale of the land upon foreclosure, the mortgagee exhausts his remedy against the land, and can neither again sell it upon the judgment, nor redeem from the sale, either before or after redemption by the mortgagor." 2 Jones, Liens, § 1128, cites this case approvingly, and says: "If a vendor who has entered into a contract to convey upon the payment of the purchase money elects to foreclose his contract of sale, he cannot, after the land has been sold, and bid in by him for a part only of the judgment, and then redeemed by the purchaser, still claim to have a vendor's lien upon the land for the balance of the purchase money." If the rule were as the appellant contends, or if such a rule would be correct in principle, then the debtor should not be allowed to redeem by paying the amount of the purchaser's bid and interest, but, to avoid

cost and litigation, he should be required to pay the amount of the judgment, and interest upon the bid. The lienholder has, however, ample opportunity to protect himself by the one sale made under his contract. Notwithstanding this, the statute gives him the right, in the event his judgment is not thereby satisfied, to at once take steps in the same suit, or by execution upon the judgment, to sell the equity of redemption, if it exists. Gen. St. c. 63, art. 8, § 4. He may at the first sale fully protect himself by bidding more than two-thirds of the appraised value, thus cutting off the right of redemption. The law did not intend to give the creditor all the advantages. If he has reasonable chance to protect himself from loss, and fails to avail himself of it, it is his own fault, and furnishes no reason for harassing the poor debtor with additional cost and litigation. If the debtor redeems, it will often work to the advantage of the former lienholder, whose judgment is in part unsatisfied. If a stranger has purchased for a trifle, and the debtor redeems and holds the property, it adds that much to his estate, to all of which, save the exempt portion, the creditor may look for the balance of his judgment, aided by execution upon it. In this instance, if the appellant loses, it is his own fault. He has slept over his rights, or been negligent of them. He failed either to bid the amount of both mortgage debts for the property, or two-thirds of its appraised value, or to take any step whatever looking to the sale of the equity of redemption. He has no right to an order of resale, and the judgment is affirmed.

RUTTLES *et al.* v. CITY OF COVINGTON *et al.*

(Court of Appeals of Kentucky. January 31, 1889.)

1. MUNICIPAL CORPORATIONS—CONTROL OF STREETS—GRANT OF RIGHT OF WAY.

A provision of a city charter that council shall have "exclusive control of the streets, sidewalks, lanes, alleys, market-places, and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair," does not confer upon the council power to grant to a railroad the right of way over and along its public streets, as that would be an appropriation or use of the streets for a purpose not contemplated when the charter was granted.

2. RAILROAD COMPANIES—CHARTER—RIGHT OF WAY THROUGH CITY.

Though the legislature may authorize the construction and operation of a railroad through a city or town, and upon its streets, even without the consent of the municipality, a provision in the company's charter authorizing it to construct its road from any point on its road to the cities named, and from any point on its road to a certain other road, does not confer upon it such authority, as the legislative authority must be conferred by express enactment, or in such language that it can be necessarily implied.

Appeal from chancery court, Kenton county; J. W. MENZIES, Chancellor. *O'Hara & Bryan*, for appellants. *Hallam & Myers*, for appellees.

LEWIS, C. J. This action was instituted by Rutbles and others, residents and owners of real estate in the city of Covington, to enjoin the city council thereof from passing an ordinance, or in any manner granting the right of way over, along, or across any of the streets, alleys, or public places of said city to the Elizabethtown, Lexington & Big Sandy Railway Company for the construction of a railroad; and, the court having dissolved the injunction granted, and dismissed the action, the plaintiffs prosecute this appeal.

If the council possesses the power under the charter of the city of Covington it is conferred by section 19, which is as follows: "They [the council] shall have also exclusive control of the streets, sidewalks, lanes, alleys, market-places, and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair." It is clear that under the general power to control streets, sidewalks, etc., a municipal legislature cannot grant the right to a corporation or individual to appropriate and use the streets of a town or city for any purpose not contemplated by the legislature

when the charter was granted, and which would tend to obstruct and hinder the free use of the streets for the purposes and in the modes they are commonly understood to be dedicated for public and private use. And as laying down railway tracks is not such an appropriation or use of streets of a town or city as they are ordinarily intended for, and as was manifestly intended by the section of the charter quoted, it seems to us no power, either express or implied, has been conferred by the city charter of Covington upon the board of councilmen to grant the right of way to the company. If, then, the authority exists at all, it is in virtue of the act of the legislature incorporating the Elizabethtown, Lexington & Big Sandy Railroad Company. And the section of the charter of the company under which the power is said to exist is as follows: "That the Elizabethtown, Lexington & Big Sandy Railroad Company may construct, operate, and maintain a railway or railways from any point or points over the line of its railway to the cities of Newport, Covington, or either of them, and from any point or points on its said line to any point or points on the line of the Kentucky Central Railroad," etc. Building and operating a railroad upon the streets of a town or city necessarily results in inconvenience and injury to those residing on and having real estate adjacent to such streets, and the right of a company to thus appropriate to its use what was intended to be used by the public for different purposes, and upon the faith of which private rights and interests have been invested, should never be implied, but permitted to be exercised only when there is a clearly expressed grant by the legislature. The section quoted does not in express terms or necessarily authorize the railroad company to operate and maintain its railway upon any street of Covington with or without the sanction of the city council; for if the power to lay its tracks upon one street may be implied, the right to thus appropriate and use any or all others follows. The legislature has the undoubted power to authorize the construction and operation of a railroad through a city or town, and upon its streets, when they are not wholly obstructed, even without the consent of the municipal legislature. But the authority must be conferred by express enactment, or in such language that it can be necessarily implied. The power, in general terms, given to construct and operate a railroad to a town or city, does not necessarily or even fairly mean the authority or right to appropriate and use any street or alley the railway company may see proper to occupy, without regard to the inconvenience or injury that may result to the public or to individuals thereby. In this case the right given by statute to the company may be fully preserved and exercised by going to the city of Covington, or intersecting its road with the Kentucky Central road, without occupying any and all streets or public places in the city of Covington the company may for its interest or arbitrarily choose to appropriate.

The language of the statutes in the case of *Railroad Co. v. Applegate*, 8 Dana, 294, and *Railroad Co. v. Combs*, 10 Bush, 384, was radically different from that used in the section quoted. In each of those cases authority was expressly given to the respective companies to construct their roads through the cities mentioned in the charters. As the legislature has not seen proper to give to the company in this case, in express terms, the right claimed, we are not authorized to strain the language of the statute for that purpose when the effect would be to seriously impair the usefulness of the public streets of Covington, and do injury to the rights of individuals. Therefore the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

*HINDS et al. v. BOSTON et al.**(Court of Appeals of Kentucky. January 31, 1889.)***APPEAL—REVIEW—WEIGHT OF EVIDENCE.**

The judgment of the trial court upon a question of fact (as whether a sale of land was made and a bond given for deed) will not be disturbed, unless clearly erroneous.

Appeal from circuit court, Metcalfe county; D. R. CARR, Judge.

This was an action of ejectment by M. Hinds and others, heirs of Joseph U. Hinds, against J. P. L. Boston and another. J. P. L. Boston having died, the action was revived against his heirs at law. There was a judgment for defendants. Plaintiffs appeal.

Garnett & Dehoney, for appellants. *Geo. R. Price*, for appellees.

HOLT, J. It is certain that Joseph U. Hinds was at one time the owner in fee of the land in dispute. The appellees claim that by a title-bond given by him to William Cassidy, in 1859, the latter acquired the equitable title to it; and, as the pleadings stand, this is the only question we need consider.

The evidence shows that Hinds was an infant in 1859, but his then incapacity to bind himself beyond the power of avoidance is not relied upon by any pleading. The issue tendered by the appellants is that no such bond was ever executed. Two witnesses testify to its existence. They differ as to the manner of the purchase. One gives it as his recollection that Cassidy paid the consideration direct to Hinds, while the other says that the latter and one Olds exchanged lands, and by the direction of the latter the title-bond for the Hinds land, or that now in dispute, was executed by Hinds direct to Cassidy. It is urged that the latter witness is not worthy of credit, because, as the vendor of a part of the land to one of the appellees, he is an interested party; also because he is contradicted in his version of the transaction in some respects, and is also assailed as to character.

The transaction occurred in 1859. This suit to recover the land was brought by the two children of Joseph U. Hinds in 1884. A quarter of a century had elapsed. It is rather to the credit of the witness, than a circumstance against him, that his recollection, after such a lapse of time, should not be exact, even conceding that he is mistaken as to some circumstances connected with the purchase. Some four or five witnesses assail his character, but he is sustained by a greater number, and his testimony is, in our opinion, supported by uncontroverted circumstances appearing otherwise in the case, and thus, to our mind, weighs as much or more in favor of his evidence than anything else. Each of the two witnesses testify affirmatively to the main point, which is that Cassidy held the bond of Hinds for a title.

As early as 1859, Cassidy took control of the land, it then being woodland, in the way of cutting wood upon and clearing it. It was thus rendered more valuable. After his death, which occurred about 1860, it was divided among his children by commissioners under a court proceeding as a part of his estate. A portion of the land in dispute fell to a daughter, Mrs. Stephens, and the balance of it to a son, Levi Cassidy. Commissioners' deeds were made to them, respectively. The daughter subsequently conveyed her portion to J. P. L. Boston, whose heirs now hold it by inheritance, and are appellees to this appeal. The son sold his portion to one Shafer, who is the witness already alluded to, and he conveyed it to the appellee Kinser. It is altogether improbable that all this would have occurred without there having been any sale of the land by the father of the appellants.

Moreover, it appears, from the testimony in behalf of the appellants as well as the appellees, that at the time or soon after it is claimed the sale was made Hinds took possession of the Olds land, and in fact lived upon it; and, besides, whether the sale was in fact made, and bond given, is a question of fact upon

which the lower court has passed, and we would be unwilling to disturb its judgment, unless clearly erroneous.

It may be questionable whether the appellants, owing to the lapse of time, and the fact that their father became of age before his death, could, in the face of a plea of limitation, have relied upon his infancy as avoiding his contract. Whether this be so or not, it has not been done by pleading; and as, in our opinion, their ancestor parted with the equitable title to the land, and it is held by the appellees, the judgment below is affirmed.

WALLACE *et al.* v. ARNOLD.

(Court of Appeals of Kentucky. February 2, 1889.)

LIS PENDENS—ADVERSE POSSESSION.

An action of ejectment is not *lis pendens* as to one not a party, and who is in possession under a bond for deed from the defendant in ejectment, and such possession may ripen into an adverse title so as to defeat a writ of possession issued on the judgment therein. Following *Wallace v. Marquett*, 10 S. W. Rep. 874.

Appeal from circuit court, Pendleton county; W. E. AUTHUR, Judge.

Petition by M. M. Arnold to enjoin Samuel Wallace and others from executing a writ of *habere facias*, issued in the ejectment suit of *Wallace et al. v. Meyers*. From a decree perpetuating the injunction defendants appeal.

J. W. Menzies and *L. T. Applegate*, for appellants. *O'Hara & Bryan*, for appellee.

PRYOR, J. This case involves a question similar to the one made in the case of *Wallace v. Marquett*, 10 S. W. Rep. 874, (decided at the present term,) both cases coming from the Pendleton circuit. In the year 1858 an action of ejectment was instituted by the appellants Wallace and others against Lewis Myers and others, to recover a large tract of land that embraced within its boundary the 27 acres of land now in controversy. The plaintiffs in the ejectment recovered in that case, and had a writ of possession issued for the first time in October, 1881, more than 20 years after the action was instituted. When the writ issued, the present appellee was in the possession, and had been, by himself and his vendors, in the continued adverse possession by actual occupancy under the title of Myers from the year 1833. Myers sold to Blackburn this land, or the tract containing 27 acres,—in regard to which there is more difficulty as to the title than as to the other tracts,—in the year 1833. Blackburn, holding the bond of Myers for title, entered upon and held possession of the land from the year 1833 till the year 1860, a period of 27 years, claiming under his title-bond. He then resold the tract to Myers, in the year 1860, and in the year 1862 Myers sold the land to Ekins, giving to Ekins his bond for title. Ekins sold to Lovelace, assigning to him the bond of Myers. Lovelace, in October, 1863, sold the land to the plaintiff (appellee) Arnold, and assigned to him Myers' bond, and in the year 1868 Myers executed to the appellee a conveyance, and under this title he was in the possession when the writ was issued. From the year 1833 until and when the writ issued, Blackburn, Myers, Ekins, Lovelace, and the appellee had been in the actual occupancy of the land under the title already set forth. The appellee, under the facts stated, filed his petition, and enjoined the appellants from executing the *habere facias*, and, the chancellor perpetuating the injunction, they have appealed.

The sole question, it seems to us, in this case, as in the other decided, is, was the action against Myers a *lis pendens*? If not, this action must be treated as one in which the title of the appellee must be overcome by the production of a better title in the appellants. The recovery against Myers is no evidence

of title against the appellee. He was no party to that action, nor were any of his vendors except Myers. The appellee had possession under his title-bond from the year 1863, without any notice, actual or constructive, of the suit in ejectment against Myers. This gave him title against the appellants and all others, and, if not, here was a possession under this title for nearly half a century, with an unbroken chain of title and possession; and, there being no *lis pendens*, as was decided in the former case, the appellee cannot be disturbed in his possession. 2 Pom. Eq. Jur. § 634.

Judgment affirmed.

CHISM v. TRENT.

(Court of Appeals of Kentucky. February 2, 1889.)

ADVERSE POSSESSION—DEED FROM ONE UNDER DISABILITY.

Where plaintiff's only right to recover in ejectment depends upon the claim that his holding has been adverse to those having the right of entry, and being *sui juris*, and the evidence shows that his holding has been under a bond for deed executed by the ancestor of those persons, a married woman, during coverture, and therefore null and void, and it is not shown when she died, or when her heirs became of age, he cannot recover.

Appeal from circuit court, Meade county; T. R. McBEATH, Judge.

Ejectment by Robert R. Trent against N. B. Chism. Defendant appeals from a judgment for plaintiff.

C. C. Fairleigh, for appellant. J. H. Trent, Jr., for appellee.

HOLT, J. The appellee, R. R. Trent, brought this action on February 14, 1887, to recover from the appellant, N. B. Chism, the possession of two lots in the little village of Wolf Creek. The land once belonged to John Finch, and was deeded by him, in 1850, to his daughter, then Elizabeth Troutman, afterwards Elizabeth Angel by reason of her marriage to Berry Angel. The title was beyond question vested in her. The petition bases the claim to recover it upon both an alleged paper title and a possessory one; the appellee claiming the latter by reason of an alleged actual and adverse possession for more than 15 years prior to the bringing of the suit. The petition sets out the derivation of the paper title under which he claims. It is, first, a bond executed by Angel and wife to William Curl, on February 25, 1870; next, a deed from the latter to Sarah E. Lewis, on July 13, 1870; and then a deed from the latter and her husband to the appellee, executed August 12, 1886. The title-bond was a nullity as to Mrs. Angel, owing to her coverture; and, the title being in her, not even the equitable title to the lots passed to Curl. Moreover, it is manifest from the bond itself that it does not embrace the lots in contest, and, even if there were a mistake in its execution, no effort has been made by pleading or proper mode to correct it. The claim of the appellee therefore fails, so far as it is based upon the so-called paper title, leaving his claim of a possessory one to be considered.

Under our statute a continued adverse and actual possession for 15 years not only tolls a right of entry which others, not under any disability, may have had, but it confers upon one so in possession a right of entry, and a right of action to recover the possession from another who may have wrongfully acquired it. When the possession has been of such a nature and for such a length of time as to take away from others all legal remedy to recover the land, it also imparts to the possessor a right to it. The right of entry attaching to the outstanding title is divested, and inures, not only to the possessor, but also to those to whose use his possession inures. It is somewhat questionable whether the possession of the appellee and those under whom he claims has been of such a character as to bring it within the legal meaning of an actual possession. The land has never been inclosed. It has laid out in

the commons, and appears to have been used at will by any and all persons for the storage of lumber and other articles. From the time of the Lewis purchase, however, in 1870, it was known as the "Lewis Lot." Not long after her purchase, the husband of Mrs. Lewis had posts put around it, or at least a part of it, preparatory to fencing it; but nothing further was done, and after a while he had the posts removed. He, however, continued to claim the land, and offered at various times to sell it to different persons. In fact the appellant appears to have recognized that Lewis was in control of it, because he offered at one time to buy it from him if he would make him a good title. Upon another occasion he said Lewis was asking too much for it; and, again, having, some four or five years before the bringing of this action, erected a cooper's shed upon it, he said to a neighbor that he "reckoned Lewis would not object." The appellant also claims to have been in possession of the property for some 12 years before the bringing of the suit. Like others, he used it for depository purposes. He appears to have owned the adjoining land, and in building he erected his cook-house and the porch of his house upon the land in contest. He, however, testifies that he did so under the impression that they were upon his land, which adjoined. Mrs. Angel, however, having died intestate, leaving a husband and but two children, the appellant on October 6, 1886, obtained a quitclaim deed from them to the land in contest, and, although not pleaded in defense, as the answer is but a denial of the averments of the petition, yet it is offered in testimony by him to defeat a recovery. It is manifest that the title of Mrs. Angel passed upon her death to her heirs, and that by virtue of the deed from them to the appellant he is now invested with it and the right to the possession, which he now has, unless he or those through whom he claims have been divested of this right by the adverse possession of the appellee and those under whom he claims. In other words, the only ground upon which the appellee can stand successfully, or base a right to recover, is that of actual, uninterrupted, and adverse possession upon his part and those through whom he claims for the statutory period necessary to confer upon him the right of entry and to the possession. Conceding that the Lewis possession was an actual one, yet the appellee has not based his claim to recover merely upon the deed made by Curl to Lewis in 1870, but has gone further back, and placed it originally upon the Angel bond to Curl. This attempted derivation of right is set forth in his petition, showing beyond question that he claims through the same source of title as the appellant. He thus expressly shows that he and those through whom he claims have not been, as a matter of fact, holding adversely to the Angel title, but looking to it for their right and a title, and claiming the land through it. Added to this is the fact that Mrs. Angel, by reason of her coverture, was not *sui juris*, but under disability to sue, and it does not appear when she died, or when her children became of age. In other words, the appellee, who can recover only upon the ground that his holding and that of those under whom he claims have been adverse to parties having the right of entry, and who were not laboring under disability, expressly shows that he and his vendors in point of fact have all the time, and are now, looking to these same parties for a title; and also shows that Mrs. Angel was in 1870 under disability, but fails to show when she died, or when her children became of age.

Under this state of case the recovery had in the lower court cannot be sustained upon the ground that the appellee manifested a possessory title and a right of entry by virtue of it; and the judgment below is reversed, with directions to dismiss the appellee's petition.

CLAY v. CHENAULT.

(Court of Appeals of Kentucky. February 5, 1889.)

DEED—CONSTRUCTION—NATURE OF ESTATE CONVEYED.

The granting and *habendum* clauses of a deed provided that "the parties of the first part, in consideration of the sum of \$3,500, * * * payment of same having been made by C. M. Clay [the grantee's father] for the grantee herein, have granted, bargained, and sold * * * to the party of the second part the lots or parcels of land situated," etc., "to have and to hold said lots of ground to the said [grantee,] and the children of his body lawfully begotten; but, in case of his death without children or their descendants, then to revert to and descend at his death to the said C. M. Clay, and his heirs and assigns, in fee forever." Held, that under Gen. St. Ky. c. 63, art. 1, § 10, providing that "if any estate shall be given by deed or will to any person for his life, and after his death to his heirs, or the heirs of his body, or his issue or descendants," he shall take only an estate for life, with remainder in fee to his heirs, etc., the grantee took only a life-estate.

Appeal from court of common pleas, Madison county; THOMAS J. SCOTT, Judge.

Lawney Clay contracted in writing with C. D. Chenault to sell him certain real estate, obligating himself to convey the same to Chenault in fee-simple, with good title. This was a suit by Clay against Chenault for a specific enforcement of the contract. Defendant denied plaintiff's ability to convey in fee. Judgment for defendant, and Clay appeals.

C. F. & A. R. Burnham, for appellant.

LEWIS, C. J. The only question in this case is whether appellant, Lawney Clay, was, by deed made to him in 1874, invested with the fee-simple title to two lots of land, which he has sold and agreed to convey to appellee, Chenault. The granting and *habendum* clauses of that deed are as follows: "That the parties of the first part, and in consideration of the sum of thirty-five hundred dollars, of which the receipt is hereby acknowledged, payment of same having been made by C. M. Clay for the grantee herein, have granted, bargained, and sold, and hereby sell, alien, and convey, to the party of the second part, the lots or parcels of land situated," etc., "to have and to hold said lots of ground to the said Lawney Clay, and the children of his body lawfully begotten; but, in case of his death without children or their descendants, then to revert to and descend at his death to the said C. M. Clay, and his heirs and assigns, in fee forever. And the said C. M. Clay reserves during the minority of the said Lawney Clay the right to control the use and possession of said lots, and to collect the rents and profits for the benefit of said Lawney Clay."

Construing that deed according to the plain meaning of the language used, it is manifest the intention of the parties was to convey to the vendee, Lawney Clay, only a life-estate in the lots; and when it is considered that the consideration was wholly paid by C. M. Clay, the father, whose wishes alone controlled, the vendee, Lawney Clay, being at the time an infant, it is almost impossible to avoid that conclusion; and, the intention being thus clear, whatever seeming repugnancy there may be between the different clauses of the deed, must, if possible, be reconciled, giving to each meaning and effect, but to no part such meaning or force as will defeat the intent as manifested by the whole instrument.

As said in *Henderson v. Mack*, 82 Ky. 379: "The office of the *habendum* clause in a deed is to limit and define the estate granted, and while, as a general rule, it must give way to the granting words of the deed, when clearly contradictory of them, yet it should certainly be resorted to equally with the balance of the instrument to arrive at the intention of the maker, which must govern when ascertainable."

Section 10, art. 1, c. 63, Gen. St., provides: "If any estate shall be given by deed or will to any person for his life, and after his death to his heirs, or the

heirs of his body, or his issue or descendants, the same shall be construed to be an estate for life only in such person, and a remainder in fee-simple in his heirs, or the heirs of his body, or his issue or descendants."

The words used in the *habendum* clause, properly construed, mean an estate for the life of Lawney Clay, remainder to his children; and in case of his death without children, or their descendants, then the estate to go to C. M. Clay and his heirs in fee. If such is not the meaning intended, we are unable to see what purpose the parties had in providing for the disposition of the estate in case of the death of Lawney Clay. It seems to us to hold that the appellant has and can pass by deed a fee-simple title to the lots in question would be contrary to the plain intention of the parties to the deed from Brown and wife, and consequently the lower court properly adjudged appellee, the purchaser, should not be required to pay the purchase price, and accept the deed of appellant.

Wherefore the judgment dismissing the action is affirmed.

MEADER v. MEADER *et al.*

(Court of Appeals of Kentucky. February 7, 1889.)

1. PRINCIPAL AND SURETY—RELIEF OF SURETY.

Judgment was obtained against M. as principal and his father as surety, and execution was levied on the latter's realty. During the existence of the execution lien the father died, and his estate was partitioned between M. (then insolvent) and other heirs, the lien covering all the land so partitioned. Held, that a bill in equity by the other heirs against M. would lie to have M.'s portion first sold to satisfy the lien. The right in favor of a surety to sue to compel the principal to discharge the debt is expressly given by Code Ky. § 661, and it extends to the surety's heirs.

2. HOMESTEAD—ACQUISITION.

The lien having attached to M.'s portion before it descended to him, he cannot, as against such lien, assert a homestead right.

Appeal from circuit court, Meade county; T. R. McBEATH, Judge.

Chapeze Wathen and *C. C. Fairleigh*, for appellant. *J. W. Lewis & Son*, for appellees.

HOLT, J. In 1876 the appellant, John H. Meader, with his father, Paschal Meader, as his surety, executed to R. J. Patterson a note for \$2,000, payable on demand, and bearing 10 per cent. interest from date. About three years thereafter the appellant, with the written consent of the surety, mortgaged to Patterson certain real estate to pay the debt. The creditor brought suit in 1881, and obtained not only a decree enforcing the mortgage lien, but a personal judgment against John H. and Paschal Meader. A certain sum was realized by the sale of the mortgaged property, but not enough to pay the debt. An execution issued upon the judgment, and was levied upon two tracts of land of Paschal Meader, but only one was sold, the other remaining in lien under the execution. At this time Paschal Meader died, leaving the parties to this action, except Patterson, as his heirs. His widow made several payments upon what remained unpaid of the debt, leaving a balance still owing, however, of \$286.60 and interest. In 1886 a portion of the heirs of Paschal Meader instituted legal proceedings to divide his unsold land, which was subject to the execution lien of Patterson for the remainder of his debt. A judgment was rendered therefor, and the division had, a certain portion of it being allotted to the appellant as one of the heirs. The appellees brought this action in equity before the confirmation of the division of the land, asking that the interest of the appellant in it be first subjected to the Patterson execution lien, as he was the principal in the debt; and, if the division already made should be confirmed, that his allotted portion be first

sold, and, if not, that then his interest in the land be first subjected to the payment of the debt. The pleadings admit the facts above recited, and also the insolvency of the appellant. A demurrer to the petition having been overruled, the appellant filed an answer, averring that the execution levy was upon the entire tract of land; that he was a housekeeper with a family; owned no real estate save his interest in this land, which was worth less than \$1,000; and that as soon as the division of it among the heirs was completed he intended to use his portion as a homestead. A demurrer was sustained to the answer, and judgment entered, directing that the portion of the land which had now been confirmed to the appellant should be first subjected to the payment of the remainder of the debt. He now complains. It is admitted he was the principal in the debt, and that he is insolvent. It appears his father, although only his surety, was compelled by execution sale to pay a considerable portion of what has heretofore been paid upon the debt. No equity in favor of the appellant addresses itself to the court; and the inquiry arises, did any legal reason or rule exist forbidding the subjection of his interest in the land to the payment of his debt, or in the manner appellees have adopted to reach it?

It is urged that the demurrer to the petition should have been sustained, because the execution lien was upon all, and not a part of, the land; and as the creditor could not have directed the sale of a particular portion of it, neither could the chancellor; also because the creditor's remedy was complete at law as well as that of the appellees, they having a right, as is claimed, after payment of the judgment and its assignment to them, to enforce it against the appellant's portion of the land. The execution creditor is not complaining. It is only the principal debtor, who rightfully and legally is the one to pay the debt. Moreover, the chancellor, has not lifted the lien from all the land, and placed it upon a part of it; but has merely directed that in enforcing it the land of the party who is primarily bound for the debt shall be first subjected. This is certainly a proper office of equity. Because the creditor, at his caprice, could not have directed the sale under his execution of some particular portion or interest in the land, presents no reason why, to prevent additional litigation, hardship, and probably loss, to innocent parties, the chancellor should not, upon a proper state of case, interfere, and control the manner of the sale.

Prior to the adoption of the Code of Practice a surety could maintain a bill to compel the principal to discharge the debt. *Morrison v. Poyntz*, 7 Dana, 307. The Code, § 661, expressly gives this right. It avoids multiplicity of actions, and is moreover just to the surety. It is more adequate to his protection than any legal remedy. This is all the appellees have done. Their property being liable to the creditor, they stand in the place of their ancestor, and he unquestionably could have maintained an action to compel the appellant to discharge the debt, or to subject his property first to its payment. We see no reason why the rule should not extend to the heirs of the surety when, as between them and the principal debtor, their property is secondarily liable for the debt. If it be subjected to its payment, they can look to him for reimbursement; and, if the property of both the principal and the surety be in lien to the creditor, the principal, who, as between himself and the surety, is both morally and legally first bound to pay, cannot be heard to say that equity, the great fountain of remedial justice, cannot compel him to do so.

The fact that one, who is otherwise entitled to a homestead, acquires it after the creation of the debt does not deprive him of the right to it, if it comes by descent. In such a case no estate of the debtor has been diverted, and the creditor cannot say that the means upon which he relied for payment have been thus invested. He has no ground of complaint. The statute denies the debtor the homestead, if obtained by purchase by him, because it is probable the possession of the very means thus used enabled him to obtain the credit;

but this reason for its liability in case of purchase fails where he gets it by descent. *Jewell v. Clark's Ex'r*, 78 Ky. 398. In the case now presented, however, the lien was created upon the land when it belonged to Paschal Meader. It descended to the appellant with the lien upon it, and as against it he has no homestead.

Judgment affirmed.

CORBETT'S EX'RS *et al.* v. HOWELL'S ADM'X *et al.*

(Court of Appeals of Kentucky. February 9, 1889.)

1. MORTGAGES—LIEN—ESTOPPEL.

After the levy of an execution on land, but before sale, the debtor gave a mortgage thereon to indemnify C. and R., his sureties, for another debt. When the land was sold under the execution, it was bid off by C., who paid for it with money furnished by the debtor, and at the request of the latter caused the sheriff to convey the land to his wife. No consideration was paid by the wife, nor did it appear that she knew of the conveyance. *Held*, that the land was still subject to the mortgage, and that C. and R. were not estopped to claim under it by causing the land to be conveyed to the wife.

2. APPEAL—JURISDICTION—TITLE TO LAND.

An appeal lies to the court of appeals from a decree holding the right of the wife to the land under her conveyance to be paramount to that of C. and R. under their mortgage, though the amount each was compelled to pay as surety was less than \$100, as the title to land is directly involved.

Appeal from court of common pleas, Ballard county; A. J. WARDEN, Jr., Judge.

Suit by the widow and administratrix of G. W. Howell, deceased, for a settlement of his estate. The executors of Jacob Corbett and W. H. Reeves filed a cross-petition, seeking to enforce a mortgage given by Howell to Corbett and Reeves on land claimed by Mrs. Howell. Their cross-petition was dismissed, and they appeal.

Bullitt & Bishop and *E. W. Hines*, for appellants.

HOLT, J. The admissions in the pleadings and testimony show substantially this state of case. Prior to November, 1865, J. Corbett and W. H. Reeves became the sureties of G. W. Howell to one Bird for debt. Another creditor of the principal debtor obtained a judgment, and on November 7, 1865, sued out execution, which was levied upon 100 acres of Howell's land. January 19, 1866, and before any sale under the execution, but after the levy, Howell executed to Corbett and Reeves a mortgage upon the land by way of indemnity as to their suretyship. Subsequently the land was sold under the execution, and bid in by Corbett for and as the friend of Howell. Corbett paid the purchase money, but it was furnished to him by Howell. In truth, the latter was the purchaser, and paid the execution debt by paying the amount at which Corbett bid in the land for him. Thereafter Corbett, by the request of Howell, directed the officer who had made the sale to convey the land to Howell's wife, the appellee, Margaret Howell.

In judging of human conduct, we must regard the motives and interests of the actors; and, while the evidence does not expressly show it, yet all the circumstances warrant the presumption that both G. W. Howell and Corbett then understood that the transfer to Mrs. Howell, and to which Reeves was not a party in any way, was subject to the mortgage. Subsequently thereto Howell died, and Corbett and Reeves were compelled, by reason of the suretyship, to pay each a sum less than \$100. The estate of Howell being insolvent, his widow, the appellee Margaret Howell, brought this action for its settlement. The record shows it will pay but a few cents to the dollar of the indebtedness.

Corbett and Reeves became parties to the action, and by cross-petition against Mrs. Howell sought to subject the land to the payment of what they had paid as sureties. Their claims were allowed against the estate. In fact the indebtedness was not contested, save a plea of payment as to Reeves' claim was presented. It was not, in our opinion, however, sustained by the evidence.

The appellee Margaret Howell also defended upon the ground that her right to the land, through the execution sale, antedated the mortgage; and that Reeves and Corbett, by reason of the latter's direction to the officer to convey the land to her, were estopped from asserting any claim under the mortgage. In the event, however, they were allowed to do so, she claimed a dower and homestead right in the land. The claim to the last-named right need not be further noticed than to say that it is alleged by the appellants, and undenied, that their debts were created prior to June 1, 1866, when the homestead law became operative.

The right to the land, when it was sold under execution, was in G. W. Howell, subject, however, to the mortgage also. It was in fact bid in for him at the sale, and he paid the purchase money. The effect of this was to reinvest him with the entire right to it, subject, however, to the mortgage. The claim of the widow to the land cannot be regarded as relating back to the levy of the execution, and antedating the mortgage, because the purchase and payment of the purchase money by or for the husband, as a matter of fact, placed the right and title to the land as if the levy and sale had never been made. The mortgage was left in full force, with no outstanding superior claim by reason of the execution sale. Corbett and Howell doubtless thus understood it, and in this condition the land passed to the widow. It was in truth but a transfer by the husband to her, and equity will so regard it.

The fact that the conveyance was made to her by the request of her husband, but upon the direction or by the consent of Corbett, certainly cannot operate as an estoppel as to the appellant Reeves, who was not a party in any way to the transaction. Nor does it have this effect, in our opinion, as to Corbett. He had no interest in the purchase made at the execution sale. It made no difference to him whether the title was in Howell or his wife, as his was now the first lien by reason of Howell having been the real purchaser at the execution sale, and having paid the purchase money. In either case, his lien could be enforced. The transfer to her was a voluntary one. No valuable consideration passed. It does not appear that she even knew of the conveyance to her at the time it was made. She paid none of the purchase money, and has in no respect changed her situation upon the faith of Corbett's conduct. She was not induced to act, and did not, upon what he did, nor was her position altered upon the faith of it.

This court has jurisdiction of the appeal. The first section of the act of May 5, 1880, (Gen. St. 394,) is a general grant of appellate power to this court over the judgments of all other courts of the commonwealth in civil cases, saving the exceptions therein named. Among them it is provided that no appeal shall be taken to this court from "a judgment for the recovery of money or personal property, if the value in controversy be less than one hundred dollars, exclusive of costs." It is true the appellants are seeking to recover debts, each less in amount than the sum named; but in doing so the title to land is directly involved, and, where this is the case, this court alone has appellate jurisdiction. The act creating the superior court denies such jurisdiction to it, where the title to a freehold is involved. Here the appellants are seeking to subject the land upon the ground that when it was mortgaged to them it belonged to the mortgagor, and that there is no title in the appellee Margaret Howell relating back, by virtue of an execution levy or otherwise, to a time anterior to the date of their mortgage. Upon the other hand, she asserts that by virtue of the levy and execution sale the land must in law be

regarded as having belonged to her at a date prior to the mortgage. The contest directly involves the title to the land; as much so as if two contesting parties were each claiming to own it. If the land had by the judgment below been subjected to the debts of the appellants, or that of either of them, most certainly Mrs. Howell could have appealed to this court, and could have done so to no other court. If this be so, have not the appellants the same right? A. seeks to enforce a mortgage given by B. against land as belonging to the latter. C. claims it. Such is the case now presented. Surely the statement of it is sufficient, without argument, to show that this court under the law is alone vested with appellate jurisdiction.

The land is liable to be subjected to the mortgage of the appellants, the dower right of Mrs. Howell being superior to it, however; and the judgment below, so far as it dismissed their cross-petition seeking such relief, is reversed, and the cause is remanded for further proceedings in conformity to this opinion.

LOUISVILLE & N. R. CO. v. LOGAN.

(Court of Appeals of Kentucky. February 12, 1889.)

1. CARRIERS—OF PASSENGERS—EJECTION OF DRUNKEN PASSENGER.

A drunken passenger on a train entered the ladies' car, and by violence and indecent language alarmed the passengers, and, when locked out of the car, pulled the bell-rope, stopping the train, and threatened the conductor with an open knife. He was ejected two miles from the nearest station, and two hundred yards from a farmhouse, it being a warm night, and not very dark; and was killed by a later train going in the opposite direction. No negligence by those in charge of the later train was shown. *Held*, that the railroad company was not liable.

2. SAME—RIGHT TO EJECT.

The fact that deceased was in such condition that he was improperly allowed to board the train as a passenger did not deprive the conductor of the right to eject him, or render the company liable for his death.

Appeal from circuit court, Marion county; W. E. RUSSELL, Judge.

Action by Mattie Logan, widow of R. V. Logan, against the Louisville & Nashville Railroad Company, to recover damages for her husband's death. Defendant appeals from a judgment for plaintiff.

Wm. Lindsay and W. J. Lisle, for appellant. Harrison & Belden, for appellee.

LEWIS, C. J. Appellee, widow of R. V. Logan, brought this action to recover damages for the destruction of his life by the alleged willful neglect of the servants of appellant; the material facts of the case being as follows: The deceased, about half past 10 o'clock at night, June 19, 1883, at Lebanon, got on a passenger train, bound from Louisville to Knoxville, Tenn., to go to a station where he resided, 14 miles distant. He was at the time intoxicated, stumbled or slipped and fell on the depot platform, was helped upon the car platform, and, in the opinion of two witnesses, was too drunk to take care of himself, though he was also boisterous, profane, and disposed to be quarrelsome. Upon being requested by the conductor, soon after the train started, to pay his fare, he asserted he had paid it, which was untrue, and in reply to the statement of the conductor he had not, he said, with an oath, he would not; that there were not men enough on the train to put him off, at the same time pulling out his knife; and did not pay until the conductor and brakeman had proceeded with him to the car platform for the purpose of putting him off. After receiving his fare, the conductor left him in the smoking car, where his seat was, and proceeded to the ladies' car, to collect fare from those who had boarded the train at Lebanon, and, while so engaged, the deceased, leaving the smoking car, went behind him, having, as some of the witnesses testify, a knife opened in his pocket, and assuming a menacing attitude, applied to him

in a loud tone of voice such profane, opprobrious, and threatening language as to cause general excitement among the passengers; one lady being so much frightened that she implored the conductor to remove him from the car. The deceased then returned to the smoking car, and, upon being soon after approached and admonished by the conductor to keep his seat and be quiet, he drew his knife, and threatened to kill him; and after the conductor returned to the ladies' car, the deceased again tried to enter it, but, being unable to do so because the door had been locked to keep him out, he, on his way back to the smoking car, pulled the bell-rope the number of times required to stop the train, and it was, in obedience to his signal, stopped by the engineer. The conductor then went into the smoking car, and, telling the deceased, who, though he had just taken his seat, pretended to be asleep, that he would not permit any one to pull the bell-rope, and paying back his fare, with the aid of the brakeman put him off the train, and left him. The place where it was done is about 4 miles from Lebanon, 2 from the nearest station south, about 150 yards from a private crossing of the railroad north, and 200 from the nearest farm-house. Early the next morning the mutilated body of the deceased was found about 25 yards north of the private crossing mentioned, and his hat, a sack, and bucket, which he had the night before, were near the place he was put off the train,—his hat being nearest the body. Three trains passed the place where his body was after he was expelled from the passenger train, two going north,—one of which passed within about one hour and a half, the other later in the night, and the third going south about daylight. It is plain he was not killed by being struck or run over by the passenger train from which he was ejected; for, not only was his body found nearly 200 yards north of where he was left by it, but a little more than 25 yards north of the place on the track where there was the first appearance of blood, showing conclusively the train by which he was killed was going north.

Assuming, as the evidence seems to warrant, that he was killed by one of the north bound trains,—though by which one of the two does not appear,—the first inquiry is whether any legal liability has been fixed upon appellant on account of negligence of those in charge of it; and, as there is no evidence showing at what time of night, or why he went upon the track in front of a passing train, if he did so voluntarily, nor whether he was in such position at the time of being struck as to make it the duty of those in charge to stop the train, or as to enable them by the exercise of proper diligence to discover him in time to prevent a collision or at all, and consequently none whatever of any negligence or fault on their part, that question must be answered in the negative. It thus results that whatever cause of action there may be in favor of appellee arises entirely from the conduct of the conductor of the passenger train; and the liability of appellant therefor, if liable at all, is not dependent upon, nor increased by, the fact that the train by which he was subsequently killed was owned and operated by the same company. For if the act of the conductor was not itself wrongful, it could not be made so by referring it to, or connecting it with, the independent act of other employees, to whom no wrong can be attributed.

Counsel argue, in effect, that when an intoxicated person offers to go upon a railroad train as passenger the alternative is presented to the company either to refuse permission, or else, having received him, and accepted his fare, to answer in damages for whatever calamity to him may follow his expulsion, though justified by his improper conduct. Although it has been held that a railroad company is not bound to receive and carry a person who is so intoxicated as to be offensive, the power to exclude one from the right of traveling on a train, who offers to pay his fare, and though intoxicated, has not been guilty of any conduct as passenger forfeiting the right, is always subject to be called in question, and the company cannot therefore be fairly held to a strict exercise of it, except where the rights of others are involved. But, even con-

ceding the conductor* could have forcibly, and without incurring any legal liability to him, kept the deceased off the train at Lebanon, and committed an error in failing to do it, we do not see how on that account the right was impaired, or the duty lessened, to put him off at any place or time afterwards when his behavior rendered it legal and necessary. And if the deceased, for whose drunken state the company was in no way responsible, acted so as to justify and require his expulsion, it would be a harsh rule to make the company liable, if not otherwise so, merely because the conductor did not assume the risk and responsibility of deciding, even if aware of the fact, that he was too much intoxicated to be allowed to go upon the train at Lebanon. Then, regarding the deceased upon the train by his own volition, which the conductor did not, nor was bound, to oppose, the main question is whether the willful neglect of appellant, or its servants in charge of it, to perform any duty it owed to him, was the proximate cause of his death. The law makes it the duty of a railroad company to use all reasonable care in operating trains for both the safety and protection from molestation and insult of passengers; otherwise orderly and infirm persons and females, who, upon the faith of such protection, frequently travel unattended, would have no security against turbulent, bad men. And as it is obvious a train must be run with skill and system in order to assure safety and comfort, the conduct of any one who interferes with the management, or without just cause attempts to do bodily injury to, or put in fear, those in charge, is reprehensible, and unlawful. But a railroad company is not required to keep at hand armed police to arrest and confine on a moving train those who violate its necessary rules, or do injury to other passengers; nor can the employees neglect their duties, upon the faithful performance of which the safety of all depends, in order to do so. Consequently the only effectual remedy for or security against disorderly and lawless behavior on board a passenger train is the immediate and summary expulsion of the wrong-doer, and plenary authority of the conductor to do it is universally recognized, and required to be exercised whenever necessary for the safety or protection of either passengers or employees. It is clear from the evidence in this case the conduct of the deceased was such as to justify his expulsion, for he not only with a hostile purpose left his proper place and pursued the conductor into the ladies' car, where he disturbed, alarmed, and offended the passengers, but, baffled in an effort to enter it a second time with the same intent, he wantonly and slyly pulled the bell-rope, whereby the train was stopped between stations. Moreover, his behavior to the conductor was without provocation, and such as to afford to him reasonable grounds to believe he was in danger of bodily harm, if not of losing his life. In fact, the *gravamen* of the action as stated in the petition is not based upon the lack of legal cause for the expulsion, but rather upon the circumstance of time, place, and manner in which it was done, in view of the alleged physical and mental condition of deceased. Though the time was at night, it was not too dark to see the railroad track distinctly, nor was the weather either cold or inclement; while it would in fairness seem no more than retributive justice that he was put off at the place his own malicious and unlawful act caused the train to stop, especially as the locality was not unsafe.

The question then arises whether, notwithstanding his continued presence on the train was so offensive and dangerous both to the conductor and other passengers as to justify and require his expulsion, the paramount duty was imposed upon the company, by reason of the mental and physical condition of the deceased, to carry him to the next station, the non-performance of which is, in legal contemplation, willful neglect. It was not enough for the jury in this case to find he was too intoxicated to take care of himself, but to constitute willful neglect, even if the company was under obligation to look after his safety after he had forfeited his right as passenger, it was necessary that the conductor knew or had reasonable grounds to believe, not, in the

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age of one of the instructions of the lower court, that to put him off the train "would necessarily expose him to the danger of death from being run over by passing trains," but that such would be the natural and probable result of putting him off. If his actions while on the train—by which alone the conductor could or was required to judge—be taken as evidence of what his actual condition was, he not only had the power of locomotion, as shown by his passing with entire safety, to and fro between the cars while the train was in motion, but knew well how to do mischief to others, and was at the same time extremely sensitive of injury to himself. And it seems to us, in the light of the undisputed facts of the case, unreasonable to charge the company with negligence of any degree in expelling him from the train at the time and place it was done.

But, as it is proper, we will consider the relation and mutual obligations existing between him and the company as though it was an open question of fact whether the conductor knew or had reasonable grounds to believe he was too intoxicated to take care of himself. It is well settled by this court, and the certain and just execution of the law and welfare of society require it to be settled, that voluntary drunkenness affords no excuse for the commission of crime, nor is it a valid defense to an action for a civil injury; for in every situation and relation an intoxicated person, like others, should be held to the strict observance of the just and statutory rule which requires each one to so use and enjoy his own as not to injure others. It thus becomes lawful for a landlord to expel from his tavern to the street or highway, at any time, a person who, whether intoxicated or not, endangers the safety, or molests and insults his guests, and no one would question the right of a housekeeper to eject from his domicile a drunken man who maltreats or offends by indecent conduct or language his wife and children, provided no more force be used in either case than was reasonably necessary. Such being a rule of conduct recognized as just and necessary, we do not see why it ought not to be applied, upon the same condition, for the benefit and protection of passengers on a railroad train, nor why they should be given the right to maintain an action against a railroad company for suffering them to be molested, put in fear, and insulted on a train by drunken men, while denying the company the right, except at its peril, to resort to the only feasible means in its power to prevent or stop the wrong being done. Common justice would seem to require either that passengers be left without redress against the company for wrong and injury done to them on trains by disorderly and vicious persons, or else that no liability attach, or negligence be imputed, to the company when the expulsion of the latter is rendered necessary for the safety and protection of the former. Thus the issue in every such case as this is really between the orderly, infirm, and females on the one side and the turbulent and evil-disposed on the other, and the company has the right to terminate the relation of carrier and passenger between it and the latter class whenever and wherever they lawlessly put in fear, disturb, or insult the former. And in our opinion, if the deceased went into the ladies' car, and there by his violence and indecent behavior or language excited, alarmed, or insulted the other passengers, or if he interfered with the management of the train by pulling the bell-rope or otherwise, or if he threatened with an open knife to take the life of or do bodily harm to the conductor, or attempted to deter or intimidate him while in the performance of his duties, the right existed to put him off the train at the place it was done, and all that was required of the company was to use no more force than reasonably necessary for the purpose, and to place him off the track, out of the way of that train; for although there might be a case where a railroad company would be guilty of willful neglect in the meaning of the statute by ejecting, without imperative necessity, a passenger so drunk as to be helpless when his death would naturally and probably result from agencies other than his own act, then present and impending, the law

does not exact care and precaution against the death of one from remote causes, or self-inflicted, whose conduct has afforded legal grounds for his expulsion.

The case of *Railroad Co. v. Sullivan*, 81 Ky. 624, is unlike this. There the only violation of the rules of the company was the failure by reason of inability to pay the fare, which was 20 cents. Here the deceased was able to pay, but not only threatened violence because he was asked to pay, but compelled the conductor to resort to force to get it. There the delinquent was neither turbulent nor offensive to passengers or employees. Here the deceased not only insulted and alarmed the passengers, but threatened personal violence to the conductor, and imperiled the safety of all on board, by causing the train to stop. In that case *Sullivan* was inhumanly put off in a deep snow, the weather being intensely cold, and on account of his helpless condition, which the conductor knew of, was unable to escape the injury that was at the time manifestly inevitable. In this case the deceased was killed by his own act in going upon the track, which the conductor had no reason to believe, from his mental and physical condition, as it appeared to him, was probable.

As the lower court refused to give any instruction according with the views here expressed, but instead gave three which are either abstract or erroneous and misleading, the judgment is reversed, and cause remanded for a new trial consistent with this opinion.

PERKINS v. MAYSVILLE DISTRICT CAMP-MEETING ASS'N.

(Court of Appeals of Kentucky. February 7, 1889.)

1. TRESPASS—SUIT AGAINST CORPORATION—PLEADING.

An action cannot be sustained against a corporation on a mere allegation that a trespass was committed on plaintiff's close, and that his property was seized by the corporation, it not appearing how or by whom the trespass was committed.

2. SAME—ALLEGATIONS.

An allegation that the president of a corporation interfered with plaintiff's trade and calling as a merchant, by telling others that he had no right to sell his goods, etc., does not state a cause of action against the corporation.

Appeal from circuit court, Mason county; A. E. COLE, Judge.

Action for damages by Milton Perkins against the Maysville District Camp-Meeting Association, a corporation. Plaintiff alleged (1) that defendant had committed a trespass on his property, and forcibly carried away goods belonging to him; (2) that defendant had by its president, by false representations, hindered and prevented plaintiff from conducting on his own premises the business of keeping and feeding horses; (3) that defendant, through its president, had made certain false representations concerning plaintiff, so as to prevent boarders from seeking entertainment at his house. Demurrer to the second and third causes of action was sustained. Defendant justified the alleged trespass by the provisions of its charter and the judgment of a justice of the peace. Judgment for defendant, and plaintiff appeals.

L. W. Galbreath, for appellant.

PRYOR, J. A corporation may be made liable for a tort, or even an assault and battery, committed by its agents, when in discharge of a duty connected with its employment, and in its execution. 2 Chit. Pl. (Amer. Ed.) 16. To make the corporation liable, the act complained of must be within the object of the association. Here the plaintiff complains that his property was seized and taken possession of by the corporation. A trespass upon his close is alleged, but the manner of committing the forcible entry, or by whom, does not appear. It is alleged in one count that the president of the corporation

prevent persons from being entertained by the plaintiff, and interfered with his trade and calling as a merchant, in telling others that he had no right to sell his goods and wares, or to entertain them, although on his (the plaintiff's) own premises. The District Camp-Meeting Association of the Methodist Church was chartered by an act of the legislature, and to suppress disorder, confusion, and to prevent the disturbance of religious worship, a police regulation is found within its charter, enacted to prevent hucksters and itinerant vendors of what may be termed "goods," and keeping private entertainment in a particular mode, calculated to disturb those assembled for religious devotion. The act does not, nor was it intended to, interfere with any legitimate trade or calling, either on one's own land or off of it, but to prevent the conduct of temporary business houses for the time only that the meeting continues.

If there was a trespass on the plaintiff's premises, it does not appear that it was authorized by any act of the corporation as such; and if the president of the corporation interfered with appellant's trade, by telling others they ought not to be entertained by him, he is personally liable, if facts are alleged constituting a cause of action.

Besides, we think the answer filed to the first count in the petition, to which the demurrer filed was overruled, presented a defense to the whole charge as made by the plaintiff; and, while that count was as defective as the other two, a trial was had on the merits; at least, the law and facts were submitted to the court, and a judgment for the defendant. The plaintiff's business house was a stable, erected on his own land, within a hundred yards of the place for religious worship, and the corporation, in order to enforce the police regulations embraced within its charter, applied to a justice of the peace, and had, under regular proceedings, a fine imposed on the appellant and his partner for selling, etc., and in discharge of the fine a part of the goods was surrendered to the officer, and on the admission of these facts the judgment was rendered.

There was nothing in the charter that authorized the agents of the corporation to go on plaintiff's land, or otherwise injure him in his trade; and if the president of the appellee, by word or action, violated the constitutional rights of the appellant, he is individually liable. On the facts admitted, the justice was right in not regarding the appellant's stable as a place of business, and in suppressing its operation.

Judgment affirmed.

BAILEY *et ux.* v. BAILEY *et al.*

(Court of Appeals of Kentucky. February 9, 1889.)

RECEIVERS—APPOINTMENT—ACTION TO ENFORCE LIEN.

In an action to enforce liens against land, where it appears from affidavits filed that, owing to defendant's mismanagement, the land is deteriorating, and the fences becoming destroyed, and these statements are not directly controverted, a receiver should be appointed to take charge of the property.

Appeal from circuit court, Butler county; W. L. REEVES, Judge.

Action by Jeremiah Bailey and others against Dock Bailey and wife, to enforce liens on land. Pending the action, on motion of the plaintiffs, a receiver was appointed to take charge of the land, and defendants appeal.

Wm. Wand, for appellants. T. H. Hines and E. W. Hines, for appellees.

PRYOR, J. This is an appeal from a judgment or order placing the land sought to be subjected in the hands of a receiver, as provided by section 298, c. 5, Carroll's Code. Affidavits were filed by the appellee showing that the land was in a ruinous condition, the fences all destroyed, and a general dilap-

idation of the entire farm, owing to the mismanagement of the appellant. There are counter-affidavits filed by the appellant, showing the value of the land, but not of such a character as to contradict, except indirectly, the statements contained in the affidavits offered by the appellee. The chancellor, under the facts, assigned to the appellant his house, yard, garden, etc., and placed the land in the hands of a receiver, and in his action we concur.

Judgment affirmed.

RISIEN v. BROWN.

(*Supreme Court of Texas. January 23, 1889.*)

1. WATERS AND WATER-COURSES—RESERVATION OF RIGHTS—CONSTRUCTION OF DEED.

A deed to land situated on a creek contained the following clause: "And I hereby convey unto said J. H. Brown, his heirs and assigns, all the rights and privileges of using the waters of said McAnnelly's creek, which I have heretofore possessed, and which, until now, I have reserved in all conveyances of land on said creek, for the purpose of erecting machinery." By a prior conveyance of land on the creek the grantor had reserved the exclusive "control of the water, and the privilege of banking on said land conveyed in said creek;" and by a subsequent conveyance of all his remaining land to a third person, he reserved "the privilege of banking water up the said creek, for the purpose of erecting machinery." *Held*, that the deed first mentioned conveyed the right and privilege of using and controlling the waters of the creek for the purpose of erecting machinery, and also the right to use the waters by erecting a dam across the creek.

2. LICENSE—REVOCAION—ESTOPPEL.

The grantee in that deed, plaintiff, authorized defendant, in 1877, to erect a dam across the creek, and utilize the water; the license to continue at plaintiff's pleasure. In 1880, defendant, with plaintiff's knowledge and active assistance, made numerous contracts to supply water from the creek by means of his dam, the contracts to continue five years. To carry out these contracts, defendant erected a new and expensive dam, plaintiff furnishing the material, and expended money for pipes, etc. In 1884, defendant, with plaintiff's knowledge and assistance, as before, made new contracts for five years longer. *Held*, that plaintiff was estopped to revoke the license before the expiration of the latter contracts.

Commissioners' decision. Appeal from district court, San Saba county; A. W. MOURSUND, Judge.

Action of trespass to try title, and to determine riparian rights, brought by J. H. Brown against E. E. Risien. Judgment for plaintiff, and defendant appeals.

Fisher & Townes, for appellant. *Burleson & Harris*, for appellee.

HOBBY, J. This suit was brought in December, 1885, by the plaintiff, Brown, against Risien, to determine the riparian rights of the parties to McAnnelly's creek. The plaintiff alleges that on the 1st day of January, 1877, and long prior to that time, and since, he was and is the owner of the land described in the petition as situated on the east bank of said creek, consisting of about 500 acres, and is the riparian proprietor of the original source of said creek, and all of its water in its natural and regular flow, and entitled to the exclusive possession of the same, from its source to its mouth, for all reasonable and domestic purposes, and for the purpose of converting it to use by artificial means, for the purposes of using it commercially, and as a power to run machinery of all kinds, by banking, damming, and all other means; that the defendant Risien on January 1, 1877, entered upon said premises, and erected a dam, extending from bank to bank, including both of the natural banks of said stream, and has converted and appropriated both banks, bed, channel, and water of said stream to his own use in various ways, as a means, power, and force to run machinery, and selling in specified quantities said water, and has placed in the natural bed and channel of said stream a hydraulic ram, and other obstructions; all of which it is alleged has been done

by the defendant Risien without the acquiescence and consent of the plaintiff, except by permissive accommodation up to about the 1st day of April, 1885, since which date he has committed such acts and trespasses and conversions without plaintiff's consent, and against his protest; praying for a recovery, and general relief. Risien answered, denying Brown's rights as claimed by him; alleged ownership in himself of a tract of land on the west bank of the creek, where the dam was erected; asserted rights to the waters of the stream as a co-proprietor with Brown; alleged the latter's acquiescence in the building of the dam, with full knowledge of all the facts connected therewith, and his encouragement of him (Risien) so do to. He also pleaded that after using the dam erected in 1877 for several years, it became unfit to meet the demands made upon him to supply water, which fact was made known to Brown, who consented to an extension of the privileges previously granted, and encouraged him in the erection of a new and permanent dam in the same place, and encouraged him to enter into contracts to supply parties with water, which contracts were to run for a number of years, and had not expired; and that Brown had encouraged parties to enter into said contracts; and he was therefore estopped from interfering with the use and enjoyment of said dam, at least until the expiration of said contracts, if not absolutely, and until he (Risien) had been compensated for the money and labor expended by him in connection therewith.

The leading questions in the case involve—*First*, the construction of the deed to Brown from McAnnelly, which it is contended vests in him the exclusive rights to the waters of the creek, as alleged in the petition. *Second*, the law of estoppel, under the operation of which it seems the rights of the defendant, Risien, depend. McAnnelly was the original owner of the land on both sides of the creek, from its source to its mouth. On the 10th day of April, 1866, he executed to Brown a deed conveying 500 acres of land, which embraced all of the land on the east bank of the stream, crossing it a short distance above its mouth, and including a small part of the land on the west side. This deed, in addition to the usual language employed in similar instruments, contained the following clause: "And I hereby convey unto sa d J. H. Brown, his heirs and assigns, all the rights and privileges of using the waters of said McAnnelly's creek, which I have heretofore possessed, and which until now I have reserved in all conveyances of land on said McAnnelly's creek, for the purpose of erecting machinery up to R. D. McAnnelly's original boundary line." Two conveyances of land had been made by McAnnelly, near the source of the creek, prior to the deed to Brown. In one of these—the conveyance to Williams in 1860—this reservation is made: "Except the extensive [probably the word 'exclusive' was intended] control of the water, and the privilege of banking on said land conveyed in said creek, up to starting point of said two-acre tract of land." "The extensive control of the water" must have been a right existing in McAnnelly at the time of the execution of the deed to Brown, and which he refers to as "heretofore possessed," and "which until now I have reserved," etc., and, together with "all the rights and privileges of using the waters of said creek," he assigned to Brown. This would seem to be the obvious meaning of the language contained in the clause in the deed to Brown, when construed in connection with the exception or reservation in the prior conveyance to Williams. If, then, McAnnelly was clothed with the right to the "extensive control of the waters of the creek" which he had reserved in the deed to Williams, this right would pass to Brown upon the principle that all of the rights and privileges possessed by the grantor at the time of the conveyance would vest in his grantee, unless it appears from the deed that less than these were intended to be conveyed. It is a familiar rule in the construction of instruments of this character that effect should be given to every part thereof, if this can be done. *Hancock v. Butler*, 21 Tex. 816. This principle would be violated, and the clause quoted,

granting to Brown "all the rights and privileges of using the waters of the creek heretofore possessed and until now reserved," etc., would be inoperative, and without meaning, if the deed from McAnnely to Brown conveys only such riparian rights to the middle or thread of the creek as would be coincident to the ownership of land on the bank thereof, because such riparian rights would be the legal effect of, and pass by, the deed without the aid of this clause. There are contemporaneous facts in the case supporting the construction of the deed that it operated to create an easement in Brown's favor. He purchased the land with the intention of erecting and operating a dam across the creek, and to control the water below, and paid an extra consideration for this purpose. That the language of this clause, as understood and interpreted by the grantor in the deed, McAnnely, conveyed greater riparian rights and privileges than would be ordinarily incident to the ownership of land on the bank of a stream, is evidenced by the subsequent conduct of McAnnely in making the reservation in the deed to Rogan, executed in 1868, and by which instrument he conveyed all of his land remaining on the creek. This tract consisted of about 12 acres on the west bank of the stream. At the time of the execution of this conveyance to Rogan he mentioned to him the "reservations" he had made in the deed to Brown, and then inserted in the Rogan deed the following: "I hereby reserve to myself the privilege of banking water up the said creek, for the purpose of erecting machinery." This could not have inured to the benefit of McAnnely, as it was the reservation of a right he could not exercise by reason of the fact that he was then divesting himself of all title to land on the creek. The conveyance previously made to Brown of 500 acres, and that to Rogan of 12 acres, embraced all of the land on the creek. The most reasonable explanation of the reservation in the Rogan deed is that it was made by McAnnely to avoid any claim by Rogan, which he could have made against McAnnely under the terms of his deed, but for this reservation or exception. The deed from McAnnely to Brown, of April, 1866, we think conveyed to the latter title to the land therein described to the middle or thread of the creek. In addition to this, the clause we have referred to, read in the light of all the facts and circumstances disclosed by the record, conveyed to Brown the right and privilege of using the waters of the creek, and of controlling the same for the purpose of erecting machinery, and conveyed also to him the right to use the waters of said creek by the erection of a dam across the same, although it should become necessary, in erecting such dam, to use the west bank of the creek, owned by another person.

The facts which the appellant, Risien, claims operate as an equitable estoppel, and preclude the recovery sought by Brown, are that Brown authorized and permitted him to erect the dam in 1877, and to utilize the water of the creek. This permission or license was to continue for such time as suited Brown's pleasure. Under this license Risien erected a dam in 1877, which he used for several years. In 1880 Risien entered into contracts with the county commissioners of San Saba county, and many other persons, to supply water from the creek. Brown knew that Risien had made these contracts; assisted him in obtaining some of them; was himself a subscriber to a contract to pay Risien a small sum annually to furnish water. These contracts were to remain in force for about five years. To carry out these contracts, Risien erected in 1880 a new substantial dam, obtaining from Brown material with which to construct it. After the expiration of these contracts Risien, in the spring of 1884, entered into other contracts of a similar character with numerous parties to supply water. These contracts were to continue and remain in force for several years. Brown knew that Risien had made these contracts, and induced several parties to contract with Risien, as he had previously done in 1880. The cost of the dam, including appellant's labor, is estimated at about \$575, and the cost of laying the pipes and other apparatus

to supply the water was about \$1,000. The income Risien derived from the water is estimated at about \$65 per month.

The remaining question to be disposed of is whether the acts or conduct of Brown were such as to call for the application of the doctrine of estoppel. An equitable estoppel, or estoppel by conduct, it is said, "consists in holding for truth a representation acted upon, when the party who made it seeks to deny its truth, and to deprive the party who has acted upon it of the benefit obtained. The primary ground of the doctrine is that it would be a fraud to permit a party to assert what his previous conduct had denied, when, on the faith of that denial, another or others have acted. It is not necessary that the fraud should be intended, but if it is the effect of the evidence set up, it is the same in its operation." Bigelow, Estop. 476; *Page v. Arnim*, 29 Tex. 71. If Brown, by a course of conduct or actual expressions, so conducted himself that Risien might reasonably infer the existence of an agreement or license, whether so intended or not, the effect would be that Brown could not subsequently gainsay the reasonable inference to be drawn from his conduct. *Harrison v. Boring*, 44 Tex. 269. Brown had encouraged and assisted Risien by supplying him with material to erect the dam in 1880, and had aided the latter in obtaining contracts to supply water to the county and numerous persons. It is true that this was with reference to the contracts which expired in 1885, but when Risien, with Brown's knowledge, had made and was entering into other contracts in the spring of 1884 of a like character, to continue several years, the latter encouraged Risien by his conduct in inducing several parties to contract with him, and to believe that he could operate the dam until the contracts expired. This conduct, entirely in harmony with Brown's previous acts, could be reasonably interpreted by Risien only as an agreement to continue the license or permission to use the dam and water for the purpose of executing these contracts made in the spring of 1884, as he (Brown) had permitted him to execute the contracts entered into in a similar manner in 1880. To allow Brown now to gainsay what his conduct then justified Risien in presuming he intended, would operate as a fraud. Risien would be unquestionably liable for the breach of any of the contracts to supply water, entered into in 1884, through the agency or conduct of Brown. Brown was instrumental in placing him in this position of liability. And it is this feature of his conduct which would preclude Brown from a recovery, or interfering with the use of the dam by Risien, until the expiration of such contracts as were made with his assistance in 1884. We do not think Brown is estopped by reason of the permission to Risien to erect the dam in 1877, and use the water until he desired him to discontinue its use; nor would the knowledge of and acquiescence in the building of the dam in 1880, and the supply of material to Risien for its erection, affect his right to recover. Neither do we think that, as condition precedent to his recovery, Brown should be required to compensate Risien for any part of the dam. The contract or license under which Risien expended his labor and means was of his own making. The dam and improvements erected by him were built with the full knowledge and recognition of the right existing in Brown to revoke the permission at any time. They were put upon Brown's land for Risien's benefit, and not to improve the estate. Brown not having revoked, and not having the power to revoke, the license given to Risien, until the expiration of the contracts made by him and heretofore referred to, Brown has no right to recover in this action, and the judgment should be reversed, and here rendered for appellant.

ACKER, J., not sitting.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed and rendered for appellant.

STONE *et al.* v. HILL.

(Supreme Court of Texas. January 25, 1869.)

JUSTICES OF THE PEACE—TIME OF HOLDING COURT—JUDGMENT—VALIDITY.

Rev. St. Tex. art. 1547, providing that justices residing at the county-seats "shall hold the regular term of their courts on the last Monday of each month," was amended by providing that justices should hold regular terms at such times as might be prescribed by the commissioners' court of the county. *Held*, that a term of court held by a justice at a county-seat after the amended article went into effect, but on the day prescribed by the old statute, the commissioners not having taken any action as to the time of holding court, was not without authority of law, and that a judgment rendered at such term was valid.

Appeal from district court, Washington county.

J. T. Swearingen, for appellants. *O. L. Eddins*, for appellee.

GAINES, J. At a term of the justice's court held at Brenham, the county-seat of Washington county, on the last Monday in December, 1881, Heber Stone, one of appellants, recovered a judgment against the appellee. By another judgment rendered in the same court, at a term held on the last Monday of October, 1883, the first judgment was revived, and a chattel mortgage foreclosed, which had been given in 1882 to secure it. In September, 1884, execution was issued upon the last-named judgment, and was placed in the hands of appellant Moore, as sheriff of the county, who by virtue thereof seized certain property of appellee. Appellee then brought this suit to enjoin the sale of the property and the enforcement of the execution, as well as the issue of any other execution upon the judgment. A preliminary injunction was granted, which upon final hearing was made perpetual. From this judgment the defendants appeal.

The ground upon which the injunction was claimed was that the respective terms of the court at which the judgments in the justice's court were rendered were not authorized by law, and that, therefore, the judgments were void. Article 1547 of the Revised Statutes contains this provision: "The justice or justices residing at the county-seats shall hold the regular term of their courts * * * on the last Monday of each month." The seventeenth legislature passed an act which provided that the article cited should be so amended as to read as follows: "Art. 1547. Justices of the peace shall hold regular terms of their courts at their respective offices at such times as may be prescribed by the commissioners' courts of the county." Laws 17th Leg. 10. This act was passed February 17, 1881, and took effect from its passage. The commissioners' court of Washington county did not prescribe the time of holding the justice's court in Brenham until November 12, 1883.

On behalf of appellee it is contended that, article 1547 of the Revised Statutes having been repealed by the act of 1881, there was no authority of law for holding the justice's court in the Brenham precinct until the commissioners' court acted. But we do not think that this position can be maintained. It is true that a strict and literal construction of the act would support the contention of appellee; but in construing a statute the intention of the legislature is to be considered, and when that intention is evident, though not consistent with the letter of the law, and a literal construction is calculated to create confusion, and to work irreparable wrong, the intention should govern. The evil which was sought to be remedied by the act in question is shown by the emergency clause. It reads as follows: "There being no adequate law now in force fixing the times of holding the justices' courts, where there are more than one residing at the county-seat, and it being impossible for the constable to wait upon the courts holding sessions at the same time, an imperative public necessity exists that this act take effect at once," etc. Cities only having 8,000 inhabitants or more were entitled to two justices of

the peace. Const. art. 5, § 18; Rev. St. art. 1534. There were probably not 10 cities of this class in the state at the time the act was passed. Therefore it was evidently intended by the act in question merely to confer power upon the commissioners' courts to change the times for holding the justices' courts at the county-seats, so that they could remedy the expressed evil, by fixing a different day for holding the justices' courts in these counties, where there were two justices in the same precinct. The law involved no radical change of policy, and, in our opinion, was never intended absolutely to require the commissioners' courts to make a change. Where there was no reason for a change of the day then fixed by the law, it was not likely that all the commissioners' courts in more than 100 counties in the state would think to designate the days upon which these courts should be held; and therefore it should not be held that the legislature intended to declare a law which might result in the closing of numerous tribunals in the state until the commissioners' courts should be called upon to take action in the premises. It should neither be held that it was intended that the days previously fixed should be deemed designated by the commissioners until they should see proper to make a change. The constitution provides that the justices "shall hold their courts at such times and places as may be provided by law." Const. 1876, art. 5, § 19. Article 1546 of the Revised Statutes provided that they should hold one term each month. This remained unrepealed by the act of 1881. We cannot believe that by that act the legislature meant to leave the justices without power to hold their courts until such time as the commissioners should act. It is rather to be presumed that they intended that each justice of the peace holding his office at the county-seat should hold his court as then prescribed by law, until the commissioners' courts should prescribe a different day for the beginning of their terms.

If a precedent were needed for our ruling, it is found in the case of *Womack v. Womack*, 17 Tex. 1. There an act of the legislature changing the terms of the district court was construed contrary to its literal terms, and it was held that, though the act prescribed that it should go into effect immediately, it did not take effect so as to avoid a term of the court, which under the old law came on within a few days after the passage of the new statute. The principle is that, where the intention of the legislature is manifest, that intention will prevail over the literal terms of the statute.

We think the terms of the justice's court at which the judgments called in question in this suit were rendered were not without authority of law, and that the judgments are therefore valid.

The judgment here appealed from will therefore be reversed, and here rendered for appellants.

DUPREE *et al.* v. ESTELLE.

(Supreme Court of Texas. January 29, 1889.)

EQUITY—ACTION TO REDEEM FROM FORECLOSURE—EVIDENCE.

In an action to redeem land from a foreclosure sale under an alleged agreement by defendant to purchase and hold the land for plaintiff, the only evidence of the agreement was that of plaintiff's father, who testified that he acted for his son in the matter and made the agreement, and that of the defendant, who testified that the proposition was made to him, but, after being advised by counsel that the transaction would be but a mortgage, he declined it, and bought the property on his own account. Defendant's attorney, after testifying, on cross-examination by plaintiff, that defendant on the day of sale asked him what effect certain things, if done, would have, to which he replied that they would amount to a mortgage, was asked by defendant, "What did defendant then say?" It appeared that the witness would have answered that defendant said "he would have nothing to do with it." Held, that as the witness' proposed answer tended to corroborate defendant, its exclusion was error.

On motion for rehearing. For former opinion, see *ante*, 98.

Prather & Lindsay, for appellants.

GAINES, J. Upon consideration of the motion for a rehearing in this case, we are of opinion that it should be granted, and that the judgment should be reversed, and the cause remanded. The appellants' first assignment of error was not discussed in the former opinion. We now conclude that that assignment was well taken. It calls in question the correctness of the ruling of the court below in rejecting certain testimony offered by appellants. The main question in the case was whether or not Dupree had, before the sale of the property in controversy by the trustee, agreed with appellee that he would purchase it, and convey it to the latter upon payment of the purchase money and \$100 for the use of his money and his services. The father of appellee testified that he acted for his son in the transaction, and made the agreement as just stated. The appellant testified on his own behalf; admitted, in effect, that J. Y. Estelle made the proposition to him, but stated that, after having been advised by counsel that the transaction would be but a mortgage, he declined to accede to the proposal, and then bought the property on his own account, or that of his wife, taking the deed to her. These were the only witnesses who swore to any direct knowledge of the transaction in controversy. Such being the state of the case, W. L. Prather, Esq., a witness for appellant, was asked upon cross-examination, "whether or not on the day of the sale of the property in question, and before the sale thereof, W. E. Dupree came to him and consulted with him as to what effect certain things, if done, (but which certain things witness did not remember definitely enough to state,) would have; that he (Prather) thereupon told said W. E. Dupree that it would only be a mortgage. After stating this part of said conversation, counsel for appellants asked said witness Prather what reply said W. E. Dupree made thereto. To this question appellee's counsel objected, on the ground that appellant W. E. Dupree could not make evidence for himself by his own admissions, and the court sustained said objection, to which ruling of the court appellants' counsel excepted."

The bill of exceptions shows that, if permitted, the witness would have answered that he (Dupree) replied to Prather that "if such was the case he would have nothing to do with it." The plaintiffs having drawn out a part of the conversation, the defendant was entitled to introduce in evidence the whole conversation, if it contained matter relevant to the issue. We think the testimony was material. There was a direct conflict of evidence upon the main issue. The testimony elicited by the cross-examination of Prather tended to corroborate the plaintiff's witness by showing that a very short time before the sale Dupree had under consideration the proposition submitted to him by the father of plaintiff. His reply to Prather tended to show, not necessarily, that he did not subsequently make the agreement, but that at the time of the conversation he abandoned the thought of accepting the proposition made him. This tended to corroborate his testimony that he never acceded to the proposition. It was but a circumstance to which the court who tried the facts may have attached little weight if it had been admitted. Nevertheless it was competent evidence, and the defendants were entitled to the benefit of it. It is not for us to say what weight the trial judge may have given it, if he had felt at liberty to consider it, and hence its exclusion must be held reversible error.

We deem it unnecessary to enter into any discussion of the amount adjudged below in favor of appellant. But, having carefully considered the question of account between the parties in the event the plaintiff should be entitled to recover, we think it proper to announce the result of our deliberations for the guidance of the court below upon another trial. The contract alleged in the petition, and that sworn to by the only witness who testified as to its terms, are not precisely the same. Our remarks will be predicated upon the contract

shown in the testimony. The witness testified as to this matter as follows: "The agreement was, we were to let him have the \$200 we had, and he was to pay the balance, and hold the property, and collect the rents, and give us credit for the same until next fall, to give us a chance to make a crop and pay her back; and he said he would charge us \$100 for doing this. That was to pay him for accommodating us, and giving us a chance to redeem the property." In the event the plaintiff should again recover, he should be charged with the amount advanced by Dupree, with the \$100 promised to be paid for the accommodation, and with all sums paid by Dupree for necessary repairs, taxes, and insurance. Dupree should be charged with all rents actually received by him. We construe the contract to mean that the \$100 was to pay Dupree for his trouble, and to cover the interest on the advance, until the latter should fall due. No interest should therefore be charged on either side of the account until the debt matured. After this, interest at the rate of 8 per cent. per annum should be allowed upon each item of debits and credits. Should the defendants be again cast in the suit Dupree should have a judgment for the balance in his favor, if any, shown by an account so stated, and should have a lien upon the lot for its enforcement. The appellee, having had credit for the \$200 deposited in another transaction, should be held to account for the whole of the purchase money bid at the trustee's sale.

The judgment is reversed, and the cause remanded.

DWYER v. RIPPETOE *et al.*

(Supreme Court of Texas. January 25, 1889.)

1. TRESPASS TO TRY TITLE—EVIDENCE—ADMISSIONS.

In trespass to try title, where defendant claimed under a sale on foreclosure of a vendor's lien, the original vendee testified that after an appeal had been taken in the proceedings to foreclose the lien he paid the judgment to an attorney, who had since died, that the attorney's partners were absent; that he had lost his receipt; and that of the other three persons present two were dead. The payment was alleged to have been made about 25 years prior to the giving of the evidence; and the third person alleged to have been present, a man 77 years old, testified that he had no recollection of any such occurrence. *Held*, that testimony of the attorney's partner relative to the attorney's mode of doing business, showing that the payment was improbable, and also that, after the reversal of the case, the attorney had filed an amended petition, and had been engaged in this suit, but had never mentioned the payment, was admissible, as also evidence of an admission made by the vendee to a subsequent owner of the premises that the lien was still in force.

2. TRIAL—RECEPTION OF EVIDENCE—GENERAL OFFERS.

After a witness had testified on the trial at great length, plaintiff offered in evidence his deposition, taken many years before in the case, and covering the same ground, together with the deeds offered in connection therewith. The record failed to show what deeds these were, and how they were offered, and how proved. *Held*, that the offer was too general, and was properly excluded.

3. EVIDENCE—OF DECEASED WITNESS AT FORMER TRIAL.

The testimony of a deceased witness on a former trial cannot be shown by the statement of facts, prepared for the purposes of an appeal, signed by the attorneys, and approved by the presiding judge, none of whom recollected it.

4. JUDGMENT—RES ADJUDICATA—PURCHASE PENDENTE LITE.

The plaintiff acquired title during the pendency of the appeal in the foreclosure suit. The court charged that plaintiff was bound by the judgment rendered therein as if he had been a party thereto. *Held* not improper to refuse to modify it by charging that the doctrine of *lis pendens* would not be enforced against one who purchased without actual knowledge of the suit, or, having knowledge of the suit, reasonably believed the debt had been paid, where there had been unreasonable delay in the prosecution of the suit.

5. JUDICIAL SALE—SHERIFF'S DEED—INTEREST CONVEYED.

The decree was for the foreclosure of the lien on all the lands sold by the vendor to the vendee. The sheriff's deed conveyed to the purchaser such interest as the vendee and a third person, to whom he had sold a part, had on the day the decree was entered. The third person never had any interest in the lot in controversy, and

the vendee had parted with all his interest before the date of the decree. *Held*, that plaintiff was not entitled to a verdict, because neither of the persons mentioned in the deed had any interest in the land in controversy at the time named, as the purchaser acquired all the title conveyed by the original vendor.

6. TRUSTS—CONSTRUCTIVE TRUST.

Plaintiff acquired title by *mesne* conveyances, pending the foreclosure of the lien, from the original vendee. Defendant acquired title in the same manner, by different conveyances, to another part of the tract included in the original conveyance, and covered by the lien. *Held*, that there was no such relation of trust, in the absence of agreement, existing between plaintiff and defendant, as would prevent defendant from acquiring an interest in the outstanding incumbrance, and enforcing it against plaintiff.

Appeal from district court, Washington county.

Bassett, Muse & Muse, for appellant. *C. R. Breedlove, Searcy & Garrett*, and *Bryan & Campbell*, for appellees.

HENRY, J. Thomas Dwyer instituted this suit in the year 1873 against A. H. Rippetoe and Julius Tamashofsky, to recover a portion of lot 43 in the city of Brenham. The case was before this court on appeal by defendants, and was reversed and remanded in the year 1886. 65 Tex. 703. In 1887 plaintiff filed an amended petition in the form of an action of trespass to try title, making J. M. Onins, D. C. Giddings, and J. D. Giddings defendants, charging that on the 23d day of February, 1871, while plaintiff was in quiet possession of said premises, the original defendants, "acting for themselves, and for and by consent of their co-defendants, with force and arms" entered upon the premises and evicted plaintiff therefrom. The deaths of defendants Rippetoe and J. D. Giddings were suggested, and their heirs and legal representatives were cited. Giddings and Onins demurred generally, and by special exceptions pleaded both the statutes of limitations and stale demand.

The original defendants filed a general denial and plea of not guilty, and specially answered, in substance, as follows: That on 17th March, 1859, one Browning sold and conveyed to W. B. Pressley lot 43 and part of 90, in one parcel, for which Pressley executed his three notes, each for \$150, and each retaining vendor's lien. That on 29th February, 1860, A. Testard, as assignee, and for the use of Lowery, instituted suit on one of said notes in the district court of Washington county against said Pressley, in which suit judgment was rendered on the 21st April, 1860, for the debt and foreclosing the vendor's lien. The case was taken to the supreme court by the defendant, and in 1867 was reversed and remanded. Afterwards, H. B. Perryman, having purchased part of lot 43, and being in possession, (not of the part claimed by plaintiff,) was made a party defendant with Pressley. In October, 1870, a judgment was rendered for the plaintiff for his debt, with foreclosure of vendor's lien on all the land sold by Browning to Pressley. That in March, 1868, R. D. Harris instituted suit in the district court against Pressley and Perryman on one other of said notes, and on October 24, 1870, judgment was rendered against Pressley for \$118.75, and against both defendants for the foreclosure of vendor's lien on all of the land sold by Browning to Pressley (all of lot 43 and part of lot 90) against both defendants. That on the 19th February, 1861, Pressley conveyed the part of lot 43 now claimed by plaintiff to J. C. Jennings, who, on the 16th day of March, 1861, conveyed it to plaintiff. On 19th February, 1861, Pressley conveyed 30 by 90 feet out of the north-east corner of lot 43 to C. J. Erwin, who, on February 27, 1861, sold it to original defendant, A. H. Rippetoe, and he, on the 16th May, 1861, sold it to one Prindle, who, on 28th August, 1863, sold it to W. S. Wilkins, from whom it was purchased on May 23, 1886, by Perryman and Pfughaup; all of said conveyances being made with warranties of title. The consideration stated in the last-mentioned deed was \$750, and that in the deed from Rippetoe to Prindle was \$700. That said lots lie contiguous to each other, forming one parcel of land. About April 16, 1870, Pfughaup, for the purpose of protecting him-

self, and before judgments were rendered, purchased said notes with the understanding that the suits should be prosecuted to judgment in the name of the original plaintiff for his benefit. Afterwards, and before judgment, Swearingen & Onins became the owners of said notes, with the right to control said suits: and defendant A. H. Rippetoe, for the purpose of protecting himself and his vendee, purchased of Swearingen & Onins a one-half interest in said notes and suits, paying therefor about \$207. That after the purchase of said notes by Rippetoe he solicited the parties interested to unite with him, and pay off said incumbrances, which they all declined to do; and thereafter on the 28th and 29th days of November, 1870, he caused orders of sale to be issued on said judgments, in pursuance of which the sheriff, on the 3d January, 1871, sold said lots to A. H. Rippetoe, who bid \$50 at each sale, which, by reason of adverse claims and incumbrances and threatened litigation, was all that said lots would bring at a fair sale. The sheriff executed to said Rippetoe a deed for said lots, whereby he became invested with the title thereto as it existed in Browning before his sale to Pressley. That defendant Tamashesky was at the date of the filing of plaintiff's original petition the tenant of his co-defendant, A. H. Rippetoe, and claims no other title. That defendant Rippetoe became seised of the entire legal title, one-half of which he held in trust for Swearingen & Onins. That J. D. Giddings and D. C. Giddings never acquired any interest in said lots until December, 1881, when they purchased a third interest therein. That Swearingen sold his interest to Onins, but the legal title to the whole always remained in A. H. Rippetoe.

Plaintiff filed an amended supplemental petition, in which he alleged that at the time of filing his suit he was not aware of the title or claim of right under which defendant afterwards undertook to defend this action. That the pleadings filed in this action previous to the trial of this cause, on the 16th September, 1874, consisted alone of the plea of not guilty, and plaintiff did not learn or have opportunity to learn the pretended title under which defendants claimed until it was disclosed through the evidence offered by them at said trial. At said trial a judgment was rendered for plaintiff, which having been appealed from by defendants, the cause was reversed by the supreme court, and remanded, in 1878. 49 Tex. 498. That defendants' title first came to his knowledge by their pleadings filed in this court on 17th January, 1879, and September 5, 1879. Plaintiff charges that the Harris judgment ought not to have effect against him because the suit in which it was rendered was not instituted until long after plaintiff had purchased the lot owned by him, and caused his deed to be recorded.

"(3) That said sheriff's sale and purchase thereat by the defendant Rippetoe, and all the proceedings anterior thereto upon which said sale purported to be based, were fictitious and void, and ought not to avail the defendants, or to prejudice the rights of the plaintiff, for this: that the said purchase of the defendant Rippetoe, though made in his own name, was in secret trust for himself and the defendants I. M. Onins and J. D. Giddings and D. C. Giddings, who were jointly interested with him therein, upon some agreement, the exact terms of which are unknown to the plaintiff, whereby the rights of the plaintiff and others were to be sacrificed by said parties under the forms of the law, although they well knew the fictitious character and consequent invalidity of said proceedings; and the defendant Rippetoe's said pretended purchase was made with notice and actual knowledge of the several matters set up in this supplemental petition in relation thereto. That the notes upon which said two judgments were rendered were executed by W. B. Pressley to said W. A. Browning in part consideration of the conveyance by said Browning to said Pressley of said lot 43 and part of lot 90 heretofore mentioned. That on or about the 5th of January, 1860, the said Pressley, joined by his wife, by their deed duly executed and recorded, conveyed to one C. J. Erwin all that part of lot 90 which had been conveyed by Browning to Pressley. That

afterwards, on or about February 19, 1861, the said Pressley sold parts of lot 43 above mentioned in severally to one J. C. Jennings, under whom the plaintiff claims, and to said C. J. Erwin and one George H. Khrono; the deeds to said Erwin and Jennings being executed on the said 19th of February, 1861, and that to said Khrono being executed February 23, 1861. That the said Pressley did pay off and discharge the judgment against him in favor of Testard to the use of Lowery, said payment being made to the attorneys of the plaintiff in said suit, to-wit, the aforesaid J. D. and D. C. Giddings and I. M. Onins, who were then partners in the practice of the law under the firm name of Giddings & Onins, who executed their receipt therefor, and then and there undertook and promised to satisfy said judgment, and dismiss said suit, and to procure such further orders therein as should be necessary to protect said Pressley and his vendees. That thereupon said several deeds from said Pressley to said Erwin and Jennings and Khrono were executed, and the consideration paid, and said deeds were accepted by the grantees upon the understanding between them and the said Key and the said Giddings & Onins, representing the plaintiff in the Testard-Lowery suits, that the said Testard-Lowery judgment was fully satisfied, of which the defendants had due notice at and before said Rippetoe's pretended purchase at sheriff's sale aforesaid. That afterwards, on or about February 28, 1861, the said Erwin, by his deed duly executed, conveyed to the defendant Rippetoe that part of lot 43 so conveyed to him by said Pressley. That after the payment, as aforesaid, of the Testard-Lowery debt, the said Pressley, relying thereon, and on the promises and undertaking of the plaintiff's counsel therein, and being furthermore insolvent, gave no further attention to the suit; and, the fact of such payment and agreement not having been brought to the attention of the court, the said cause proceeded to judgment in the supreme court on February 18, 1867, when the judgment of the court below was reversed, and the cause remanded for further proceedings. That the mandate of the supreme court was issued July 22, 1867, and was filed in this court March 18, 1868, all of which is patent of record. That afterwards one H. B. Perryman (who, in conjunction with one A. Pflughaupt, had become seised and possessed of the portion of lot 43 which had been conveyed as aforesaid by Erwin to Rippetoe, and who held the same by mesne conveyances under a warranty of title from said Rippetoe) was made a party defendant to said suit of *Testard, to the Use of Lowery, v. Pressley*, and also to the other suit, which had been meanwhile filed in the name of Harris, executor of Key, on the other note. That in the proceedings in the case of *Testard, for the Use of Lowery, v. Pressley and Perryman*, the plaintiffs were represented by J. D. & D. C. Giddings as their attorneys, while the defendant Perryman was represented by Swearingen & Onins, attorneys, which firm was composed of one P. H. Swearingen and defendant I. M. Onins, who had theretofore been one of the plaintiff's counsel in the last-named case; and he, (the said Onins,) as plaintiff believes and charges, alone took part in the practices and proceedings hereinafter alleged, although some or all of them were done and taken in the firm name of Swearingen & Onins. That pending said two suits of *Testard, Use, etc., v. Pressley and Perryman*, and *Harris v. Pressley and Perryman*, both of said notes were again paid off by Perryman and Pflughaupt, or one of them, to J. D. & D. C. Giddings; but notwithstanding such payment, and the previous payment by Pressley, the defendants procured said suits to be prosecuted to judgment in the names of the original plaintiffs therein, respectively, as appears in the defendant's answer, and afterwards procured the issuance of the executions under which the sheriff's sale was made, at which the defendant Rippetoe acquired the pretended title to the whole of lot 43 and part of lot 90, under which defendants seek to defend this suit. That said causes, and especially the case of *Testard, to the Use of Lowery, v. Pressley*, had been and were suffered to remain on the docket of said court for many years without prosecution, until the said Pressley, defendant

therein, and those who would have been privies had the same been a *bona fide* proceeding, and had the same been prosecuted with due diligence according to the course and practice of the court and of the law, had forgotten its existence, when judgment therein was taken, under which the sheriff's sale and the defendant Rippetoe's purchase were afterwards made."

"(5) And the plaintiff further alleges that on or about the 16th of March, 1861, the aforesaid J. C. Jennings, in consideration of the sum of seven hundred and ninety-seven 50-100 dollars to him in hand paid by the plaintiff herein, by his deed duly executed, conveyed to the plaintiff 60 feet square in the southwest corner of lot 43, being the premises in controversy; and that the plaintiff thereupon entered into possession of the same, and erected permanent improvements thereon, consisting of a two-story brick building of the cost and reasonable value of ten thousand dollars. That the defendant Rippetoe, in consideration of the sum of seven hundred dollars, by his deed executed May 16, 1861, conveyed to one T. J. Prindle the lot conveyed to him, the said Rippetoe, by the said Erwin, as above mentioned, and bound himself therein to warrant and defend the title thereto to the said Prindle, his heirs and assigns. That the said Perryman, who is named as a party defendant in the above-recited suits, and against whom, in conjunction with Pressley, judgments were rendered as above recited, was, at the date of his being made a party thereto, and at the date of said judgments, in possession of that part of lot 43 conveyed by said Rippetoe to said Prindle, claiming and holding title thereto by virtue of several conveyances to him, the said Perryman, and A. Pfughaupt, from said Prindle and others claiming under him with warranty of title."

On March 28, 1888, plaintiff again amended by offering "to allow to the defendants such ratable proportion of the amount paid by them, if any, for the property purchased at the sheriff's sale referred to in the pleadings as the premises in controversy bear to the whole purchase, or to such part thereof as may be held to be subject to a concurrent or subsequent lien with the premises in controversy, or to pay the amount thereof should the court hold that in equity and good conscience he ought so to do." The court sustained the exceptions of Onins, D. C. Giddings, and the heirs and legal representatives of J. D. Giddings, and dismissed plaintiff's case as to them, to which he excepted.

A written agreement between I. M. Onins, J. D. and D. C. Giddings, and A. H. Rippetoe, dated 6th June, 1874, was introduced in evidence showing that they were jointly and equally interested in lots 43 and 90, and that Rippetoe held the legal title in trust for said parties. It further showed that some of the land had been sold by Rippetoe, and that the proceeds of such sales were equally divided between said parties, and that said parties were bound to share equally costs and damages growing out of litigation with respect to said lots. The court submitted to the jury, in the form of special issues, the questions: "(1) Did Wm. B. Pressley, in 1861, and before the rendition of the judgment in the case of *Testard, for the Use of Lowery, vs. Pressley and Perryman*, pay off to J. D. Giddings, the attorneys of record, the debt upon which said suit was founded? (2) If he did pay off the debt as charged, did the defendant Rippetoe have notice of that fact when he bought the lot at the sheriff's sale? (3) If the jury answers the first question in the negative, you need go no further, but return a verdict for the defendant." The jury responded negatively to the first question. The court further charged the jury that if they believed the Testard-Lowery debt was paid off to J. D. Giddings by Pressley, as charged, to ascertain from the evidence whether others were interested with Rippetoe in the purchase at the sheriff's sale, and if they found there were, and that such parties had notice of such payment at and before such sale, then plaintiff was entitled to recover the shares owned by such parties. The jury was instructed that if the evidence showed that the Harris suit was instituted after Dwyer had purchased, and caused his deed to be recorded, the defendant Rippetoe acquired no title against plaintiff under that

judgment. Judgment was rendered for defendants, from which the plaintiff prosecutes this appeal.

His second assignment of error is that the court erred in admitting the testimony of D. C. Giddings and R. D. Harris. Pressley testified that he paid the Testard-Lowery judgment to J. D. Giddings, for which Giddings gave him a receipt; that neither I. M. Onins nor D. C. Giddings, who were the partners of J. D. Giddings, was present at the time of the payment; that the payment was made in February, 1861, while the case was pending by writ of error in the supreme court; that he had lost the receipt; that Erwin, Jennings, and Khrone were present when the payment was made; that of those present all were dead, except himself and Khrone. Khrone testified that he was 77 years old, and that he never heard any conversation between Pressley and J. D. Giddings about the judgment, and that he did not remember ever being in Giddings & Onins' office with W. B. Pressley. The evidence objected to is stated as follows in appellant's brief: "D. C. Giddings testified that he had been unable to find any entry on the books of Giddings & Onins relating to the alleged payment; that witness and Onins made the collections of the firm, kept the books, and generally conducted the work of the office; that they two were constantly in the office, and there was no time in the year 1861 when both were absent at the same time; that J. D. Giddings, who had other engagements, was absent a great deal, and transacted but little of the business of the firm; that he rarely made a collection, and when he did he was always careful to wrap up the money to itself, and report it to witness, or to Onins, who would make the proper entries in the books; that J. D. Giddings had drawn up an amended petition in the Testard-Lowery case, after its reversal in the supreme court; that he had consulted with witness about the case; that he had conducted the first trial of the present suit; and that he had never mentioned the alleged payment to witness, etc. R. D. Harris testified that prior to the institution of his suit he had called on the plaintiff, and other purchasers under Pressley of portions of the premises subject to the vendor's lien, to unite in paying off the note held by him, and that they had failed to act on his suggestion; that he had also written to Pressley about it, who had written in reply that the note was secured by a vendor's lien on a lot, and to go ahead and make his money. We think that under all the circumstances of this case the evidence of these witnesses was properly admitted. The only grounds of objection to it assigned in appellant's bill of exceptions are that the evidence "was incompetent and irrelevant, was hearsay, and *res inter alios acta*, and tended to confuse the jury and obscure the testimony."

The third assignment is that there "was error in excluding portions of W. B. Pressley's testimony, and the several deeds offered in connection therewith, as shown by plaintiff's first bill of exceptions." The record shows that this witness was present at the trial, and testified at great length before the jury. The bill of exceptions referred to recites that "plaintiff sought to show by the witness Pressley the same facts previously elicited from him by deposition, as hereinafter shown." The defendants objected to said testimony on the ground of irrelevancy. The objection was sustained. The excluded testimony (it is stated in the bill of exceptions) "is shown by the following interrogatories and answers found in the deposition of said witness taken February 11, 1882, which for convenience may by consent be copied." Then follows the interrogatories and answers, covering eight type-written pages, which we have carefully examined without being able to find anything properly admissible and material not included in the oral evidence of the witness admitted by the court. This bill of exceptions also recites "that the court, on like objection, excluded the several deeds referred to in said interrogatories and answers which would have supported the recitals therein." Exactly what deeds these were, and how they were offered and how proved, we are not able to satisfactorily ascertain from this bill of exceptions. If after the witness had testified orally it

was proposed to repeat, add to, and confirm his testimony by reading an old deposition of the same witness found among the papers, and offer all deeds referred to in the deposition, instead of offering them separately, with proper proof of their execution, and explanations of their relevancy, as seems to have been the case, we think the offer was too general, and that the evidence was properly excluded.

Plaintiff offered to read the evidence of the defendant A. H. Rippetoe at a former trial of this cause, from a statement of facts found among the papers, signed by the attorneys of both parties, and approved by the presiding judge. It was made to appear that the witness was dead. The plaintiff offered to establish the evidence by his attorneys and those of the defendant, and by the presiding judge at the trial, none of whom could recollect it. The court excluded the statement of facts. We think the ruling was correct. The statement of facts was in no sense the act of the witness. It was made only with reference to the issues that would be presented in the appellate court, and would not necessarily contain all of the evidence given by the witness on any point. While it may be used as a means of refreshing the memory of a witness in a proper case, we see no reason for departing from the rule that has always prevailed in the courts of this state limiting the representation of a deceased witness' testimony to the evidence of a witness who heard it. In Wharton on Evidence it is said: "What a witness, since dead, has sworn upon a trial between the same parties may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or the former evidence may be proved by any person who will swear from his memory to its having been given." Section 177. "The mere notes of the judge, unsworn to, or unproved, cannot be received. If the judge be alive he must be called as a witness; the notes being then receivable to refresh his memory." Section 180.

The court charged the jury that if plaintiff purchased during the pendency of the foreclosure suit he was bound by the judgment rendered therein as fully as if he had been a party to the suit. Plaintiff requested charges announcing that the doctrine of *lis pendens* applied to a purchaser without actual knowledge of the pendency of the suit, or who, having notice of the suit, believes and has reasonable grounds to believe that the debt has been paid, is a harsh one, and will not in such a case, and where there has been any unusual or unreasonable delay in the prosecution of the suit, be enforced; announcing that there had been great apparent negligence and delay in the prosecution of Testard-Lowery foreclosure suit, and instructing the jury that, defendants having offered no sufficient explanation of such apparent negligence and delay, they could not avail themselves of the judgment of foreclosure to defeat plaintiff's recovery; that it is ordinarily the duty of the plaintiff in a case which has been reversed in the supreme court, to file the mandate in the district court to the first term of the court; that in this case the mandate was not filed to the first or second, but to the third, term; and that it was for the jury to say whether or not the evidence has sufficiently explained this delay. Without copying more from the eight charges requested by plaintiff on this subject and refused by the court, we think the charge of the court was proper, and those asked by plaintiff inadmissible.

Appellant's sixth assignment of error presents this question: In executing the orders of sale issued upon the judgments foreclosing the vendor's lien, the sheriff's deed in terms conveyed to Rippetoe, the purchaser, such estate as Pressley and Perryman had on the 17th and 24th days of October, 1870. It appeared from the evidence that Perryman never had any interest in the lot now in controversy, and that Pressley had parted with all of his interest long before said date. Plaintiff requested the court to charge the jury to render a verdict in his favor because neither Pressley nor Perryman owned any interest in the land at the time named. This charge was properly refused. The

purchaser at the sheriff's sale acquired all the title conveyed by Browning to Pressley.

The plaintiff requested the court to charge the jury as follows, which the court refused: "(20) The several portions of lot 43 and part of lot 90, sold by Pressley to various parties, would be liable in the order of such sales for the payment of the vendor's lien thereon; and if two or more fractional parts of a lot were sold to different parties at the same time, and in the course of the same transaction, then they would be liable concurrently for the payment of the lien, and such concurrent purchasers would be charged with a trust towards each other in any dealing with the common incumbrance, and their several vendees subsequently would also be charged with a like trust towards each other so far as dealing with the common incumbrance is concerned." And, "(21) A person charged with a trust, as above defined, has a right to buy in the common incumbrance, and to enforce a *pro rata* contribution from the others whose property is jointly liable with him therefor; but the rules of law will not permit him to purchase up such incumbrance, and then to prosecute it to judgment and execution, without notice to the others whose property is bound for it, and to acquire a title to their property under a sale made by virtue of such judgment and execution." This question was decided on a former appeal of this case. It is there suggested that the equities existing between the parties could not be asserted in this case. Referring to the case of *Roberts v. Thorn*, 25 Tex. 735, it was held that "tenants in common, acquiring their interests under different instruments at different times, and there being no agreement between them respecting the title, are under no such relation to each other as to prevent one of them from purchasing an outstanding title or incumbrance." It is there suggested that such trust relation may arise between joint tenants as coparceners or tenants in common holding under the same instrument if the right is asserted within a reasonable time. Here none of these relations existed. Even if such right had existed, it was not asserted in a proper manner or reasonable time. As said by Justice GOULD, we still are unable to see how the relation of Rippetoe, either to the property or to the plaintiff, disqualified him from purchasing otherwise than in trust for Dwyer and others, and, in the absence of authorities supporting the doctrine laid down in the charge, we hold it erroneous.

The appellant's eighth assignment of error is as follows: "(8) The plaintiff's evidence tending to show that prior to the rendition of the judgments in the cases of *Tetard*, to the *Use of Lowery*, v. *Pressley and Perryman*, and *Harris v. Pressley and Perryman*, the vendor's lien notes therein sued on had been paid off by Pfughaupt and Perryman, whereby said vendor's lien was discharged as to purchasers under said judgments having notice of such payment, and, the evidence tending to charge the defendant Rippetoe and his associates with notice of said payment at and prior to his purchase at the sheriff's sale, the court erred in confining the charge to an assumed purchase of the notes by Pfughaupt, and their transfer to him, as was done in the special charges given at defendant's request, and in refusing the twelfth, fifteenth, twenty-second, twenty-third, twenty-fourth, and twenty-fifth special charges requested by the plaintiff, presenting to the jury his theory of the evidence."

The evidence relating to this issue, as found in the record before us, is as follows: Giddings testifies that, after the suits were filed, Perryman and Pfughaupt, and their attorneys, had several interviews with him about a settlement of the notes, how much the several parties ought to pay, etc. Finally, Perryman and Pfughaupt proposed to pay the notes, with the understanding that if not reimbursed by contributions from other owners of property subject to the lien, the suits should be prosecuted to judgment, for their benefit, in the names of the plaintiffs as they stood on the docket; and, in accordance with this understanding, Perryman and Pfughaupt paid witness the

money, and he made the transfer,—he thinks under Onins' direction. Onins testifies that his firm bought the claims, and afterwards, before the judgments were rendered, sold a half interest in them to Rippetoe; that the claims were transferred to Pflughaupt by mistake; that the claims were to go into judgment for the use of his firm; and that the property was to be purchased for the joint account of Rippetoe and his firm; that they were to buy in the property, unless it brought the money; that they were interested equally with Rippetoe in the purchase afterwards made by him, and that such was the understanding from the time of their transfer. Pflughaupt testifies: "Perryman and I were joint owners of the 30x90 out of lot 43, now called the 'Barrel-House.' We held under a warranty deed from W. G. Wilkins, who held under a warranty from Dr. A. H. Rippetoe. When Perryman was made a party to the two suits of *Testard-Lowery v. Pressley and Perryman*, and *R. D. Harris, Executor of Key, v. Pressley and Perryman*, we employed I. M. Onins to defend the suit for us, that is, to see that we were protected on our warranty. Rippetoe was solvent, and we knew we could hold him for whatever we had to pay to secure our title. There was only about \$400 then due on the two notes. We did not regard Wilkins as solvent, but looked to Rippetoe. Onins said he would do all he could for us, but it would be best for us to compromise. The case went along for some time, and we got tired of waiting, as nothing was being done, and at last Perryman and I raised the money, and paid off the notes to Giddings & Giddings, who were the attorneys for the plaintiffs in the two suits. It was our money that paid the debts. I think the money was paid to Mr. A. Jeffries, clerk for Giddings & Giddings, but in their presence. Onins was present also. He was our attorney and had charge of the business for us. After the debt was paid I left, and Onins remained behind. I did not know of any transfer of the notes to us or to Onins. We paid the debts to release our property from the liens, and expected Onins to recover back the money for us out of our warrantors. We looked only to Rippetoe, whom we knew to be solvent. We did not know he had only sued Wilkins." *Cross-examined*. "Only Perryman's name was in the suits, but we were both interested in the property. If Onins had a partner at that time, I did not know it. Perryman and I talked only to him. We never heard of Swearingen. When we paid the money Onins said he would get it back for us out of 'those fellows.' We did not get it back until after the suits were decided, and after the sheriff's sale. We paid the notes to save our property, but Onins was our attorney, and we were acting on his advice, and we did what he told us. We paid the debts off to relieve our property of the liens, and looked to Rippetoe to pay us back our money. When we left Giddings' office we left Onins in there. He stayed behind to fix it up so we could get our money back. He was to act for us in getting it back. On the day of the sheriff's sale Rippetoe came down and borrowed \$47 of us, to pay costs of suit. About two or three weeks after the sale we got our money back. It was paid to us by Rippetoe and Onins." *Re-examined by Plaintiff*: "We did not authorize Onins to take a transfer of the notes to himself, or to him and Swearingen, or to transfer any interest in them to Rippetoe. It was our money that paid the notes, and all he was authorized to do for us was to get it back from Rippetoe for us. We never knew how he was managing the case."

The plaintiff requested the following charges, which were refused:

"(12) If the evidence shows that said debt was paid by Perryman and Pflughaupt before the judgment was rendered, and that Rippetoe had notice of such payment at and before the time of his said purchase at the sheriff's sale, then he acquired no title to the premises in controversy, and you will find for the plaintiff."

"(16) If you believe from the evidence that the *Testard-Lowery* debt was paid before the rendition of the judgment of October 17, 1870, and that Onins

was, under the rules elsewhere stated, charged with notice of such payment, and if you further believe from the evidence that Onins and Rippetoe, either alone or in conjunction with others, combined together to procure the sale of the property under the forms of law, with the purpose of buying it in for their joint account at a sacrifice, and that Rippetoe's purchase was made in pursuance of such conspiracy, then you are charged that the purchase so made by Rippetoe would be void, although notice of the payment may not have been brought home to him."

"(22) An attorney at law charged with the collection of a debt has no authority to transfer the debt, and you are charged that the transfer to A. Pfughaupt, indorsed on the notes by J. D. and D. C. Giddings, was nugatory and void; and, if Pfughaupt paid the debt with the intent to discharge the lien from his own property, its effect was to discharge the lien upon all the property, including that involved in this suit, and the lien would not be revived by the attempted transfer, whether made by the direction of Pfughaupt or not.

"(23) If the jury believe from the evidence that Pfughaupt paid the debt, the lien would be discharged, and the debt would not be re-established by any subsequent transfer of the notes, by whomsoever or to whomsoever made. And if you find from the evidence that I. M. Onins, J. D. Giddings, and D. C. Giddings, all, or either of them, have any interest in the property, and had notice of the payment of the debt by Pfughaupt, (if any,) or had knowledge of such facts and circumstances as would have put a reasonably prudent man on inquiry, then the plaintiff would be entitled to recover the interest of each, (if any,) in said property; and if you believe from the evidence that Rippetoe had notice of the payment (if any) of the debt by Pfughaupt, or had knowledge of such facts and circumstances as would have put a reasonably prudent man on inquiry, then the plaintiff is entitled to recover the whole of said property.

"(24) If Pfughaupt paid the debt, the lien would be discharged, and would not be re-established by any subsequent transfer of the notes, by whomsoever or to whomsoever made."

These charges were refused. In the charge in chief the court wholly ignored the payment made by Pfughaupt, and submitted only the issue as to the payment made by Pressley; and, in the fourth charge given at defendant's request, charged in reference to said issue as follows: "(4) Pfinghaupt had the right to take up the liens on the property in order to protect himself in the part owned by him, and to have the same prosecuted to judgment for his benefit, and A. H. Rippetoe and Swearingen & Onins could also become the owners of said liens and claims; and it is no defense to Rippetoe's title under the foreclosure and sheriff's sale that the debts had been transferred by the plaintiff in the foreclosure suits." The issue here raised suggests a distinction between the payment and consequent satisfaction and discharge of the lien debts and their transfer or assignment. The court treated the transactions as an assignment, and not a discharge, and, unless there was a conflict in the evidence upon this point, the charge given at the request of defendant was not only proper, but was the only charge required on the subject. The plaintiff in his supplemental petition distinctly alleges that this was a payment and discharge of the debt. The charges refused present that theory of the case. If the difference is material, and there was evidence tending to establish his theory, it was his right to have a charge submitting it to the jury. This court held on the last appeal of this case that the prosecution of the lien debt to judgment after its payment by Pressley would have been fraudulent as to a purchaser from Pressley of the incumbered property. Pressley owed to the plaintiff the duty of paying the debt for which the property sold him was bound. But the purchasers of other portions of the property, bound for the same debt, owed plaintiff no such duty. Other owners of parts of the in-

cumbered land were under no greater obligations to pay the debt than plaintiff was. If none of them discharged it, the result would be that the suit would be prosecuted, and the land would be sold to satisfy the judgment. Up to the date of the sale plaintiff would, in that case, have had the right to pay off and discharge the judgment, or, failing to do that, he would have had the right to purchase all of the land at the sheriff's sale. The action of Perryman and Pflughaupt, whether treated as a payment or purchase of the debt, did not change his position in any of these particulars, or deprive him of any right. If plaintiff was deprived of no right, if his position was changed in no respect, we are unable to see how he can complain that the transactions were fraudulent.

Plaintiff, or any other purchaser of the land from Pressley, had the right to pay or purchase the debt as he chose, and afterwards to stand in the shoes of the original creditor, and enforce it, treating the payment as an assignment of the debt, or, if he preferred to do so, treating it as a discharge, and demand contribution from the owners of other parts of the incumbered property. This right existing, we do not think the form of the transaction, or the precise words used in consummating it, ought to be given a controlling effect.

The fact that a judgment was rendered for the debt stands as conclusive evidence in this proceeding, against all parties to the suit in which it was rendered, that the debt on which it was rendered had not been then paid. Grant that if the debt had in fact been paid when the judgment was rendered, it would be open to collateral attack by all strangers to that suit, and that, notwithstanding plaintiff's position as a purchaser *pendente lite*, he may be treated as a stranger for the purpose of attacking the judgment collaterally, still he would have to show that he was defrauded. He would have to show that the prosecution of the debt to judgment for the use of Perryman and Pflughaupt placed him in some different and worse situation than he would have been in if it had not been paid at all. This he has not done. If others, situated like he was, and bound to do no more than he was, had done just what he did, his situation would have been exactly what it now is.

For these reasons we do not deem it material to weigh with the greatest precision the language of the witnesses to determine whether the transaction by Perryman and Pflughaupt was a purchase or a payment of the debt; but if it was material we would find it quite difficult to determine that the evidence, taken as a whole, or that the testimony of any one witness, considered as a whole, tends to establish a payment as contradistinguished from a purchase of the debt. Onins testifies, unequivocally, that it was a purchase. Giddings uses the word "pay," but evidently in the sense of "purchase," as he says they proposed "to pay the notes with the understanding that, if not reimbursed by contributions from other owners of property subject to the lien, the suits should be prosecuted to judgment for their benefit in the names of the plaintiffs as they stood on the docket." Pflughaupt says the notes were paid off, in a way to indicate that he intends to be understood they were discharged; but he at the same time says that Onins was present, and had charge of the transaction. It was Onins that caused the transaction—at the time, and not afterwards—to take the form of a purchase, and not a payment. The witness says they expected Onins to get back the money out of their warrantors; that they were acting by his advice, and did what he told them; and that when they paid the money they left him behind to fix it up so they could get their money back. We think this evidence authorized Onins to do what he in fact did. He made the transaction a purchase, and not a discharge of the debts. Treating it as a purchase, he did recover the money paid by the witness, and released his land from the incumbrance. The witness, having made Onins his agent, received the benefit of his transactions, and thereby ratified them. He cannot now be permitted, as a witness or otherwise, to disavow them.

We think the court committed error in sustaining the exceptions of defendants Giddings and Onins to the plaintiff's petition, and for that error the case would have to be reversed if it were not that they are so connected with the defendant Rippetoe that the case against them has been fully developed on the trial. We are satisfied that plaintiff has no better right to recover of them than he has to recover of Rippetoe, and think that the error must be treated as immaterial. Whatever may have been the equities of the plaintiff if they had been prosecuted at another time and in other forms, we are constrained to say that we think he had no right to recover in this suit, and that the judgment ought to be affirmed.

CAVIEL v. COLEMAN, County Judge.

(*Supreme Court of Texas. January 29, 1889.*)

1. SCHOOLS AND SCHOOL DISTRICTS—CONTRACTS WITH TEACHERS—APPROVAL OF COUNTY JUDGE.

Act Tex. Feb. 4, 1884, provides for two systems of public schools, one known as the "district," the other as the "community," system. In the former the trustees "shall have the power to employ teachers," and the county judge "shall approve all contracts between teachers and trustees," and "shall approve all vouchers against the school funds of his county." In the latter it is provided that the "trustees shall make contracts with teachers," and that "the amount contracted by trustees to be paid to a teacher shall be paid on a check drawn by a majority of the trustees," * * * and approved by the county judge." *Held*, that the omission, in the sections relating to the community system, of the clause empowering the county judge to approve all contracts between teachers and trustees, shows that it was not intended to give him the control of contracts under that system.

2. SAME—APPROVAL OF CONTRACT—MISTAKE.

Where the county judge has approved two of three copies of a contract with a teacher unqualifiedly, and retained the third, he cannot justify a refusal to approve vouchers for salary in accordance with the contracts by testimony that he approved the two copies by mistake and oversight, and that he intended to approve them qualifiedly, at a reduced salary, as he had done with the one retained by him.

Appeal from district court, Victoria county.

A. S. *Thurmond*, for appellant. C. F. *Carsner*, for appellee.

HENRY, J. Appellant petitioned the district court for a writ of *mandamus* requiring appellee, as county judge, to approve certain vouchers issued to him by the trustees of a school community for his salary as teacher of a public school. From a judgment refusing the writ he prosecutes this appeal. Victoria is one of the counties exempted from the district system of public schools. The trustees of the school community entered into a written contract with appellant, employing him to teach a public school for a year, beginning on the 1st day of September, 1887, at a salary of \$60 per month. Three copies of the contract were signed by the trustees and the teacher. Two of them were approved by the county judge, and delivered, one to the teacher, and the other to the trustees. One copy was retained by the county judge, and does not seem to have been signed by him. The unsigned one was offered in evidence at the trial. This copy, in the body like the others, contains the promise to pay the teacher \$60 per month, but the unsigned approval, coming after the signatures of the teacher and trustees, is for \$50 per month. There is no evidence in the record to show that the teacher or trustees knew of the difference in the amount until after the contract had been partly performed by the teacher, nor is there anything to show when the qualified approval was in fact written upon it. The school was taught for five months and thirteen days. About two months after the school was begun the teacher presented to the county judge a voucher, signed by the trustees, for \$60, one month's salary. Appellant refused to approve it. He then stated to the teacher that he had not intended to sign the contract for over \$50, and that, if he was not

willing to teach for that, he would have to close the school. Appellant continued the school, declining to receive the diminished salary, and, having taught five months and a fraction, presented to the county judge for his approval six vouchers, duly signed by the trustees, for the sums stipulated in the contract. The county judge refused to approve any of them.

Appellee testified that he only intended to sign the contract for \$50 per month, and that his signing for more was an oversight.

The act to establish and maintain a system of public free schools, passed February 4, 1884, provides for two systems, one known as the "district," the other as the "community," system. Such counties as are placed by the legislature in the community system are expressly exempted from the district system when its provisions are in conflict with special requirements of the community system. The amount of salaries to teachers is limited by both systems, and the limit is the same in both, as regards the highest salary to be paid. In the district system no rule is provided for fixing the salary within the given limit, except that the "trustees shall have the power to employ teachers," and that the county judge "shall approve all contracts between teachers and trustees," and "shall approve all vouchers against the school fund of his county." Under the community system it is provided that "trustees shall make contracts with teachers, and in making them shall base their contract with the teachers on the basis of the number of pupils within and of scholastic age," etc., and that "trustees in making contracts with teachers shall determine the salary to be allowed as wages to be paid upon the following rates of tuition." Following this language, a rate *per capita* per month is prescribed, not to exceed a given sum per month. It is further provided, under this system, that "the amount contracted by trustees to be paid a teacher shall be paid on a check drawn by a majority of the trustees on the county treasurer, and approved by the county judge. The check shall in all instances be accompanied by the affidavit of the teacher that he is entitled to the amount specified in the check as compensation under his contract as a teacher." The petition in this case, and the exhibits attached, show that a contract was made and checks drawn in favor of the teacher as prescribed by law. The petition avers that these checks were presented "as is required by law" for the approval of the county judge. The answer of the defendant evidences that the sole ground upon which he declined to approve the checks was his belief that he had the power, under the law, to modify and reform the agreement between the trustees and teacher. We think this view of the law is incorrect. The general act expressly requires the approval of both the contract and voucher by the county judge. The requirement of his approval of the voucher or check is preserved in the sections relating to community schools. The omission in these sections of the clause with regard to his approval of the contracts, while that relating to the vouchers is retained, evidences, we think, that the legislature did not intend to confer the power on him of controlling the contract. If it was necessary for the county judge to approve the contract, then the uncontradicted evidence in the case shows that he did so. The general statement that he signed the agreement by a mistake or oversight amounts to nothing. To allow the views of appellee to prevail is to allow him not only to abrogate the written contract, but to set up another and a different one, never consented to by the other contracting parties. The judgment will be reversed, and cause remanded.

RED *et al.* v. MORRIS, Tax Collector.

(Supreme Court of Texas. January 29, 1889.)

1. TAXATION—EXEMPTIONS—SCHOOL PROPERTY.

Under Rev. St. Tex. art. 4678, § 1, exempting from taxation "all buildings used exclusively and owned by persons or associations of persons for school purposes," it is not necessary that the property, in order to be exempt, shall have been dedicated to school uses. It is sufficient if it is in fact so used.

2. SAME—EXCLUSIVE USE—EVIDENCE.

The fact that the owners of the school property live on it a portion of each year, for the reason that, as principal, matron, and teacher, their constant presence is necessary to the conduct of the business, does not justify a finding that the property is not used exclusively for school purposes.

3. JUDGMENT—RES ADJUDICATA—TAX OF PREVIOUS YEAR.

A judgment, in a suit brought by plaintiffs' ancestors, involving the tax of a previous year, that the property was not used exclusively for school purposes, is not a bar to plaintiffs' suit, in which the property is claimed to be so used in a subsequent year.

Appeal from district court, Travis county.

Z. T. Fulmore and J. B. Davies, for appellants.

GAINES, J. This suit was brought by appellants against the appellee as tax collector of Travis county, to enjoin him from making a sale of certain property described in the petition for the taxes assessed thereon for the year 1887. A preliminary injunction was granted, but upon final hearing a decree was rendered dissolving it, and from that decree this appeal is prosecuted. The ground upon which the tax was sought to be avoided was that the property was used exclusively and owned by the plaintiffs for school purposes, and that it was therefore exempt from taxation under our constitution and laws. The property consists of certain lots in the city of Austin, upon which is situated a large two-story building, constructed of stone and brick, with a basement. There are certain outhouses and improvements upon the lots, all of which are appropriate to the uses of the main building. The building was erected in 1876, for a seminary of learning for young ladies. It has ever since been used for that purpose. The school seems to have been maintained at one time by the father and mother of the present plaintiffs. The father and mother died before the year 1887, and plaintiffs inherited the property from them. Since the death of their parents, three of the plaintiffs have maintained the institution as a boarding and day school for girls and young ladies, serving, respectively, in the capacities of principal, matron, and teacher in the school. They live in the building during term-time, their residence there at such time being necessary to the proper conduct of the business. During the vacation the principal and matron lived upon the premises, their presence being then essential to protect the property, to make needful repairs, and to conduct the correspondence with the patrons of the school. The fourth plaintiff does not live upon the property, and receives no rent or profit for the use of it.

In *Red v. Johnson*, 53 Tex. 284, this same property, in the hands of the father and mother of the present plaintiffs, was held not exempt from taxation. It then appeared that the plaintiffs in that suit had a family, and that the building was used, not only for the purposes of a school, but as the residence of the family. The property was held not to be used exclusively for school purposes. The judgment in that case was pleaded by defendant as *res adjudicata* to the petition in this. We think, however, that the plea was no answer to the petition in the case before us. That writ was to enjoin a tax for a different year, and the judgment did not affect the right to bring the present suit. Property not exempt one year may become exempt another year, by reason of a different manner of using it. The court below found that

the "premises, buildings, lands, and improvements" were "used for school purposes," but the findings do not show whether they were so exclusively used or not. We think the evidence warranted a finding of the affirmative of the latter issue. The plaintiffs who lived upon the property were each of them of full age, and unmarried; and it appears from the testimony that they did not occupy the property as a residence, and that their living there was merely an incident of the uses to which the property was devoted. In this respect the case would seem not to differ materially from that of *Cassiano v. Academy*, 64 Tex. 674. There the school was conducted by the Ursuline Order of Nuns, and the teachers (presumably of that order) lived upon the property, and made it their home. In the opinion the court say: "Every person who occupied any portion of the premises was exclusively engaged in some department in the service of the school." The remark is equally applicable to the present case. The court below determined, however, as a matter of law, that in order to exempt the property from taxation by reason of its use for school purposes, it must also be owned for such purposes. The constitution does not make the exemption, but authorizes the legislature to make exemptions in certain cases. Const. § 2, art. 8.

The Revised Statutes, (article 4673, § 1,) following the language of the constitution in this particular, provides that "all buildings used exclusively, and owned by persons, or associations of persons, for school purposes," shall not be subject to taxation. The meaning of the words, "owned by persons, or associations of persons," is not quite clear. We think, however, that if it had been the intention of the legislature to exempt only such property as had been dedicated to the use of schools, although exclusively used for that purpose, words would have been employed which would have conveyed more distinctly the idea intended. When by the use of apt words a definite meaning could clearly have been conveyed, and mere general terms are employed, which are of doubtful construction, it is to be presumed that such meaning was not intended. The words quoted were evidently used for a purpose, and they must be given a meaning. They must be construed to impose a limitation upon the exemption in addition to that imposed by the previous words in the same clause. But when we consider that without the use of these terms the owner of property might lease it for profit to another, to be used for school purposes, and thereby exempt it from taxation, we think the purpose of their employment becomes apparent. Property belonging to charitable associations, and leased for profit, is held not exempt, although the income may be devoted to the purposes of the association. *Morris v. Masons*, 68 Tex. 698, 5 S. W. Rep. 519. We think, in pursuance of the same policy, the legislature meant, by the employment of the terms under consideration, to prevent the owners of property from taking advantage of the exemption, when they leased the property to others for profit, to be used by the latter for the maintenance of schools. Here the persons who own the property use it themselves, and devote it exclusively to school purposes. Property is owned for such purposes when the owners use it solely for the purpose of keeping a school upon it, and receive no direct profit from it. We conclude that the plaintiffs showed that their property belonged to the class defined in the exempting clause under consideration, and therefore the judgment should have been in their favor.

There being no controversy as to the facts, the judgment below will be reversed, and here rendered for appellants, perpetuating their injunction as prayed for, and for all costs, both in this court and the court below.

WILLIS v. SMITH.

(Supreme Court of Texas. January 29, 1889.)

1. VENDOR AND VENDEE—VENDOR'S LIEN—RELEASE.

E. and W., partners, purchased land from the six owners, the deed reciting that no part of the price was paid, and gave their six notes for the price each secured, by a lien upon an undivided sixth. E. gave a mortgage, which purported to "convey" the tract, and which stated that his interest was the undivided half, and that the mortgage was intended only to cover that. E. afterwards purchased W.'s interest. The vendor's liens were afterwards foreclosed upon the undivided five-sixths; the decree reciting that the note for the other sixth had been paid by E., and the vendor's lien thereon discharged. *Held*, that the release of the one-sixth inured to the benefit of the mortgagee, in the absence of evidence that the payment was made before E.'s purchase from W.

2. ESTOPPEL—BY RECORD.

E., and consequently one purchasing at execution sale against his executors, with notice of the decrees foreclosing the liens and mortgage, were estopped to deny that the purchaser under those decrees acquired an undivided five-sixths under the decree on the liens, and acquired under the decree on the mortgage an undivided half to the extent of E.'s interest, free from prior liens at the time of its entry.

3. MORTGAGE—FORECLOSURE—REDEMPTION.

The purchaser acquired the right to redeem from the decrees, but lost his right by failure to exercise it before the decrees were executed.

4. EVIDENCE—MADE COMPETENT BY THAT OF ADVERSE PARTY.

Where plaintiff charges defendant with fraud in obtaining property of which defendant is in possession under a sale under a deed of trust, and plaintiff offers the deed of trust in evidence for a limited purpose, defendant may introduce the same in evidence to explain his possession and to disprove fraud.

5. TRIAL—INSTRUCTIONS.

The court should charge upon decisive rules of law called to its attention by special charges, though they are not technically correct in every particular.

6. APPEAL—REVIEW—CROSS-ASSIGNMENTS OF ERROR.

Cross-assignments of error will not be considered when they are not referred to in appellee's brief, and the independent propositions of the brief are not predicated of or germane to them.

7. SAME—DECISION—SECOND APPEAL.

The decision of a question on appeal is conclusive of that question on a subsequent appeal.

Commissioners' decision. Appeal from district court, Brazoria county.

Action by E. E. Smith against R. S. Willis. B. H. Epperson and A. U. Wright owned the Fally league, on which the Darrington plantation is situated, having purchased it from the six heirs of Blackwell. For the purchase money they executed and delivered their six promissory notes, each secured by lien retained against an undivided one-sixth of the land. In February, 1878, Epperson executed a mortgage to Sallie Dixon, containing the following clauses: "Do hereby bargain, sell, and convey unto the said Sallie Dixon, her heirs and assigns, forever, one league of land surveyed in the name of David Fally, situated in Brazoria county, upon which is what is known as the 'Darrington Plantation.' * * * It is understood that my interest in said land is the undivided one-half thereof, and this instrument is intended only to cover that." This mortgage was recorded in Brazoria county in September, 1878. On July 31, 1878, Wright conveyed his half interest in the land to Epperson, who assumed payment of all debts against the firm of Epperson & Wright. This deed was recorded in Brazoria county, February 6, 1880. B. H. Epperson died, leaving a will appointing J. P. Russell and R. B. Epperson general independent executors, and E. S. Epperson special independent executor. The will was admitted to probate October 2, 1878, and the executors qualified. On February 20, 1879, Epperson's executors executed to P. J. Willis & Bro. a deed of trust on the league of land, to secure the payment of notes held by Willis & Bro., amounting to about \$20,000. Lawson, the trustee named in this deed, sold the land under the deed of trust on the 4th day of May, 1880, to P. J. Willis & Bro., and they took possession immedi-

ately thereafter. P. J. Willis & Bro. conveyed the land to defendant, and he was in possession at the time the execution under which plaintiff claims was levied on the land. On May 20, 1880, the Dixon mortgage was foreclosed on an undivided one-half of the league, by decree of the district court of Marion county. On December 1, 1880, plaintiff recovered judgment in the district court of Marion county against the executors of Epperson, and against A. U. Wright as surviving partner, for \$1,283.83. On May 24, 1881, the heirs of Blackwell obtained judgment against the executors of Epperson upon the purchase-money notes executed by Epperson & Wright, and foreclosing the liens upon the undivided five-sixths of the land. This judgment recited that the note given by Epperson & Wright for the other one-sixth had been paid off by Epperson, and the vendor's lien thereon discharged. On June 21, 1881, execution was issued against the executors of Epperson on the judgment, in favor of plaintiff, under which the entire league was sold in September, 1881, and bought in for plaintiff by his attorney; who afterwards on May 5, 1883, conveyed the land by quitclaim deed to plaintiff. On November 1, 1881, five-sixths undivided interest in the league were sold under an order of sale issued on the decree of foreclosure in favor of the Blackwell heirs. Defendant purchased at this sale. In April, 1882, an undivided half interest in the league was sold under an order of sale issued on the decree of foreclosure in favor of Dixon, and defendant purchased at this sale. On a former trial in the court below there were verdict and judgment for plaintiff for one-sixth of the land, and for an annual rent from the date of his purchase. Defendant appealed, and the judgment was reversed, and the cause remanded. 66 Tex. 43. On the last trial there were verdict and judgment for plaintiff for an undivided one-twelfth of the land, and \$2,000 as rent therefor. Defendant appeals.

G. E. Mann, for appellant. *G. W. & F. J. Duff*, for appellee.

ACKER, J. It is contended that the court erred in refusing to give special charges requested by appellant, to the effect that the decree of foreclosure in favor of the Blackwell heirs recites that Epperson paid the one-sixth of the purchase money, which freed the undivided one-sixth of the land from the vendor's lien, and the plaintiff cannot recover the one-twelfth he claims, unless he shows that Epperson paid the one-sixth before he bought from Wright; "and, having failed to so prove, your verdict must be for the defendant." That the recitation in the judgment of foreclosure in favor of the Blackwell heirs admits that the note of Wright & Epperson for the undivided one-sixth, which was free from lien, became free because Epperson paid the note. This recitation binds the plaintiff, who claims under Epperson by subsequent purchase, and under this admission defendant, purchasing under the liens in favor of the Blackwell heirs and Dixon, gets title to all the land. That the Dixon mortgage, by conveying title to the whole league of land, and then reciting the interest to be an undivided one-half, and by the use of the word "convey," makes an estoppel, which estoppel binds the plaintiff, as subsequent purchaser under Epperson, from claiming that Epperson did not have an unincumbered half interest with which to satisfy the Dixon lien. That the purchase by defendant of five-sixths undivided interest in the land under the judgment of foreclosure in favor of the Blackwell heirs, and the purchase by defendant of the undivided one-half interest under the Dixon judgment, gave defendant the whole right, title, and interest of the estate of B. H. Epperson in the land, in that the said judgments show that Epperson & Wright bought the whole of the land, and gave vendor's liens thereon for the purchase money, and that Epperson afterwards gave the Dixon mortgage on an undivided one-half of the whole; and the judgment in favor of the Blackwell heirs shows that B. H. Epperson, in his life-time, paid off the vendor's lien on an undivided one-sixth; and the orders of sale on said respective judgments, and the sales and deeds thereunder, show that defendant, R. S. Willis, bought the un-

divided five-sixths under the decree in favor of the Blackwell heirs, and then bought all of Dixon's lien interest of an undivided one-half of the whole, as far as the estate of Epperson had land left to meet his contract with Dixon for the undivided one-half. That the defendant had acquired an undivided five-sixths of the land under the decree in favor of the Blackwell heirs, and an undivided half interest under the Dixon decree, and that at the date of the levy of the execution and sale thereunder, under which plaintiff claims, Epperson's estate could assert no interest in the land, except the right to redeem from the Blackwell and Dixon liens; and, the plaintiff having failed to redeem, the defendant, by subsequent purchase under said liens, acquired title to the land, clear of any rights plaintiff acquired under his purchase at the execution sale.

While some of the special charges requested and refused may not be technically correct in every particular, they were sufficient to call the attention of the court to the rules of law which we think applicable to and decisive of the controlling question in this case. If Epperson paid the one-sixth of the purchase money to the heirs of Blackwell, which released the land to that extent from the vendor's lien, during the existence of the partnership of Epperson & Wright, then the presumption would obtain that the payment was made with partnership funds.

We think it unnecessary, however, to further discuss this point; for the execution under which appellee purchased was not against the firm of Epperson & Wright, but against the estate of Epperson in the hands of the executors. Under this writ, only the property of Epperson's estate, or the interest of that estate in the property belonging to the firm of Wright & Epperson, could be levied. If appellee relied for recovery upon the fact that the land was the property of the firm at the time the levy was made under which he purchased, the decree of foreclosure in favor of the Blackwell heirs reciting that Epperson paid the one-sixth of the purchase money, it devolved upon him to prove that the payment was made during the existence of the partnership of Epperson & Wright. Appellee contends that, as there was no evidence as to the time when this payment was made, it must be presumed that it was made at the time of the purchase. Such presumption cannot be indulged in the face of the recitation in the deeds to Epperson & Wright that no part of the purchase money was paid at the time of the purchase. Appellee, having purchased under an execution against the estate of Epperson, is in privity with Epperson, and has in virtue of his purchase only such rights as Epperson's estate had at the time of the levy of the execution. Being a privy in estate with Epperson, he is bound by the recitations in the decree in favor of the Blackwell heirs, as Epperson would be.

Did the release of the vendor's lien against one-sixth of the land, obtained by the payment of one-sixth of the purchase money by Epperson, inure to the benefit of the Dixon mortgage? It was, in effect, decided on the former appeal that it did, if the mortgage contained sufficient covenants of warranty. (The mortgage was not in evidence on the former appeal.) It is conceded that the mortgage contains no express covenants of warranty, but it is contended that the recitations in the conveying clause, the use of the word "convey," the recitation that Epperson owned an undivided half of the land, together with the recitation in the decree in favor of the Blackwell heirs, constitute an estoppel against Epperson, and those in privity with him.

Mr. Justice NELSON, delivering the unanimous opinion of the court in *Van Rensselaer v. Kearney*, 11 How. 325, after a very full review of many leading authorities, says: "The principle deducible from these authorities seems to be that, whatever may be the form or nature of the conveyance used to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seised or possessed of a particular estate in the premises, and which estate the deed purports to convey, or, what

is the same thing, if the seisin or possession of a particular estate is affirmed in the deed, either in express terms, or by necessary implication, the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seised and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title, as between parties and privies." *Carver v. Jackson*, 4 Pet. 7; *Irvine v. Irvine*, 9 Wall. 625; *Box v. Lawrence*, 14 Tex. 555, 556; *Parker v. Campbell*, 21 Tex. 768; *Kimbro v. Hamilton*, 28 Tex. 561; *Perrin v. Perrin*, 62 Tex. 479, 480.

If Epperson would be estopped from denying that his payment of one-sixth of the purchase money, and consequent release of that much of the land from the vendor's lien, inured to the benefit of, and that the one-sixth of the land thereby became subject to, the Dixon mortgage, it seems that appellee, claiming under Epperson by purchase subsequent, and with notice, would be likewise estopped.

Under the recitations in the decree of foreclosure in favor of the Blackwell heirs, and the recitations in the mortgage deed to Dixon, Epperson could not be heard to deny that appellant acquired an undivided five-sixths of the land by his purchase under the former decree, nor could he be heard to deny that appellant acquired an undivided half of the land by his purchase under the decree of foreclosure in favor of Dixon, to the extent of the interest owned by him in the land free from prior liens at the time the decree of foreclosure was entered. We think that appellee is equally estopped. At the time the execution was levied under which appellee claims, he had notice of the decrees foreclosing the liens in favor of the Blackwell heirs and Dixon, and by his purchase he acquired only the equity of redemption then held by Epperson's estate. He acquired the right to redeem the land from the decrees of foreclosure at any time prior to the execution of these decrees by sales made thereunder. There is no pretense that he ever offered to exercise his right to redeem, and we think his right was lost by the execution of the decrees. *Fisher v. Foote*, 25 Tex. Supp. 311; *Willis v. Smith*, 66 Tex. 48.

We think the court erred in refusing to charge the jury upon the questions presented by the special charges requested.

It is also insisted that the court erred in excluding the deeds of trust executed by the executors of Epperson to Farley and Lawson, trustees, to secure the indebtedness of the estate to P. J. Willis & Bro. The objection to these instruments was upon the ground that the executors had no power to execute them. This question was decided against appellant on the former appeal, the instruments having been offered and excluded on the former trial on the same ground. We are bound by the decision then made, however much we may be inclined to a different view.

Appellee had charged in his petition that appellant had fraudulently taken a large quantity of personal property belonging to the Epperson estate, and had never accounted to the estate for the proceeds of the property, and also charged appellant with fraud in his several purchases of the land. Appellant was in possession of the land and personal property under sales and purchases under these deeds of trust at the time appellee's execution was levied. Appellee had introduced the deeds of trust in evidence for a limited purpose, and we think appellant should have been permitted to offer them for any purpose, except to prove title. Under the former decision in this case, they were not admissible for the purpose of proving title in appellant, but, after they had been offered by appellee for a limited purpose, we think they should have been admitted in behalf of appellant, to show how he came into possession of the personal property, and as tending to disprove the charge of fraud. We deem it unnecessary to consider other questions presented, as they become immaterial under our view of the law of the case.

Appellee filed cross-assignments of error, but they are not referred to in his

brief, nor are the independent propositions contained in his brief predicated upon his assignments of error, nor are they in any way germane to his assignments. The questions attempted to be presented by appellee's independent propositions cannot, therefore, be considered.

Because of the errors indicated, we are of opinion that the judgment of the court below should be reversed, and the cause remanded.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment reversed, and cause remanded.

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BULLOCK *et al.* v. SMITH *et al.*

(Supreme Court of Texas. January 25, 1899.)

1. EVIDENCE—HEARSAY.

Where plaintiff in trespass to try title claims through a deed from defendant's ancestor, which defendant alleges to be a forgery, and to have been procured by fraud, evidence of conversations with such ancestor and the grantee in such deed, concerning the circumstances of the execution of the deed after the grantee had parted with his title, is inadmissible.

2. ADVERSE POSSESSION—CONTEST OF CLAIM.

Where defendant alleges adverse possession, evidence that while he was in possession his right was "contested" is properly excluded; the only available contest being by suit carried to judgment.

3. SAME—EXTENT OF LIMITS.

Possession resumed by a grantor cannot be held to be under color of his original grant, and his claim under the statute of limitations is restricted to the limits of his actual occupation, unless they embrace less than 640 acres, and his title by adverse possession matures before Rev. St. Tex. took effect, in which case he is restricted to 640 acres, including his improvements as occupied. If such title matures after the Revised Statutes took effect, he is restricted to 160 acres, unless a larger area is inclosed. Rev. St. Tex. art. 3195.

4. TRIAL—INSTRUCTIONS.

Where plaintiff claims under a deed of 200 acres on a certain creek, to include improvements as the purchaser may request, and some wards are evidently omitted in the deed, and the evidence shows several improvements on the creek, but does not show that the land intended to be conveyed is embraced in the field-notes of the land claimed in the petition, error in charging that the evidence shows that the land is not included in such field-notes is harmless.

5. TRESPASS TO TRY TITLE—STALE DEMAND.

The plea of stale demand is not applicable, where plaintiff claims under legal title.

Appeal from district court, Angelina county.

Trespass to try title by Anna V. Bullock and husband against Olive Smith and others. Plaintiff appeals. By Rev. St. Tex. art. 3195, "the peaceable and adverse possession contemplated in the preceding article * * * shall be construed to embrace not more than 160 acres, including the improvements on the number of acres actually inclosed, should the same exceed 160 acres."

N. J. Townsend, Wheeler & Chesnutt, and Ingraham & Ratcliff, for appellants. *Wharton Branch*, for appellees.

GAINES, J. This was an action of trespass to try title brought by the appellant Anna V. Bullock, joined by her husband, against the appellees, to recover two tracts of land, parts of a league of land granted by authority of the state of Coahuila and Texas to Thomas Smith. The league is a parallelogram extending in a general direction east and west. The first tract described in the petition consists of 1,107 acres, taken off of the west end; not embracing, however, 200 acres on the north-west corner. The second tract embraces also 1,107 acres, and is taken off the east end of the league by a line running parallel to its east boundary. The plaintiff claimed under a deed purporting

to have been executed by Thomas Smith on the 28th day of December, 1838, and purporting to convey the premises in controversy to one William Gann. The defendants claimed the first tract as heirs of Thomas Smith, the original grantee, and the second as heirs both of Thomas Smith and of his wife, Olive Smith. They set up the statute of limitations and stale demand; and also answered specially that the deed from Smith to Gann was not executed by Smith or his authority, and that it was procured by fraud. The fraud was alleged to consist in this: that Smith agreed with Gann to convey to him the land in controversy, in consideration of a sale to him by Gann of a land certificate, which the latter represented and warranted to be good, that, Smith being illiterate, Gann caused the deed to be prepared, and read it to Smith as containing the terms of the contract agreed upon by them, in which, among other things, it was stipulated that, if the certificate was not valid, the agreement to convey the land should be void; and that by this fraudulent device he procured Smith's execution of the deed. They also pleaded that the league of land was originally located by Stephen Stanly for Thomas Smith, and that Stanly was to have one-half of the land for his services; that a parol partition was had between Smith and Stanly, in which the east half was set apart to Stanly; and that Olive Smith, the wife of Thomas Smith, was the daughter of Stanly, and that in the division of his estate upon his death the 1,107 acres on the east end of the league in controversy in this suit were allotted to her. Upon the trial there was also a controversy concerning 200 acres of land purporting to have been conveyed by Thomas Smith to Jordan Smith in January, 1839. The defendants also denied that this deed was executed by their ancestor. The answers were verified by oath.

Upon the trial the plaintiffs introduced the deed from Thomas Smith to William Gann; a deed from Gann to F. T. Phillips and J. S. Roberts, and a regular chain of conveyances from the last-named grantees down to plaintiff Anna V. Bullock, the wife of her co-plaintiff. The deed from Gann to Roberts and Phillips was dated May 18, 1839. The defendants introduced testimony tending to show that the deed from Thomas Smith to Gann was a forgery, and also that the allegations in their answer in reference to fraud in the procurement of the deed were true.

The truth of the last-named plea became an important issue upon the trial. Such being the state of the case, a witness was permitted to testify, over the objection of plaintiffs, as follows: "I heard Gann say [referring to the Smiths] the whole set of them were a pack of fools. I knew from what I heard both of them say that Gann was to convey to Smith a valid land certificate, and that Smith was to convey to Gann 8,121 acres of land, which was considered a swap between said Gann and Smith. Smith made a deed to the land under the impression that he was receiving a valid land certificate, but Gann gave him a spurious land certificate for a league of land. Smith wanted to go on Red River to locate, and for this reason he made the swap with Gann. Gann paid him no money. This I learned from a conversation with both parties, while trying to settle the matter. The reason why Smith wanted to swap, I think, I only learned from Smith and his wife. Thomas and Olive Smith claimed that Gann was to return the land to them if the certificate was not good. Gann said he was willing to turn the land back to them, but could not, as he had sold it." Gann having parted with his title to the land at the time these conversations took place, the evidence was hearsay and should have been excluded. The error in admitting this evidence requires a reversal of the judgment. Since the case will be remanded for a new trial, the assignments of error which call in question the sufficiency of the evidence to support the verdict will not be discussed. There are, however, some other assignments which demand consideration.

The court charged the jury, in effect, that if defendants, or any one for them, had possession of the land in controversy, or any part of it, at any

time before the bringing of the suit, and plaintiffs knew of such possession, or might by reasonable diligence have known of it, and negligently delayed the bringing of their suit for 10 years, the jury should find for defendants upon their plea of stale demand. This, we think, was error. The plaintiffs claimed only under a legal title, and the plea of stale demand was not applicable to their case. *Harvey v. Cummings*, 68 Tex. 599, 5 S. W. Rep. 518; *Wilson v. Simpson*, 68 Tex. 306, 4 S. W. Rep. 889.

The sixth assignment of error is as follows: "The court erred in section 25 of its charge, as follows: 'If you believe that plaintiffs have title to the land, and you believe that the defendants, or any one of them, or some one for them, had peaceable adverse possession of the land in suit, using, cultivating, and enjoying the same, openly claiming it adversely to all others as their own, prior to the institution of this suit on July 24, A. D. 1882, you will find for the defendants. If you find they have had such possession of any particular tracts, and not possession of the whole, you will find for the defendants for such tract or tracts as they may have shown you they had possession of.'"

If the deed from Thomas Smith to Gann was shown to be a forgery, then the defendants had the title without the aid of the statute of limitations. If, however, that deed was executed by Smith, then, when he or his heirs resumed possession of the land, having conveyed the title he formerly had, neither he nor they can be held to have been in possession under color of his original grant. The claim under the statute of limitations would be restricted to the limits of the actual occupation, or, if the land actually occupied was less than 640 acres, then to that number of acres, to include the improvements as occupied; provided the title by limitation matured before the Revised Statutes went into effect. If the title by limitation did not mature until the present law went into operation, then the claim would be limited to 160 acres, unless a larger area was in fact inclosed.

That portion of the charge of the court is complained of which relates to the 200 acres of land conveyed by Thomas Smith to Jordan Smith. Plaintiffs showed a regular chain of title to this tract. But we have been unable to determine whether it is a part of the land described in the petition or not. The description in the deed is: "The following two hundred acres of land situated in Nacogdoches county, on Paphir's creek; said land to be surveyed so as to include the improvements according as the purchaser may request, which I, the said Thomas Smith, who conveyed all my right, title, and interest to the land." The language here quoted indicates that something has been inadvertently omitted. If the description is to be deemed sufficient to convey title to any land, and to enable a party claiming under the deed to recover, such recovery could only be had by showing by parol the improvement then owned by Smith, and intended to be conveyed. The deed only informs us that it is land embracing an improvement on Paphir's creek. The defendants pleaded that the 200 acres intended to be conveyed were the tract in the northwest corner of the league, which is not embraced in the field-notes of the land claimed in the petition. The court seems to have concluded that the proof showed this. At all events, we think that the plaintiffs failed to make a case which entitled them to recover any 200 acres of land embraced within the field-notes set out in the petition. The evidence shows that there was at least more than one improvement on Paphir's creek. Hence, if the court erred in its conclusion, the error did not operate to the prejudice of appellants.

The appellants also insist that the court erred in refusing to admit in evidence certain testimony to the effect that while Olive Smith was in possession of a part of the league her right was "contested." If she was holding adversely, the only contest that would have affected her claim of title by the statute of limitations would have been a suit prosecuted to judgment. We do not see that the evidence was relevant to any issue in the case, and are of opinion that it was properly excluded.

The defense of fraud, and the claim under the title set up by defendants, as the heirs of the wife of Thomas Smith, through the locative interest alleged to have been set apart to her father, Stanly, were both equitable claims, to which, it seems, the plea of stale demand would have been applicable, if it had been pleaded. But the plaintiffs did not reply to the answer. If the defendants had brought the suit, and plaintiffs had pleaded not guilty, it may be that the defense of stale demand could have been admitted under that plea. It would seem the fact that Smith and the defendants may have resumed possession of the land would not have relieved them from the effect of their laches in failing to bring suit to enforce their rights growing out of the alleged fraud in the execution of the deed to Gann, or out of the alleged setting apart to Stanly of a part of the land in satisfaction of his locative interest. *Walt v. Haskins*, 68 Tex. 418, 4 S. W. Rep. 596. On account of the errors indicated, the judgment is reversed, and the cause remanded.

HOLLIDAY v. HOLLIDAY.

(*Supreme Court of Texas. February 1, 1889.*)

NEW TRIAL—ABSENCE OF CLIENT AND ATTORNEYS—APPLICATION—MERITORIOUS DEFENSE.

In reply to a request by defendant's attorney to see the judge relative to the time of trial of a case, plaintiff's attorneys wrote that they were willing, if the judge should permit, to set the case for such time as would suit defendant's counsel; and afterwards wrote that they were willing to let defendant's attorney suggest the day of trial at any time during the first two weeks of court. The day was set by the latter, but the judge, whose consent had not been obtained, set the case five days in advance of the day fixed; and, neither the defendant nor his attorney being present, judgment was rendered for plaintiff. Defendant's attorney did not know of the action of the judge, and, the defendant was informed thereof two days before the trial, but was unable to be present on account of sickness. *Held*, that though the absence of the attorney and defendant was satisfactorily accounted for, a motion for new trial will not be granted where no facts are set out showing a meritorious defense.

Appeal from district court, Brazos county.

J. Earl Preston, for appellant. *Ford & Doremus*, for appellee.

HENRY, J. The district court for Brazos county convened the first Monday in September, 1888, which was the 8d day of the month, and its term by law is six weeks. On the 30th day of August, 1888, four days before the court convened, appellant's counsel addressed the following letter to Ford & Doremus, attorneys for plaintiff:

"NAVASOTA, TEXAS, August 30, 1888.

"*Messrs. Ford & Doremus, Bryan, Texas*—GENTLEMEN: Please see Judge Henderson, and get his permission to set Holliday *vs.* Holliday for some day in the last week in September. I shall leave early next week for the Panhandle, to attend court, and cannot tell how long I may be detained up there. Please oblige me.

Yours, truly, J. E. PRESTON."

On the same day plaintiff's counsel wrote defendant's counsel as follows:

"BRYAN, TEXAS, August 30, 1888.

"*J. Earl Preston*—DEAR SIR: We are willing to set the Holliday case, if the judge will permit, which we think he will, at any time that will best suit your convenience during the first two weeks of court. We want to try case. Cannot agree to a later date. Or we will let the case come up on regular call as may suit you best.

Yours, truly, FORD & DOREMUS."

On the 1st day of September plaintiff's counsel addressed the following letter to defendant's counsel:

"BRYAN, TEXAS, 9, 1, 1888.

"*J. Earl Preston, Attorney at Law*—DEAR SIR: Yours to hand, and no doubt written before ours reached you. We are willing to set some day during the first two weeks of court, and will be willing that you suggest the day; otherwise we feel that the case should take its course on the docket. We want to dispose of this case at this term of the court. Yours, &c.,

"FORD & DOREMUS."

September 8, 1888, defendant's counsel, in answer to the last foregoing letter from appellee's counsel, answered as follows:

"NAVASOTA, TEXAS, Sept. 8, 1888.

"*Messrs. Ford & Doremus, Bryan, Texas*—GENTLEMEN: I am in receipt of your favor in which you state that you are willing to set the Holliday *vs.* Holliday for any day during the two first weeks. I have calculated my time closely, and believe I can reach Bryan from the Pan Handle on Saturday, the 15th inst. I may not be able to get there before the arrival of the south-bound train in the evening. If you should waive a jury, please make the demand for us. I trust to your well-known candor in this matter. Have written my client about this matter. I believe we can about get through the case Saturday evening. If possible, I will be there Saturday morning.

"Yours, truly,

J. EARL PRESTON."

On the same day appellant's counsel wrote him the following letter:

"NAVASOTA, TEXAS, Sep. 8, 1888.

"*Lon Holliday, Esq., Allen Farm, Texas*—DEAR SIR: Holliday *vs.* Holliday will be set for Saturday the 15th inst. Notify witnesses, and recollect it will be next to impossible to get another continuance. If Mr. Harrington will not come, tender his fees. You will also have to pay \$5.00 jury fee. Don't neglect this matter. Yours, truly,

J. EARL PRESTON."

Both parties had filed their pleadings at a previous term. Appellant's pleadings, if properly supported by evidence, would have entitled him to recover the land in controversy.

The case, on the 10th day of September, 1888, was tried before a jury, resulting in a verdict and judgment in favor of plaintiff. Neither the defendant nor his attorney appeared at the trial. The judgment recites that the plaintiff appeared by attorney, and the defendant "by his answer filed in this cause." The court charged the jury to find a verdict in favor of plaintiff for the land sued for, and further to find for plaintiff such rents, if any, as the evidence showed him entitled to. The record does not contain a statement of facts. The defendant filed a motion for new trial, and affidavits for and against it were heard by the court. The above correspondence was made part of the motion. It appears from affidavits heard by the court in connection with the motion for new trial that when the case was called on the first day of the court, neither defendant nor his attorney being present, plaintiff's counsel called for a jury in behalf of defendants, as requested; that the case was placed on the jury docket by the court; and that plaintiff's attorney requested the court to set the case for Saturday, September 15th, but the judge declined to do so, stating that the jury docket would be disposed of before that time, and that he did not feel authorized to hold a jury for the trial of this cause. The court set the case for September 10th, and requested the attorney representing the plaintiff to notify defendant's attorney, which was done by the next mail. It also appeared that appellant was at the place of holding the court on the 8th of September, and was then informed by one of plaintiff's attorneys that the case was set for trial on the 10th, and would no doubt be then tried; and that appellant left the place of holding the court, and on the 10th, the day of the trial, telegraphed to the judge: "Please pass my case

until Preston can return from North Texas." In connection with his motion for a new trial the defendant testified that he was sick on the day the case was tried, and unable to attend the court; that his attendance at the trial was necessary and important; that he was a witness in his own behalf, and the only witness within his knowledge of certain facts necessary and material to his defense; and that he was prevented from attending court and testifying in said cause by reason alone of his sickness. No facts sustaining defendant's pleadings, or showing that he had a meritorious defense, were in any manner shown in connection with the motion. Defendant's attorney testified that he never received the letter mailed to him informing him that the case had been set for the 10th; that at the time the letter was written he was on his way to Haskell county, and the day case was tried he was in the town of Haskell, 350 miles away. It does not appear from the record whether the case was or was not reached on regular call of the docket on or before the day on which it was tried. The defendant's attorney reached the court on the morning of the 15th of September, after the trial was over.

Appellant files eight assignments of error substantially raising the points: (1) That there was error in trying the case on a day set by the court and plaintiff's counsel, in the absence of defendant and his attorney, and without notice to them; that there was error in overruling defendant's motion for a new trial; (3) that it was error to charge the jury to find for plaintiff. Plaintiff's attorneys, in all of their communications and correspondence previous to their last letter, had expressed their own willingness to have the case set with, but not without, the consent of the judge. Even without this reservation, all parties were charged with knowledge that it could not be set without such consent. This led defendant's attorney to request those of plaintiff to see the judge, and procure his permission. The reply to this letter for the first time omitted mention of the condition, and for the first time agreed to a day. The defendant's attorney was fairly justified in concluding from the correspondence that the consent of the judge had been obtained. He did in fact, it seems, give it that construction, and acted on it. The defendant heard of the mistake only two days before the case was tried. On the day of the trial he was unable, from sickness, to attend it. Under all the circumstances, we do not think he ought to be prejudiced, either for not procuring another attorney or applying for a continuance. When a motion for a new trial is made on the ground that the party making it was not represented at the trial, or, if present in person or by attorney, on the ground that he had no pleadings filed, making the issues on which his rights depended, the rule seems well established in this state that, in addition to excusing his absence or failure to plead, the party must also show, by a sufficiently circumstantial statement, that he has a meritorious cause of action or defense. Stating generally that he has a meritorious cause of action or defense is not sufficient. Enough should be stated, supported by affidavit, to show at least a *prima facie* case. Courts ought not, in such cases, to set aside judgments rendered, except upon a showing which, if true and unexplained, would change the result on a subsequent trial. *Cowan v. Williams*, 49 Tex. 397; *Montgomery v. Carlton*, 56 Tex. 431; *Contreras v. Haynes*, 61 Tex. 105.

We think that in this case the absence of the defendant and his attorney from the trial was sufficiently accounted for, and if he had, in support of his motion for new trial, shown facts supporting his pleadings, or constituting a meritorious defense not already pleaded, his motion ought to have been granted. There being no statement of facts, and the plaintiff's petition showing a good cause of action, we cannot hold that the court erred in charging the jury to find a verdict for plaintiff. We affirm the judgment.

ZUNDELL *et al.* v. GESS.

(Supreme Court of Texas. February 1, 1886.)

TRUSTS—CONSTRUCTIVE—LIEN ON HOMESTEAD.

Plaintiffs, foreign bankers, having in their possession 2,048.95 francs, worth \$389.32, belonging to defendant, sent him, by mistake, a check for \$1,073.06, which he collected, believing the amount to be the American equivalent of the francs, and mingled it with \$375.06 of his own. After spending some portion of his money in traveling, he bought a homestead in Texas, in which he invested \$750 of the remainder, and his wife \$300 of her separate funds. *Held*, that plaintiffs, having failed to show that the money invested in the homestead was the identical money which they had by mistake sent defendant in excess of the sum he was entitled to, were not entitled to a lien for such excess. Reversing, on rehearing, 9 S. W. Rep. 879.

On rehearing. For former decision, now reversed, see 9 S. W. Rep. 879. *Potter & Hughes*, for appellants. *Davis & Garnett*, for appellee.

STAYTON, C. J. The judgment in this cause was reversed, and rendered in favor of appellants, during the Tyler term of this court, and it is now before us on motion for rehearing. 9 S. W. Rep. 879. The facts, in substance, are that appellee, having in the hands of his guardian in Switzerland 2,048.95 francs, ignorant, however, of the amount, desired this sent to him in Texas. His guardian purchased from Zundell & Co., bankers in Switzerland, a draft on New York as a means for sending the money, or deposited it with them to be sent. By mistake made in reducing francs to dollars of United States coinage, the bankers, instead of sending a draft for \$389.32, the true value of the 2,048.95 francs, delivered to them by the guardian of appellee, made out and sent to him a draft for \$1,073.06, which he collected in ignorance that it was more than he was entitled to receive from his guardian. At the time appellee received this money from the bank that collected the draft sent to him for appellants, he had \$375.06, otherwise acquired, which he placed with that received on the draft. After this he made a visit north, and spent some money, but the amount spent is not shown. On his return to Texas, he married and purchased a home in Gainesville, for which he paid \$600, and in the improvement of this he subsequently expended \$150. In the former disposition of this cause it was thought that the evidence required a holding that the home and improvements made thereon were paid for with the remainder of the mixed fund held by appellee when he started on his visit north; and under that view of the facts it was held that, while the alienage of appellants would forbid the enforcement of a constructive trust through which appellants might assert ownership in the specific property bought with that fund, yet that they might, by reason of the facts, have and enforce a lien on the property bought, to secure the payment of the sum due from appellee to them, and judgment was so entered.

To entitle appellants to this relief, it is necessary that they shall have traced their money into the property against which the claim is asserted; for, if this be not done, it cannot be held that one who knowingly or ignorantly receives the money of another, and expends it in the payment of debts or otherwise, thereby creates a lien on any or all of his property, or confers upon the person whose money is so used any right other than that held by ordinary creditors. It seems impossible for appellants to show that \$683.74 of the money collected on the draft sent by them to appellee, or the representative of this, was actually used in the purchase and improvement of the property; for, when appellant went north, he had in his possession \$1,448.06, with no means, so far as the record shows, to distinguish that to which he was justly entitled from that received by him through mistake; and, if it had been shown that all of this sum except \$683.74 had been expended before he bought the home and improved it, and that this sum had been used for that

purpose, even then the case of *Bank v. Weems*, 69 Tex. 489, 6 S. W. Rep. 802, would not furnish a precedent for holding that the sum so invested must be deemed to have been the money of appellants.

It may justly be held, when a trustee knowingly, or even negligently, so mixes his own money with that of a person for whom he holds other money in trust that the money of each cannot be identified, and afterwards expends in his own business a sum equal to his own, that the balance in hand is the money of the *cestui que trust*; and so, upon the presumption that the trustee acted honestly, and expended in his own business, or for his own purposes, only what he had the right to so expend. In such a case, the burden of showing what is his, and what he holds as trustee, rests, and ought to rest, upon him; and if he fails to do this, as he ought to be able to do if he has discharged his duty, he cannot complain if the presumption is indulged that he acted honestly, and has on hand the identical money, or the representative of that which it was his duty to have on hand. Such a presumption may well be indulged when the trustee is shown to have been aware that he was in possession of money belonging to another, which he had neither the legal nor moral right to retain or use; but ought such a presumption to be indulged when the person who is sought to be made liable to the rules applicable to trustees was ignorant, at the time he used money justly belonging to another, that such a state of facts existed as would impose upon him the relation of trustee for the person really entitled to the money?

We think, in the case last supposed, the reason for indulging in such a presumption as may be raised in a case in which a trustee, knowing his relation to a trust fund, mixes it with his own money, wholly fails; and that the presumption ought not to be raised in any case in which, by the fault or negligence of the other party, money comes into the hands of the person sought to be charged as a trustee under circumstances that induced him to believe it belonged to him, when so believing he used it. In such cases, the use of a fund by a person innocent of any wrongful intent, and ignorant of his want of right, is influenced by the fault or negligence of the real owner, and no presumption of fact ought to be indulged against him which does not arise as a fair deduction from the known facts.

In this case, it must be remembered that the funds were practically mixed by appellants, who placed their own in one draft with that to which appellee was entitled, and that they furnished him no means to ascertain that this had been done until after the entire fund had been expended.

The burden of proof to show that their money, or some particular part of it, went in payment for the property in question, rests upon appellants; and this they must show with reasonable certainty, before they become entitled to other relief than that given by the judgment of the court below. It may be conceded that "whenever one party has obtained money which does not equitably belong to him, and which he cannot in good conscience retain or withhold from another who is beneficially entitled to it," a constructive trust will arise, whether the money came to the possession of such person by accident, mistake of fact, or fraud. 2 Pom. Eq. Jur. § 1047. To enforce this trust, the money must be identified, or it must be clearly traced into property purchased with it. If this be done, it is the right of the beneficiary to have the money or property bought with it, and this right he may enforce against the trustee, or any one holding under him, who is not an innocent purchaser. If he does not desire to have the property bought with his money, it is his right to have a personal judgment against the trustee, with enforcement of lien against the property to secure its payment.

It was held in the former opinion that while appellants, on account of their alienage, were not entitled to the property which they allege was bought with their money, yet they were entitled to have it sold, and its proceeds applied in satisfaction of the personal judgment obtained against appellee.

Looking to the whole record, does it justify the conclusion reached on the former consideration of the case? Appellants had in their hands a sum of money belonging to appellee, of a coinage presumably that of the country in which they lived, the value of which they are presumed to have known, which they, as bankers, undertook to reduce to American money, and remit to appellee. They made a mistake in doing this, and sent a sum larger than they should have sent, which appellee received in ignorance of the sum due to him, or that the sum received was more than he was entitled to. If, under this state of facts, it were shown that the entire and identical \$1,078.06 was invested in the property bought and improved by appellee, then we would be authorized to hold that appellants had shown that \$683.74 of their money had been invested in the property, and it would be their right to enforce its repayment through a sale of the property. If, however, it was shown that, of the identical money received by appellee through the draft sent to him by appellants, \$750 was invested in the purchase and improvement of the property, then, under the facts of this case, a court would not be authorized to presume that, to the extent of \$683.74, this was money belonging to appellants; for there would be no more reason for presuming this than that appellee thus used \$387.72 of that fund which rightfully belonged to him.

It appears, however, that at one time the mixed fund amounted to \$1,448.06, of which \$764.82 justly belonged to appellee. This was more than was expended by appellee in the purchase and improvement of the property, and we might as well presume, under the facts of this case, that this was so used, as to presume that appellee so used the money rightfully belonging to appellants. We think it does appear, with reasonable certainty, that appellee had not in his hands, at the time he purchased the property, of the mixed fund amounting to \$1,448.06, a sum equal to \$683.74, and it does clearly appear that \$300 of the money actually paid for the property was the separate fund of the wife of appellee. The property belongs to her in the proportion the money she paid bears to the entire purchase money, and this furnishes another reason why appellants should be held to clearly show that their money paid for the property, or to what extent it did so; for through their negligence there came into the hands of her husband money which he and she were authorized to believe belonged to him, and thereby she was induced to join him in the purchase of the property by the use of that money and her separate means, expecting by the purchase to acquire a home from which she could not be excluded, except through her own consent, given as the law requires. Had she known that the money of a third person was used to pay a part of the purchase money, and that, by reason of this fact, the property intended for a home would be subject to sale to repay the sum so used, the probability is that she never would have invested her money in the property. How far, if at all, a trust clearly established, but arising out of the negligent act of the person asserting it, ought to be enforced upon the rights of a third person, ignorant of the existence of the facts that give rise to the trust, it is not necessary to decide. In all cases the person asserting the trust must clearly show both its existence and extent.

We are constrained to hold that the finding of the court below, to the effect that appellants had not shown that the property in controversy was bought with their money, must be given effect. In the former disposition of the case the fact that a part of the money paid for the property was the separate estate of Mrs. Gess was not considered, nor, as it now seems to us, was due weight given to the finding of the court below, or to the evidence on which it was based. The judgment heretofore entered in this court will be set aside, and the judgment of the court below affirmed. It is so ordered.

PELLAT v. DECKER.

(Supreme Court of Texas. February 1, 1889.)

HOMESTEAD—ACQUISITION—FILING NOTICE—CITY LOTS—ESTOPPEL.

Rev. St. Tex. arts. 2843-2866, inclusive, relating to homesteads, and providing that a homestead, not being within a town or city, included in a larger tract, may be set apart by filing for record in the office of the clerk of the county court an instrument of writing containing a description of the part claimed as exempt, has no application to city lots; and such a paper, designating an unimproved city lot, on which the family never resided, will not destroy the right of exemption as to other property actually used as a homestead, as against a mortgagee having knowledge that it was being so used.

Error from district court, Nueces county.

Action by George Decker against Victor Pellat, to recover lots in Rio Grande City, Starr county, Tex. Rosa Pellat, wife of defendant, was afterwards made a defendant on her own motion, and by agreement the venue was changed from Starr county, where the action was originally brought, to Nueces county. Verdict and judgment for plaintiff, and defendant Rosa Pellat brings error; Victor Pellat having died after judgment. Rev. St. Tex. arts. 2843-2866, inclusive, provide that, when a head of a family is entitled to a homestead in a part of a tract of land not in a town or city, he may file for record in the office of the clerk of the county court of the county an instrument of writing, describing the part claimed as exempt by metes and bounds, or otherwise sufficiently identifying it.

McCampbells & Welch, for plaintiff in error. *John C. Russell*, for defendant in error.

STAYTON, C. J. The property in controversy, consisting of lots 5 and 6, in block 15, in Rio Grande City, was continuously occupied by Victor Pellat and plaintiff in error, his wife, as their homestead, from some time in the year 1872 until the institution of this suit, on June 7, 1888. Prior to January 6, 1880, Victor Pellat was indebted to John Decker, and on that day he and his wife executed a mortgage to Decker on the homestead lots to secure the debt, which then amounted to \$3,000. Decker became uneasy about his security, and negotiations were had between the parties, which resulted in the execution of a paper by Pellat and wife to Decker, dated April 27, 1881, which on its face conveyed to Decker the two lots then and before that time occupied by Pellat and wife as their home. The consideration expressed in this deed was the exact sum of the principal and interest due to Decker to that date. It is claimed that this indebtedness was thus extinguished, and that the conveyance was intended to be, as it appeared, absolute.

In the agreement for the execution of this deed, however, it was understood that other papers should be executed between the parties, and these seem to have been in course of preparation by a lawyer at the time the deed of April 27, 1881, was executed and acknowledged. In fact, it seems that the officer who took the prior acknowledgment of Mrs. Pellat to the deed, and who seems to have carried on the negotiations between the parties, received the deed under a promise to hold it, and not to place it on record until the other papers were executed.

One of the papers which the parties had agreed should be executed at the time the deed was, was executed, but bears date May 1, 1881; and therein John Decker bound himself to reconvey the property to Pellat and wife when they should pay to him \$3,470, an indebtedness evidenced by a negotiable promissory note of date May 1, 1881, executed by Pellat to Decker, and payable two years after its date, without interest, until after maturity. This note was for the exact sum due from Pellat to Decker on April 27, 1881. By the instrument before referred to Pellat and wife bound themselves to pay that

promissory note. Decker also executed a lease of the property to Pellat and wife for the term of two years, at an annual rental of \$300, and this paper was executed as of date May 2, 1881.

Prior to the execution of the mortgage to John Decker of date January 6, 1880, at whose instigation does not appear, Pellat and wife signed and acknowledged what is termed a "Designation of the Homestead," in which there is a statement of the different lots owned by them, and a declaration that lot No. 1, in block 18, was their homestead; and that all other property therein enumerated, including lots 5 and 6, in block 15, on which they were then actually residing, was not embraced in the homestead, but was subject to forced sale.

It does not appear that the lot thus designated as homestead was ever improved, or in any manner used for homestead purposes; but, as before said, it does appear that lots 5 and 6, in block 15, were actually occupied continuously by Pellat and wife as their home for some time in the year 1872, until this suit was brought, when they were excluded from it under a writ of sequestration sued out by the plaintiff. It further appears that the paper termed "Designation of Homestead" was recorded. John Decker having died, this action was brought by George Decker, one of his heirs, to recover the two lots, and there was a judgment rendered in his favor, from which, Victor Pellat having died, his widow prosecutes a writ of error.

Much parol evidence was offered by the parties for the purpose of showing on the one side that the deed of April 27, 1881, was intended to be an absolute conveyance, without any condition of defeasance and in satisfaction of the indebtedness of Pellat to Decker; and on the other side to show that it was understood and agreed by the parties that the deed should only operate as a security for the debt then existing, and kept in force by the note of date May 1, 1881.

The charges given were lengthy, and those asked by defendants, and refused by the court, were numerous. On the giving and refusing to give charges are based many assignments of error, which it will be unnecessary to consider.

The defendant in error was permitted, over the objection of Pellat and wife, to offer in evidence the paper purporting to be a designation of homestead, to which we have before referred; and, while the court informed the jury that that alone could not deprive the property of its homestead character, the charge was calculated to induce the jury to believe that it was entitled to some consideration and weight, upon the question whether the property was homestead. The court was asked by the defendants to instruct the jury that the paper offered to show designation of homestead "could not operate as such designation, and relieve other property actually used and occupied by them as a home or place of exercising the business of the head of the family of its homestead character." This charge was refused.

We are of the opinion that the evidence objected to should have been excluded, for it was not entitled to any weight whatever, nor under the uncontroverted facts to be introduced in evidence in support of any issue in the case. Pellat and wife, as before said, were actually and continuously using the property as their home from 1872 until this action was brought; and this, as to such property, is the conclusive designation of homestead, against which no declaration to the contrary can be allowed any weight. The law provides a method, when a rural homestead is a part of a larger tract, whereby the homestead may be designated, and the excess subject to execution identified. Rev. St. arts. 2948-2866. Those laws, however, have no application to homesteads in towns or cities, nor to such a question as that before us.

There is no pretense that John Decker was deceived by the act of Pellat and wife in making and recording the paper called a "Designation of Homestead." On the contrary, he seems to have been fully aware that it would not protect

his mortgage subsequently executed, and as a fact he knew that Pellat and wife were actually occupying the property as their home on April 27, 1881. The evidence objected to should have been excluded, and the charge asked should have been given, to exclude from the jury any foundation for belief that they were authorized to look to the paper objected to, for the purpose of ascertaining whether the property in controversy was the homestead of Pellat and wife on April 27, 1881. The court did not inform the jury what facts would give homestead character to property, and, in the charge to which we have referred, left the jury to infer that in ascertaining whether the property was homestead they might consider the evidence objected to.

All this was calculated to mislead, and for the error in admitting the evidence referred to, and in refusing to give the charge requested, the judgment of the court below will have to be reversed, and the cause remanded, and it is so ordered.

TRINITY & S. RY. CO. v. MITCHELL *et ux.*

(*Supreme Court of Texas. February 5, 1890.*)

MASTER AND SERVANT—INJURY TO EMPLOYE—NEGLIGENCE OF FELLOW-SERVANT.

A section hand in the employ of the defendant company, directed to go after some tools, got on the tender of a train, and rode down the track for that purpose, and when the train stopped got off, and either in going away from the tender, or in attempting to get on again, was run over. The train was moving slowly at the time. It was not shown that the place of the injury was such as required signals that the train was in motion, or that the engineer was incompetent, and there was evidence that the employee was so close to the tender that he could not be seen by the engineer. *Held*, that the evidence was not sufficient to warrant a recovery for such injury.

Appeal from district court, Tyler county.

Sam T. Robb and J. T. Stevenson, for appellant. *West & Chester*, for appellees.

STAYTON, C. J. Appellees seek to recover damages for an injury resulting from the death of their son, a young man who had nearly reached majority, which it is alleged was caused by the negligence of the servants of appellant, and by the negligence of appellant in keeping in its service an engineer alleged to have been unfit for the place. There is, however, no evidence tending to show that the engineer in charge of the train at the time the young man was injured was not in every respect a competent, careful, and sober man. The person injured was in the service of the railway company in the capacity of section hand, and it seems was at work on the section where the injury occurred. It was desired to place on a side track, at Ogden, some cars, but it would need some repairs before this could be done, and, with a view to the making of them, the deceased was directed to go westwardly down the main track to a hand car, to get spike-maul, spikes, and gauge. It seems that the train, with tender in front, started in that direction, and that the deceased went on it until it stopped short of the place to which he was going. He then left the tender, and started on his way down the track; but for some purpose, probably to tie his shoe, stopped on the track but a short distance from the tender, which soon moved slowly to the westward, and ran over him while moving at a very slow rate of speed.

This is the statement of the case most favorable to the appellees that can be made from the evidence, while the evidence offered by appellant tends to show that deceased was injured while attempting to get on the front end of the tender, while in motion. There is some conflict in the evidence whether the bell was ringing or other signals given of the moving train, but it is not shown that the injury occurred at a place where the law requires such signals

to be given for the protection of any person. A public road was but a short distance to the east, but the moving train had crossed that, and was moving west. Under this state of facts, it is urged that there was not sufficient evidence to sustain a verdict for the plaintiffs, and that the court erred in refusing to grant a new trial based on this ground.

That the deceased, and those engaged in operating the train, were fellow-servants, is settled by the former decisions made in this state. His death is not shown to have been brought about by any defect in the track or cars which would fix liability on the master for injury to a servant. It is not shown that the engineer, or any other person engaged in operating the train, was incompetent, or for any reason unsuitable to discharge the duties of the position he held, nor even that the engineer was negligent in the particular instance. Under this state of facts, we think the motion for new trial should have been granted.

Had it even been shown that the engineer was negligent on the particular occasion, this, of itself, would not be sufficient evidence to fix liability on appellant, on the ground that it had not used due care in selecting, employing, or retaining him. The evidence, however, tends to show that the deceased was on the track so near to the tender that the engineer could not see him. There was no necessity for him to be there, and on the case made by the evidence it would seem that his own negligence contributed to the injury, and would bar an action by him had he survived; and what would bar an action by him must operate as a bar to an action brought by his parents for an injury resulting in his death. The new trial should have been granted, and for the error of the court below refusing it the judgment will be reversed, and the cause remanded.

LINK *et al.* v. PAGE *et al.*

(Supreme Court of Texas. February 5, 1889.)

1. APPEAL—REVIEW—HARMLESS ERROR.

Upon trial of an issue involving the validity of the deed under which defendants claimed, the court charged that, unless the jury believed the deed a forgery, they should find for defendants. It was not contended that the deed was forged, but the uncontradicted evidence showed that the grantor therein, through his own gross negligence, allowed the grantees to mislead him into the execution of a deed different from what he intended. The court refused to submit the question, as requested by plaintiffs, whether defendants were *bona fide* purchasers under said deed, without notice of the fraud, but the evidence showed without dispute that such was the fact. *Held*, that a verdict for defendants should not be set aside for the errors in giving and refusing the instructions mentioned, as on the uncontradicted evidence the jury, if properly instructed, must necessarily have found the same verdict.

2. DEED—VALIDITY OF EXECUTION—POWER OF ATTORNEY—EVIDENCE.

Where a deed is executed by an attorney in fact, who is so constituted by two different instruments, one of which is valid and the other invalid, the deed passes title, though it purports to have been executed under the later instrument, and the valid power, though not referred to in the deed, may be received in evidence to support it.

Error from district court, Bee county.

Trespass by James Link and E. W. Link against E. W. Page and others, to try title to land in Bee county. Verdict and judgment for defendants, and plaintiffs bring error.

A. B. Petcolas, for plaintiffs in error. Broune & Beasley, for defendants in error.

GAINES, J. The plaintiffs in error, who were proved to be the heirs of Robert N. Martin, brought this suit in the court below to recover of defendants in error the tract of land described in the petition. Both parties claimed under John Robinson and Agnes Bailey as the common source of title. The

plaintiff introduced in evidence a power of attorney from John Robinson, Agnes Bailey, and her husband, John Bailey, to James Bailey, which authorized him to sell and convey the land in controversy, as well as other lands. This instrument was executed April 20, 1857, and was duly acknowledged. The plaintiffs also introduced in evidence a deed from John Robinson, Agnes Bailey, and her husband, John Bailey, executed by James Bailey by virtue of the power above mentioned, which conveyed several tracts of land, including the land in controversy, to Robert N. Martin. Neither of these instruments were recorded in Bee county until the rights of defendants had attached.

The record shows that the constituents in the power above named had previously executed a power of attorney in 1855, which authorized John and James Bailey, or either of them, to sell the same lands. To this power of attorney there was no proper certificate of acknowledgment to bind Agnes Bailey, who appeared upon its face to be a married woman.

The defendants introduced in evidence a deed executed in the name of John Robinson, Agnes Bailey, and her husband John Bailey, by James Bailey, as their attorney in fact, to one Bushick, which purported to convey to Bushick certain lands in Texas, and which included in the description the land in controversy. This conveyance referred to the power of attorney executed in 1855, and purported by its recitals to have been executed by virtue of the power therein given. To support the deed to Bushick, the defendant offered in evidence the power of attorney executed in 1857, to which plaintiffs objected. The instrument, however, was admitted over their objection. The ruling of the court upon this question is the ground of the first assignment of error. The question is not an open one in this court. In *Hough v. Hill*, 47 Tex. 148, the precise point was before this court, and it was there held that a deed made by an attorney will pass the title, if he in fact have the power to sell, although it may purport by its recitals to be executed by virtue of a power contained in another instrument, which may be invalid.

The defendants introduced a chain of conveyances of land in controversy from Bushick down to themselves, and testified that they bought the property without notice of any adverse claim, and paid a valuable consideration therefor. The plaintiffs, in rebuttal, introduced James Bailey, the attorney who executed the deed to Bushick. This witness testified that Bushick applied to him to purchase 300 acres of the land, representing that there was that quantity which had not been previously conveyed; that he told Bushick that he thought that he was mistaken; that Bushick insisted, and he consented to convey him the 300 acres for \$300; that a deed was drawn, in accordance with that agreement, which he read; that he retired from the room, and when he returned Bushick presented a deed to him which he took to be the same he had read, and which he signed and acknowledged without reading. The witness also stated that he never received the \$300 actually agreed to be paid. The deed signed and acknowledged by him purports to be for the consideration of \$1,000, and purports to convey all the lands in Texas inherited by the grantors from certain brothers named, and refers to the record of a decree of partition for description. The decree of partition shows that the several tracts set apart to the grantors embraced some 20,000 acres.

There was a plea of *non est factum* interposed as to the deed to Bushick. The court charged the jury, in effect, that, if they found that this deed was forged, to find for plaintiffs, unless they found for defendants upon their pleas of the statute of limitations; but, if they did not find the deed was forged, they should find for defendants.

Let us first determine what is the law of the case. The plaintiffs having pleaded *non est factum* to the deed, which purported to have been made to Bushick, and no evidence having been offered to establish it except that of James Bailey, the attorney in fact, who purported to have executed it, it was a question for the jury whether the deed offered by defendants was or was not

the substituted paper which he testified that he signed and acknowledged. We think his testimony warranted the jury in concluding that it was the instrument so executed. The court having submitted the question of forgery to them, and they having found for defendants, we think it must be conclusively presumed that it was the same instrument. But the facts testified to by Bailey are also uncontroverted; and we are therefore of opinion that it must be determined that the deed actually executed by him was not the deed he had read, and had agreed to execute, but that his signature and acknowledgment were obtained by fraud in substituting an instrument he never agreed to sign. We do not understand that this made the grantee, who perpetrated the fraud, guilty of forgery; but we do understand that, as between the parties to the transaction, the signing and acknowledgment of the writing did not make a contract of conveyance. The attorney of the grantors never having assented to the contract set forth in the alleged conveyance, signed by him through mistake on his part and fraud on part of his grantee, the minds of the parties did not meet, and no agreement was consummated. *Stacy v. Ross*, 27 Tex. 4; *Van Valkenburgh v. Rouk*, 12 Johns. 387; Bish. Cont. (2d Ed.) § 346; Id. § 645 *et seq.*; Pol. Cont. 401 *et seq.* A purported conveyance, the execution of which is obtained by any fraudulent device by which the grantor is misled as to the contents, is void. But when the signer has not exercised due care, and through his gross negligence has signed a paper by which third parties may be misled to their injury, a different principle will apply. Where a negotiable instrument has been so signed, and has passed into the hands of innocent purchasers, the party so signing, whether as maker or indorser, is generally held estopped to deny the validity of his signature. It has been so held by this court. *Davis v. Gray*, 61 Tex. 506, and cases cited. We think, also, where the owner of real property negligently clothes another with the apparent title to it, although the execution of the instrument which purports to convey the title may be obtained by fraud, and third parties being misled thereby innocently purchase and pay value for the property, he should be held estopped to deny the validity of the conveyance. This principle was announced by this court in the case of *Steffan v. Bank*, 69 Tex. 513, 6 S. W. Rep. 823, in which it is held that one who signs and acknowledges a conveyance, to be delivered only upon conditions, may be estopped to set up the non-delivery by negligently permitting it to pass into the hands of the grantee. See, also, *Hussey v. Moser*, 70 Tex. 42, 7 S. W. Rep. 606; *Gavagan v. Bryant*, 88 Ill. 376.

Bailey's testimony shows that, after he had read the deed Bushick had prepared, Bushick told him he wished to add something to it, and that he retired, was then gone an hour, and upon his return signed the deed presented to him without further examination. This, we think, shows gross negligence, and that his grantors should be held estopped to set up the fraud, as against purchasers for value without notice of it; and we are also of opinion that the plaintiffs, who claim under a deed which they had failed to have recorded, should also be estopped to allege the fraud, as against purchasers who paid value, without notice either of the existence of the former deed, or of the fraud practiced in obtaining the latter.

It is further complained that the court erred in failing and refusing to submit to the jury the question whether the defendants were *bona fide* purchasers or not. This was a question of fact depending for its determination upon oral testimony, and it was proper to have submitted it. But the facts that defendants received their conveyances, and paid value for the land, without notice either of the fraud of Bushick in obtaining his deed, or of the prior conveyance to Robert N. Martin, are undisputed. Is there any evidence in the case by which the defendants should be held to have been put upon inquiry? We think not. It is true that nearly 20 years had elapsed from the date of the power of attorney which was executed in 1857 to the time of the execution of

the deed to Bushick. But after a diligent search we have found no case which holds that the power ceases to exist, even after such a long lapse of time. On the contrary, it seems that an agency which is proved to have once existed is presumed to continue, in the absence of rebutting evidence. *Ryan v. Sams*, 12 Adol. & E. (N. S.) 460; *McKenzie v. Stevens*, 19 Ala. 692. There was no evidence in this case of the revocation of the power. It is true that the power may have been exhausted by the previous conveyances made by the attorney, but the conveyance of the land in controversy was not of record in Bee county, and defendants cannot be held to have had notice of it. Their testimony showed that when they purchased they paid a fair value of the land. The deed to Bushick is a warranty deed, and purports to convey, not a mere chance of a title, but the lands themselves. Under these circumstances, if the court had given the proper instructions, and the jury had found for plaintiffs, it would have been the duty of the court below, upon motion, to set aside the verdict. The judgment for the defendants was the only proper judgment which the evidence warranted. In such a case a new trial will not be granted on account of errors in the charge. *Bowles v. Brice*, 66 Tex. 724, 2 S. W. Rep. 729, and cases there cited.

The judgment is accordingly affirmed.

SAN ANTONIO & A. P. RY. CO. *et al.* v. COCKVILL.

(*Supreme Court of Texas*. February 5, 1889.)

1. ABATEMENT AND REVIVAL—PLEA IN ABATEMENT—PLEADING.

A plea in abatement, because defendant is not sued in the county in which he resides, cannot be sustained, unless it negatives the existence of any of the exceptions which, under the statute, would authorize jurisdiction where the suit is brought.

2. PARTIES—NECESSARY.

In an action by an assignee of time-checks and due-bills given to laborers employed in the construction of a railroad, against the railroad company and the general contractor, where the petition charges that they were executed by the contractor, and were his obligations, which matters are not denied in the answer, and the contractor made himself primarily liable to the laborers, subcontractors who had given the checks and due-bills were not necessary parties.

3. EVIDENCE—COMPETENCY.

A witness was properly permitted to testify to statements made by an agent of the railroad company to the effect that the company owed the contractor \$2,000,000, and that the checks sued on were all right, and were a lien on the road; such evidence being drawn out on cross-examination by defendants themselves, and there being nothing to show that it was not responsive to questions asked.

4. SAME—PLEADING AND PROOF—VARIANCE.

The fact that the petition described the time-checks as having no indorsement or assignment on them, while those introduced in evidence had indorsements in writing across their backs, was not such a variance as to make them inadmissible in evidence.

Appeal from district court, Fayette county.

Suit by M. Cockvill against the San Antonio & Aransas Pass Railway Company and M. Kennedy, contractor, to recover on certain contractor's time-checks and due-bills issued to laborers on the railroad, and held by plaintiff as assignee. There was judgment for plaintiff, and defendants appeal.

S. C. Patton, for appellants. *Phelps & Lane* and *Brown & Dunn*, for appellee.

HENRY, J. Appellee filed his petition in the district court of Fayette county, on the 1st day of February, 1888, against the San Antonio & Aransas Pass Railway Company and M. Kennedy, alleging that the railway company was a private corporation, chartered and organized under the laws of this state, and that the defendant Kennedy was a resident of Nueces county, in the state of Texas. That during the year 1887, the railway company was engaged in con-

structing its road from Yoakum, in Lavaca county, through Fayette county, in the direction of the city of Waco. That Kennedy had contracted with the railway company to grade and construct its road. That in constructing the road Kennedy had employed a great number of subcontractors and laborers, and that for their labor time-checks and due-bills were issued to said laborers, which were signed, registered, and approved by the agents of Kennedy, and thereby became his promises to pay to the laborers the several sums specified in them. Copies of the time-checks and due-bills were set out in the petition, amounting in the aggregate to \$3,275. That plaintiff had purchased, and was the lawful holder and owner of, said claims, etc.

Kennedy filed a plea in abatement, setting up that he resided in the county of Nueces, and not in the county of Fayette. His plea contains nothing else, and does not refer to or negative the existence of other grounds of jurisdiction.

Both defendants excepted to the petition, on the grounds: (1) That it shows that the district court of Fayette county did not have jurisdiction over either of the defendants; and (2) that it shows that certain other persons (naming them) should be joined as defendants. The persons named are the various persons whose names are signed as contractors to the time-checks and due-bills sued upon, and who are alleged in the petition to have been subcontractors. Both defendants filed a general denial.

Plaintiff moved to strike out defendant Kennedy's plea to the jurisdiction, on the ground that it failed to negative the existence of all grounds of jurisdiction. The court sustained this motion, and overruled defendant's exceptions. The cause was tried by the judge, and judgment rendered for the plaintiff against M. Kennedy for \$3,569.60, and for foreclosure of laborers' liens against the railway company for \$2,994.02.

The instruments described in the petition were read in evidence, and it was found that plaintiff had purchased and owned them. There was evidence showing that the time-checks and due-bills were given by subcontractors under the defendant Kennedy to laborers employed in the construction of the defendant company's railroad during the year 1887, and within the 12 months next preceding the institution of this suit. There was evidence tending to show that no work was done in Fayette county before the last of May, 1887, and that some of the time-checks were for work previous to that date, and hence for labor not performed in Fayette county. The evidence clearly shows that Murphree & Wimbish, who, as subcontractors, issued a number of the time-checks sued on, amounting to \$198.75, and W. L. Carver, who was also a subcontractor, and issued such checks for over \$300, did no work in Fayette county. The evidence shows that the defendant M. Kennedy was the contractor to construct the whole of said railway, and that other persons were officers and agents of the corporation, as follows: U. Lott, president; B. F. Yoakum, general manager and treasurer; A. M. French, chief clerk of construction; G. T. Porter, commissary clerk of the construction department; and J. P. Nelson, chief of the construction department.

The evidence shows that the time-checks were presented to Porter, the commissary clerk, and that he entered them in his books, indorsed them as registered, signed his name to them officially, returned them to the party presenting them to him, and charged them to the contractors who drew them.

A letter from J. P. Nelson, addressed to plaintiff, was introduced in evidence, dated 24th September, 1887, in which he said: "Contractor's time-checks, signed by Porter, are all right; nothing further to be done with them. You must have the men get them signed by Porter before disposing of them. I hope we will be able to take up all of June time-checks shortly. Money is very hard to get, and our subscriptions slow in coming in."

The first two assignments of error complain of the action of the court in striking out defendant Kennedy's plea to the jurisdiction, and overruling the

exceptions of both defendants raising the same question. The venue of suits of this character against railroads is prescribed and limited by the act approved 18th February, 1879, (appendix Rev. St. 5.) The third section of that act reads: "Suits by mechanics, laborers, and operatives, for their wages due by railroad companies, may be instituted and prosecuted in any county in this state where such labor was performed, or in which the cause of action or part thereof accrued, or in the county in which the principal office of such railroad company is situated." The domicile of the railroad company is not stated in the petition. The plea of the defendant Kennedy failed to state any objection to the jurisdiction, except that of his own residence. This plea does not negative the existence of the exceptions which would give the district court of Fayette county jurisdiction over this cause of action, as to the defendant Kennedy, notwithstanding Nueces county was his home; nor does it negative the existence of grounds of jurisdiction over the railway company that would carry with it jurisdiction over its co-defendant. The petition, while it fails to state there are such grounds of jurisdiction, does not negative their existence. The plea in abatement was properly stricken out, and the exceptions to the jurisdiction were properly overruled. *Stark v. Whitman*, 58 Tex. 376; *Raleigh v. Cook*, 60 Tex. 442.

The railway company having failed to plead to the jurisdiction, and the plea of its co-defendant having been properly stricken out, and the court having jurisdiction of the subject-matter, there was nothing in the way of its proceeding to judgment.

It is complained that the court erred in overruling the exception that the subcontractors were necessary parties. The due-bills and time-checks on which the judgment was rendered were in writing, were copied into the petition, and produced in court. The petition sufficiently (at least, in the absence of a special exception) charged that they were executed by, and had become the obligations and promises of, the defendant Kennedy, and that plaintiff had become, by purchase, the owner and assignee of them. Our statutes, in order to put these matters in issue, require them to be expressly denied under oath. They were not put in issue in any way. The defendant Kennedy having made himself, expressly and primarily, liable to the laborers for the debts, no reason exists for making the subcontractors parties. The plaintiff claims nothing from them. They have no lien or claims, and never had, against the railroad company. The only relation they ever had to these transactions was that of debtor to the laborers. Their debts were discharged when they were assumed by Kennedy. Plaintiff, as the assignee of the laborers, stands in their place, and makes no demand of payment against the subcontractors, but claims payment of Kennedy alone, on the strength of his assumption and promise to pay the debts. Whoever may own the debts, and whoever may be bound to pay them, they are all the time a lien on the property of the railway company, but that is the limit of its obligation. When the debts shall be paid, all obligations against the railway company will cease to exist. It was the laborers, and not the contractors, who acquired liens against the property of the railway company. There would seem to be more force in the proposition that the laborers ought to be made parties than that the subcontractors ought. The plaintiff is the assignee of the laborers' claims, and enjoys all of their rights. If they had made no assignment of their claims, they, by the express provisions of the statute, could have maintained their suit against their debtor to recover their debt, and against the railroad company to enforce their lien, "without its being necessary for the plaintiff to make other lienholders defendants thereto." Section 2, act Feb. 18, 1879. The only reason that can be suggested for making other parties must be asserted in behalf of the railway company, and not the defendant Kennedy, who can have no right to demand that others shall be brought in to pay debts that he has assumed and made his own. Upon the part of the railroad company no other

claim or equity in favor of bringing in other parties can be asserted than that the debts for which its property is bound originally belonged to the laborers, and that, while it is true the payment of the debts to any lawful holder will discharge the liens, it is also true that if, after the payment of the judgment to the assignee, the original owners of any of the claims, not having been parties to the suit, and therefore not concluded by the judgment, should sue upon and prove that they had never transferred their claims, it would be subject to a second recovery for the same debt. Such objection will apply as well to every assignment of a cause of action, and confer upon the debtor the right to have every precedent owner of the assigned instrument made a party, in order that they may be estopped by the judgment. No such rule has ever prevailed. It is the debtor's right in every case, by proper pleadings, to compel the plaintiff, who sues upon an assigned instrument, to show title in himself by proving the genuineness of all transfers. This is all the protection the law gives in such cases, and it is ample. The case of *Railroad Co. v. Rucker*, 59 Tex. 587, was upon a different state of facts from those presented in this case.

The fourth assignment of error complains of the admission of the evidence of a witness who was permitted to testify to statements made by an attorney and an agent of the railroad company, to the effect that the railroad company owed Kennedy \$2,000,000, and that the checks or claims sued on in this case were all right, and were a lien on the road. The bill of exceptions shows that the evidence objected to was drawn out on cross-examination by defendants themselves, and there is nothing to show that it was not responsive to questions asked or intentionally drawn out. This furnishes a sufficient explanation for its not having been stricken out. If it was not sufficient, we do not find in the assignment any other sufficient cause for its exclusion.

Appellants complain of the introduction of the time-checks in evidence over their objection that there was a material variance between those introduced in evidence and those described in the petition, in this: "That the petition sought to recover on instruments which it described as having no indorsement nor assignment on them, while those introduced in evidence had indorsements in writing across their backs." As we have before said, the instruments were correctly copied into the petition, and we do not think they were inadmissible as evidence on account of the objections here stated.

It is urged that the court erred in permitting time-checks to be read in evidence for work done before February 1, 1887, either against the railroad company or Kennedy. We find no evidence in the record indicating that any checks were admitted as evidence in which the liens had accrued against the railway company as long as 12 months before the institution of this suit. If it had been done, it would have been error as to the railway company, but not as to Kennedy.

The only remaining error assigned is that the court erred in making time-checks, issued to Murphree & Wimbish, a basis for judgment, because it was shown that Kennedy was not a resident of Fayette county, and because they were issued for labor not performed in Fayette county, and that for like reason there was error in giving judgment on any time-checks issued before June, 1887. There being no plea to the jurisdiction, we think the court could properly have given judgment against both defendants for all of the debt sued for.

It seems to us that the plaintiff recovered judgment against Kennedy for no more, and against the railroad company for less, than he was entitled under his pleadings and the evidence, and therefore the judgment will be affirmed.

12 Tex. 375 EAST LINE & RED RIVER R. CO. v. CULBERSON.

(Supreme Court of Texas. February 5, 1899.)

1. MASTER AND SERVANT—INJURY TO EMPLOYE—LIABILITY OF LESSOR RAILROAD COMPANY.

One employed as conductor by a railroad company operating as lessee, without authority of statute, a railroad belonging to another corporation, cannot recover of the latter corporation for injuries sustained on account of a defect in an engine owned and controlled by the lessee.

2. LIMITATION OF ACTIONS—RUNNING OF STATUTE—AMENDMENT OF COMPLAINT.

Where an action is begun before the statute of limitations has run, the amending of the complaint by adding a necessary party after the statute has run does not set up a new cause of action so as to make the statute a defense.

3. SAME—NEW PARTY PLAINTIFF.

But in such case, where the action was not brought for the benefit of the party subsequently joined, and the right of the latter to recover is presented for the first time by the amendment, the statute may be pleaded as to such party.

4. APPEAL—PRACTICE—BILL OF EXCEPTIONS—OBJECTIONS NOT MADE BELOW.

A bill of exceptions signed and filed as a part of the record during term-time will not be disregarded where objection is made for the first time after the cause has been submitted in the supreme court that the signature of the judge was obtained by undue practice, and where the affidavit of the latter shows that he knew the contents of the bill.

Appeal from district court, Camp county; W. P. McLEAN, Judge.

Todd & Hudgins, for appellant. *Moore & Hart, Sheppard & Thompson, J. M. Pouns*, and *C. A. Culberson*, for appellee.

GAINES, J. W. A. Culberson, while operating a train upon the road of the appellant company as conductor, lost his life in endeavoring to make a coupling between the engine under his control and a train in its front. The appellee, who was his wife, brought this suit, on behalf of herself and other beneficiaries, to recover damages under the statute for the injury. She alleged that the accident resulted from a defect in the engine and the incompetency and carelessness of the engineer. During the progress of the trial the defendant offered to prove by a witness that at the time of the accident the road was not operated or controlled by the defendant company, and that the deceased was not in its service at the time, but was in the employment, and was acting for the Missouri, Kansas & Texas Railway Company, another corporation. Upon objection to this testimony by the plaintiff, it was excluded by the court. There is a plea in abatement in the record, which sets up that the road of the defendant company was leased to the Missouri, Kansas & Texas Railroad Company by authority of law; but it was neither sworn to nor insisted upon at the trial, and it must be considered as waived. If, however, the facts justified the conclusion, it was competent, however, for defendant to show under its general denial that although the injury was received upon its road, and was actionable, another company was responsible for such injury, and that it was not liable. Did the evidence offered tend to show this? The defendant did not offer, in connection with its other testimony, to prove that the Missouri, Kansas & Texas Company was operating and controlling its road by authority of any statute, and we think the question must be treated as if no such authority existed. We have then the question of the right of a servant of a railway company, operating without authority of statute a road belonging to another corporation, to recover of the owner damages for personal injuries resulting to him in the course of his employment through the negligence of his employer, or of its officers or agents. This is a new question in this court, and one upon which we have found no direct authority which is at all satisfactory. This court has held that a railroad company cannot without statutory authority lease its road to another so as to absolve itself of its duties to the public, and that when such lease is made the lessor is liable for an injury to

a passenger resulting from the negligence of the lessee. *Railroad Co. v. Underwood*, 67 Tex. 589, 4 S. W. Rep. 216; *Railroad Co. v. Rushing*, 69 Tex. 308, 6 S. W. Rep. 834. We have also held that, in case of an unlawful lease or sale, the lessor or vendor is liable to a shipper for the failure of the company operating the road to furnish transportation upon his demand. *Railroad Co. v. Morris*, 68 Tex. 49, 3 S. W. Rep. 457.

There have been numerous decisions in other states holding the lessor liable, when the lease is unauthorized, for injuries to live-stock, and to persons crossing the track, caused by the negligence of its lessees: so that it may now be considered the accepted and settled doctrine that, in all cases where one railroad company is operating trains upon the road of another without authority of law, the owner of the road remains responsible for the discharge of its duties to the public, and becomes liable for injuries resulting from the lessee's failure to perform those duties. The lessor, by accepting its charter, assumes the obligation to carry passengers safely over its line. If it intrusts that duty to another company, and a passenger is injured, it is responsible. It binds itself to carry all freight offered to it, and to deliver it safely. Should its lessee fail to do this, it is liable. It assumes to operate its road safely and carefully, so as not negligently to destroy or damage property, and not to injure persons who have the right to pass on or near the track. Should its lessee negligently do damage to property, or inflict personal injuries upon wayfarers crossing the road, this is failure of duty on its part, and it is responsible for the wrong. But the duties which are owed by a railroad company to its servant are not duties owed to him in common with the public, but grow out of the contract of service. He assumes the relation of servant to his employer voluntarily, and out of it arises the reciprocal obligations from one to the other. It seems to us that the relation of the servant of the company operating the road to the owner is very different from his relation to his employer, and that relation of the owner of the road to him is different from its relation to the general public. His contract is not with the company owning the road, and it may be asked, does the latter owe him the duty of a master to his servant, or guaranty that the master with whom he has voluntarily contracted will perform its obligation to him? It may be that if the injury had occurred by reason of a defect in the road-bed or track, and not by reason of a defect in the engine, the company charged with the duty of keeping up the road would be liable. But if it were true that the injury was caused entirely by another company operating the owner's road, and was inflicted upon one of its own employes, it is difficult, by reason of a defect in machinery entirely under its control, to see upon what principle of policy or justice the lessor should be held liable merely because it owned the road.

In the case proposed to be made by the evidence offered, it seems to us that the liability of the deceased's employer would have been precisely the same on the defendant's road as if the train had been running upon its own road at the time of the accident. The act of the Missouri, Kansas & Texas Company in operating the road without a license from the legislature, if such was the fact, was merely illegal in the sense that it was unauthorized, and the object in holding the lessor responsible in such a case is certainly not to impose a mulct or fine by way of punishment. The reason for the rule is the protection of the public who need the protection. The passenger and the shipper of goods have no option, but must avail themselves of the services of the lessees, whether the lease is authorized or not. The law will not permit the owner of the road to shirk its duty to them by turning over its road to another company; nor will it permit it to deny its liability where it has allowed such other company, without authority of law, negligently to injure wayfarers over the track or property along the line. There is no privity between the persons injured in such case and the operating company. It is not so with an employee who voluntarily enters the service of the latter company with a

knowledge of the facts, and participates knowingly in the wrong, if wrong it be. Where in similar cases a recovery has been permitted against a lessor, it has usually been allowed upon various considerations of public policy: *First*, because the franchises granted are in the nature of a personal trust, and sound policy demands, so far as the general public is concerned, that the corporation receiving the grant should be held responsible for the proper execution of the powers granted; and, *second*, for the reason that to deny the responsibility of the lessor would enable a railroad to shirk its responsibility, and to injure the public by placing its property under the control of irresponsible parties; and, *third*, because a person who has received an injury at the hands of the operating company, and was ignorant of the relations between that company and the owner of the road, might be at a loss to determine against which to bring his action, and thereby placed at a disadvantage in seeking a redress of his wrongs.

None of these reasons apply on the case of the servant of a lessee who is injured through the neglect of his employer. He needs no protection as one of the general public, because he can enter the service or not as he chooses. He is under no compulsion to take employment from an irresponsible company, and he certainly knows whom to sue for a wrong inflicted through his employer's neglect, for the latter is certainly liable to him in such a case. The reason of the rule which holds the lessor liable fails in case of an employee of the lessee, and we think that to follow it in a case like this would be to give it an arbitrary, and not a reasonable, application. We conclude that the court erred in excluding the testimony, and for this error the judgment must be reversed. We do not know what the evidence may disclose upon another trial as to the relations of defendant corporation and the Missouri, Kansas & Texas Company, and it would be futile to attempt to anticipate the questions that may arise. We merely hold now that the evidence offered and excluded, tended, *prima facie*, to show that the defendant was not liable for the alleged injury. This case was reversed upon a former appeal, because it was then held that the mother of the deceased should have been made a party as an active plaintiff, or as a beneficiary of the recovery. Since the remand of the cause the petition has been so amended as to bring the suit as well for her benefit as for that of the plaintiff and the children of the deceased. To the amended petition, which was filed more than 12 months after the death of the deceased, an exception was interposed upon the ground that the cause of action was barred by the statute of limitations. As to the plaintiff and the original beneficiaries, the exception was not well taken. The making a new party did not set up a new cause of action. The exception should, however, have been sustained as to the mother of the deceased. The action was neither brought by her, nor for her benefit, until 12 months had elapsed from the time her son died. The suit in behalf of the beneficiaries did not affect the running of the statute against her. But defendant, having pleaded the statute against her, can no longer complain that she is not a party to the action.

We think the other questions raised by the appeal, except in so far as the sufficiency of the evidence to sustain a recovery is concerned, is not likely to arise upon another trial. Since the cause will be remanded, the evidence will not be discussed.

For the errors pointed out, the judgment is reversed, and the cause remanded.

OPINION ON MOTION FOR REHEARING.

GAINES, J. This is a motion for a rehearing, and is accompanied by affidavits which are intended to impeach a bill of exceptions found in the record. This bill shows the ruling of the court, which in the opinion formerly delivered was held to be reversible error. The affidavits tend to show that the bill was improperly allowed and signed by the trial judge. It is not denied that

it was allowed, signed, and filed as a part of the record during term-time. We are of opinion that the record cannot be attacked in this way. If by any undue practice the signature of the trial judge should be procured to a bill of exceptions, which he did not understand, and which he did not intend to sign, we think it would be competent for the court in which the trial was had, upon a motion made for that purpose, to strike it from the record. This might be done even after the adjournment for the term, and after an appeal had been perfected to this court. The trial court has the power, in a proper proceeding, and upon proper proof, so to amend its records as to make them speak the truth, even after the jurisdiction has attached in the appellate court. If the amendment be made after the transcript has been filed in the supreme court, the record may be corrected in the latter court by a suggestion of its diminution and a motion for a *certiorari*. It cannot be corrected here in the first instance, and especially after the cause has been submitted. Besides, the affidavit of the trial judge, which accompanies this motion, shows that at the time he signed the bill of exceptions he knew its contents. If we could disregard the bill, the motion for a rehearing should be granted; but we are of opinion that it must be treated as a proper part of the record in the case. The question upon which the judgment in this case was reversed was not very fully discussed in the original briefs of counsel, and we have therefore deemed it proper to give it a careful reconsideration. The argument of appellees in support of the motion contains a very full citation of authorities, which have been carefully examined, but which have not changed our former opinion. We think a review of the cases cited will show that none of them are inconsistent with our views as formerly expressed.

Railroad Co. v. Meador, 50 Tex. 85, was a case in which the railroad company was held liable to the owner of land for the trespass of its contractors in entering upon his premises and constructing its road without having first condemned the right of way. The principle decided is that the act which the contractors were employed to perform being unlawful, so far as the landowner, whose land had not been condemned, was concerned, the company could not escape its liability by showing that the persons who committed the trespass were independent contractors to perform the work. The principle does not apply to the question presented in this case.

In *Railroad Co. v. Watts*, 63 Tex. 549, it is said that the appellee, being the servant of the Missouri, Kansas & Texas Railroad Company, which had leased and was operating the road of the International & Great Northern Railroad Company, the latter company would not be responsible to him for the negligence of the former, provided the lease was authorized by law. It is not decided that the lessor would have been responsible if the lease had not been authorized.

In *West v. Railroad Co.*, 63 Ill. 545, it was held that the company was not liable to the servants of its contractors for an injury received through the contractors' negligence.

In *Sawyer v. Railroad Co.*, 27 Vt. 370, the defendant company had made a contract with another company by which the latter had the privilege of running its trains over the former's road. It was the duty of the defendant to keep a certain switch on its road in order. Through the negligence of its servants the switch was misplaced, and a locomotive of the other company derailed, the derailment resulting in an injury to the plaintiff, who was a servant of the latter company, on duty upon the locomotive at the time of the accident. There the injury was the direct result of the negligence of the servant of the owner of the road, and the plaintiff was held entitled to recover. If, as seems to be contended in the present case, he was to be considered the servant, not only of the company who employed him, but also of the owner of the road, then he would have been the fellow-servant of the switchman who cause the injury, and he could not have recovered.

The case of *Merrill v. Railroad Co.*, 54 Vt. 200, virtually reaffirms *Saoye v. Railroad Co.*, *supra*. There it seems that the defendant company was running over a portion of the road of another company, and that this arrangement was authorized by law. It is apparent that the decision does not apply to the case now before us.

Another case cited is *Nugent v. Railroad Corp.*, 12 Atl. Rep. 797. There it is held that "a railroad corporation, over a section of whose track another company, by virtue of a contract, runs its trains, is liable in tort to the latter's brakeman, who, while in the due performance of his duty on his employer's train, receives a personal injury solely by reason of the negligent construction of the former's station house." There the injury complained of resulted directly from the negligence of the company owning the road. It was decided that they were charged with the duty of keeping their road in safe condition for the operation of trains, and that they were liable to the employee of the operating company for an injury resulting from a failure to perform this duty.

In *Railroad Co. v. Brown*, 17 Wall. 445, the lessor company was held responsible to a passenger on a train of the lessee who was improperly expelled from a car by a servant of the latter. The liability of the owner of the road to passengers on the operating company's trains was recognized in the former opinion.

Freeman v. Railroad Co., 10 N. W. Rep. 594, seems to have been an action by a wayfarer for an injury received from the railroad train at a public crossing.

Aycock v. Railroad Co., 89 N. C. 321, was an action by the owner of land for damage caused to his timber by fire communicated by sparks from a passing engine.

Balsley v. Railroad Co., 8 N. E. Rep. 859, involves the same principle as the case last cited.

Nelson v. Railroad Co., 26 Vt. 717, was a suit against a corporation owning a railroad, for a cow run over and killed by a train of its lessee. The liability which was held to exist in each of the five cases last named, is distinctly recognized in the former opinion in the case before us.

The case of *Sellers v. Railroad Co.*, 25 Amer. & Eng. R. Cas. 451, was brought by the administrator of a servant of the defendant company directly against the company which employed him for injuries which resulted in his death. It throws no light upon the present case.

There are a few other cases cited in the arguments of counsel, but they are upon the same lines, and involve the same principles, as the cases just discussed. None of them are decisions upon the immediate question before us. These cases commented upon afford ample authority for holding that a railroad company, which without authority of law leases its road to another corporation, is responsible for the torts of the lessee, so far as the general public is concerned. Not one of them sustains the position of appellee that the lessor is liable to the servant of the lessee for injuries resulting from the negligence of the latter company. We have found only one case in which a servant of the company operating a railroad under a license of the owner was permitted to recover of the latter for the negligence of the former's servants. This is the case of *Railroad Co. v. Mayes*, 49 Ga. 355. The case, however, presented peculiar complications, and there is another ground upon which the decision might properly have been rested. The immediate question before us was not discussed in the opinion.

We are satisfied that no well-considered case can be found which sustains the doctrine contended for by appellee. A few may be found where the servant of the lessee has been permitted to recover of the lessor for injuries resulting from a faulty construction of its track or from negligence in failing to keep it in repair. But in such a case the injury results from the failure of the lessor to perform its immediate duty. The argument in support of the motion

for a rehearing assumes that we have in our opinion treated the plaintiff's suit as an action *ex contractu*. This is a mistake. The suit is for a tort. But the duty, the violation of which gives the ground of action, grows out of a contract. The petition alleges that the defendant was negligent in not furnishing a safe engine and a competent engineer, and that from this negligence the deceased received the injuries which resulted in his death. The duty of furnishing the deceased a safe engine grew out of the relation of master and servant, and this relation was created by his contract of employment. We think it follows that if the deceased was employed as conductor of a train by a company operating the road under a lease, and the injury resulted from the incompetency of the engineer, or the imperfection of the engine furnished him by the lessee, the latter would be liable, and not the lessor.

It does not do to say that the lessee would be the agent of the lessor as applied to this case; this would be a mere fiction, not based upon any sound rule of law. The lessee, under an unauthorized lease, may be deemed the agent of the lessor, so far as the latter's duties to the public are concerned. Having undertaken by its charter to operate its road, the company which it puts in charge of its line may be looked upon as its agent, so far as its general duties under its franchises are concerned. But the duty which is owed to an employe of the lessee is a special one, and not a duty owed to him in common with the general public.

It is also urged that we are in error in holding that the mother of the deceased was barred of her right of action by the statute of limitations. She was a necessary party to the suit, either as plaintiff or beneficiary in the first instance. She was not made a party until more than one year had elapsed since the death of her son. The amendment which alleged her existence, and prayed a recovery for her benefit as well as that of the other plaintiffs, presented for the first time her right, and it was a new cause of action so far as she is concerned. We see no reason why the rule that applies to tenants in common in suits for the recovery of land, that one may be barred though the others are not, should not apply in this case.

The motion for a rehearing is overruled.

KANSAS & G. S. L. R. CO. v. DOROUGH.

(*Supreme Court of Texas*. November 23, 1888.)

1. CARRIERS OF PASSENGERS—INJURY TO PASSENGER—PLEADING—EVIDENCE.

Under a general denial, defendant may show that the employes operating the road were not its servants, but the servants of a receiver operating the road under decree of court.

2. TRIAL—RECEPTION OF EVIDENCE—HARMLESS ERROR.

The exclusion of the decree appointing the receiver in such case, and the decree showing his final discharge, cannot be assigned as error, in that the decrees showed that at the time of the injury the road was in the hands of a receiver, where the last decree showed that prior to the accident another decree had been rendered taking the road from the control of the receiver.

3. SAME—INSTRUCTIONS.

It is not error to refuse to charge that failure to stop at a station "does not justify a person in attempting to board a train in motion," where the jury have already been told that plaintiff cannot recover if he attempted to board the train while in motion, and when an ordinarily prudent man would not have made the attempt.

4. CARRIERS OF PASSENGERS—INJURY TO PASSENGERS—CONTRIBUTORY NEGLIGENCE.

Plaintiff flagged a train at a flag station. The train did not stop, though the signal was seen, but as it passed the conductor seized a coat that was upon plaintiff's arm, and told him to jump on, in attempting to do which he was injured. Plaintiff testified that he did not know how fast the train was running, but thought he could

safely board it. Another witness testified that the train was running six or eight miles an hour. *Held*, that a verdict for plaintiff would not be set aside on appeal, on the ground of contributory negligence.¹

Appeal from district court, Smith county; FELIX J. McCORD, Judge.

Action by Eugene T. Dorrough against the Kansas & Gulf Short Line Railroad Company to recover damages for personal injuries. Defendant appeals.

N. Webb Finley, for appellant. *John M. Duncan*, for appellee.

GAINES, J. This is an action brought by appellee against appellant for personal injuries alleged to have resulted to plaintiff as a passenger in attempting to board a train of the defendant from the negligence of its servants. After the plaintiff had introduced his testimony, the defendant offered in evidence a decree of the district court of Smith county, dated prior to the injury, which placed the property and management of the road in the hands of a receiver. This having been ruled out, the defendant offered a subsequent decree of the same court, in the same case, showing the final discharge of the receiver, which, upon objection, was also excluded. The ground of objection to the first decree, as shown by the bill of exceptions, was that the fact of the appointment of the receiver had not been specially pleaded. This ground was tenable. The injury was alleged to have been caused by the negligent acts of the servants of the defendant company. The testimony already adduced showed that the injury occurred from the operation of a train on the defendant's road, and from this the presumption arose that the persons in charge of the train were its employees. But the defendant had pleaded a general denial, and under its plea it was competent for it to show that the servants in charge of the train were not its servants, (*Railroad Co. v. Culberson*, ante, 706, decided at this term,) but those of the receiver operating the road under the decree of a court of competent jurisdiction.

It is settled law that the receiver of a railroad company is the representative of the court, and not of the company, and that the company is not liable for his acts or those of his employees. The evidence first offered tended to show that the persons operating the train which caused the injury were not the servants of the company, and if it had stood alone it should have been admitted. But although the second decree offered was rendered after the injury, and showed that up to that time the receiver had not made a final settlement of his accounts, and had not been finally discharged, it also evidenced by its recitals that, prior to the accident, a former decree had been rendered in the case, which took the road from his hands, and discharged him from the duty of operating the line.

Now, the assignment of error upon these rulings of the court is to the effect that the court erred in excluding the two decrees, because they showed "that at the time the injuries were received the railroad of the defendant company was in the hands of a receiver." We conclude that the two decrees taken together show the contrary, and that, therefore, the assignment is not well taken.

The charge is not complained of. It is full and fair, and very clearly presented the issues made by the pleadings and the evidence. But appellant's counsel insists that the court erred in refusing a special instruction to the effect that the failure of a railroad company to stop its train at a station "does not justify a person in attempting to board a train in motion." The charge is abstract, and, even if literally correct, it seems to us was calculated to mislead the jury. The jury would have been warranted in inferring from it that under no state of circumstances could a passenger board a train in mo-

¹On the general subject of contributory negligence in alighting from and boarding moving trains, see *Watson v. Railway Co.*, (Ga.) 7 S. E. Rep. 854, and note; *Railroad Co. v. Railroad Co.*, 36 Fed. Rep. 879; *Covington v. Railroad Co.*, (Ga.) 6 S. E. Rep. 593, and note.

tion without being guilty of contributory negligence. Under the decisions of this court, that cannot be said as a matter of law. *Railroad Co. v. Murphy*, 46 Tex. 356. Whether the attempt to board a train, under the circumstances disclosed by the evidence in this case, is negligent or not is a matter of fact to be left to the jury. The general charge instructed the jury in this case that if the "plaintiff attempted to board defendant's train while in motion, and when an ordinarily prudent man would not have made the attempt," he could not recover. This clearly and sufficiently presented the issue of contributory negligence.

It is also assigned as error that the court should have granted a new trial on the ground that the evidence showed that the plaintiff was guilty of contributory negligence. The evidence shows that the plaintiff went to a flag station upon defendant's road for the purpose of taking passage; that he flagged a train, and the signal was seen; that the train did not stop, but that as it passed the conductor seized a coat he had upon his arm, and told him to "jump on;" and that he did jump, and was thrown down, and received the injury complained of. The plaintiff testified that he did not know how fast the train was running, that it was difficult to tell the speed of a running train, but that he thought at the time that he could board the train with safety; that he could safely board a train running at 5 miles; that he could get on one running at 15, but did not think he could if it was running 25 miles per hour. Another witness testified the train was running at the rate of 6 or 8 miles per hour. The company did not call any of the employees who were on the train at the time to prove the rate of speed or any other fact.

In the case of *Railway Co. v. Murphy*, *supra*, this court in its opinion quote with approval this language: "It was for the jury to say whether the danger of boarding the train when in motion was so apparent as to make it the duty of the passenger to desist from the attempt." Citing *Johnson v. Railroad Co.*, 70 Pa. St. 357. We have not the same power over the verdict that the court had before whom the case was tried below, and cannot say that the conduct of the plaintiff in attempting to board the train was so manifestly negligent that the jury were not warranted in finding to the contrary. We do not think that the fact that plaintiff thought it safe to board the train justified the attempt. A rash man might consider that safe which a prudent one would not. Nor was the invitation of the conductor a justification of the plaintiff's attempt. But these facts were proper to be looked to in determining the question of contributory negligence.

There is no error in the judgment, and it is affirmed.

WILLIS *et al.* v. HUDSON.

(Supreme Court of Texas. February 5, 1889.)

1. TRESPASS—TRIAL—INSTRUCTION—WEIGHT OF EVIDENCE.

In an action against execution creditors for trespass in seizing plaintiff's goods under an execution against H. & Co., the defense was that the goods were not, in fact, plaintiff's, but were held by him for H. & Co. Defendants introduced a bill of sale of goods by H. & Co. to plaintiff, with evidence as to the consideration paid by plaintiff; it being contended that at least part of the goods seized were included in the bill of sale. The court charged that, if the goods were delivered pursuant to said bill of sale, it would vest the title in plaintiff, unless it was the intention of the parties that they should merely be put under the cover of a different name while they were to remain the property of H. & Co. Held, that the charge was not a charge upon the weight of the evidence.

2. SAME—SEIZURE ON VOID EXECUTION.

The execution was issued on a judgment which had been satisfied and released by part payment through an assignee for the benefit of creditors, and was void. There was much evidence as to the judgment, and the debt on which it was founded. Held, that an instruction that, if the goods were plaintiff's, though they became so under

circumstances rendering their ownership fraudulent as to H. & Co., the execution was no justification for their seizure, was correct, and applicable to the case; as from the evidence the jury might infer that the judgment was still in force, and the execution issued upon it a good defense.

3. SAME—EVIDENCE.

Since defendants, after the discharge of their judgment, could not attack a fraudulent transfer of goods by H. & Co., it would be immaterial whether the goods were purchased with the money of H. & Co., if they were intended by the parties to belong to plaintiff.

4. EVIDENCE—BURDEN OF PROOF.

In such an action, the burden of proving the ownership, seizure, conversion, and value of the goods is on the plaintiff, as is also that of proving any circumstances of oppression or malice attending the levy, as a basis for exemplary damages.

5. VENUE IN CIVIL CASES—JOINT DEFENDANTS.

The petition being originally filed against the execution plaintiffs and the sheriff jointly, and alleging that the trespass was committed in the county in which the sheriff resided and the action was brought, an objection by the other defendants that they should have been sued in the county of their residence is not well taken.

6. ABATEMENT AND REVIVAL—PLEADING—DELAY.

Such an objection, not made until after a plea to the merits, a trial, a judgment, and a reversal thereof in the supreme court, a change of venue, and a dismissal as to the sheriff, comes too late.

Appeal from district court, Brazos county.

Action by Thomas F. Hudson, Jr., against P. J. Willis and another, partners trading as P. J. Willis & Bro., and S. G. Wilson, to recover for the conversion of certain personal property. Verdict and judgment for plaintiff, and defendants Willis & Bro. appeal; the action having been dismissed as to Wilson.

G. E. Mann and McLemore & Campbell, for appellants. *W. K. Homan, Sayles & Bassett*, and *Seth Shepard*, for appellee.

STAYTON, C. J. This action was brought by appellee against appellants and S. G. Wilson, to recover damages for an alleged seizure and conversion by them of a stock of goods which he alleged he owned and possessed at the time they were taken by the defendants. The cause was before this court at a former term, when a judgment obtained by appellee was reversed, and the cause remanded. 68 Tex. 678. The action was originally instituted in Burleson county, where the defendant Wilson resided, appellants being residents of Galveston county. After the cause was remanded, the venue was changed, on motion of defendants, to Brazos county, and after this was done appellee dismissed his action as to Wilson. Appellants then, by exception, presented the question of their right then to be sued only in the county of their residence, which was shown by the petition, but this was overruled. They further claimed that the dismissal as to Wilson made the cause of action set up against all a new cause of action, and interposed, by exception, the defense of limitation, which was also overruled. They also pleaded "not guilty," and on this plea went to trial before a jury, who returned a verdict against them, on which the judgment appealed from was entered.

In the course of the trial the following facts appeared, in reference to which there was no controversy:

(1) That on January 1, 1881, Thomas F. Hudson, Sr., and his son John A. Hudson, who composed the firm of Thomas F. Hudson & Son, made an assignment, under the statute, for the benefit of such of their creditors only as would accept under it, and release them.

(2) On March 7, 1881, P. J. Willis & Bro. recovered a judgment for \$43,973.11 against Thomas F. Hudson & Son.

(3) On May 3, 1881, they accepted under the assignment, and agreed to execute a release; and under this, on or before October 8, 1881, they received the sum of \$8,452.17, for which they gave the following receipt and release:

"\$8,452.17. Received from C. E. Wynne, assignee of the estate of Thos. F. Hudson & Son, and Thos. F. Hudson, and John A. Hudson, the sum of eight thousand four hundred and fifty-two and 17-100 dollars, in full payment and discharge of all claims and demand against the said Thos. F. Hudson & Son, and against the said Thos. F. Hudson and John A. Hudson. In witness whereof we have hereunto signed our names at Galveston, Texas, this 8th day of October, 1881.

[Signed]

P. J. WILLIS & Bro."

(4) On November 29, 1882, P. J. Willis & Bro. caused an execution to be issued against Thomas F. Hudson & Son on the judgment recovered by them on March 7, 1881, which, at their request, was levied upon the goods claimed by appellee, and for the conversion of which this action was brought.

(5) The levy was made by Wilson, sheriff of Burleson county, who was originally made a defendant, and after the sale of the goods the proceeds were paid to P. J. Willis & Bro.

(6) At the time Hudson & Son made the assignment they were the owners of a stock of goods, and these were sold by the assignee, and bought by Kauffman & Runge, who for a time conducted the business through Thomas F. Hudson, Sr., and his son, as agents; under an agreement, however, that Kauffman & Runge would reconvey the stock to Thomas F. Hudson, Sr., and John A. Hudson, upon payment by them of the sum bid by Kauffman & Runge.

(7) Under this agreement the goods again became the property of Hudson & Son, in January, 1882. There may be some controversy, however, whether the purchase of the goods by Kauffman & Runge may not have been for and under an agreement with Hudson & Son.

(8) Hudson & Son conveyed to Thomas F. Hudson, Jr., the appellee, that stock of goods by an instrument of writing as follows:

"ROCKDALE, TEX., Jan. 26, 1882.

"For and in consideration of the sum of two thousand (\$2,000) dollars to us in hand paid, and also in consideration of one promissory note of even date with this, for the sum of twenty-four thousand five hundred and sixteen dollars and fifty-two cents, (\$24,516.52,) due twelve months after date, the sum being paid and given by Thos. F. Hudson, Jr., we hereby transfer to him all our stock of general merchandise, together with all notes and book-accounts due us, and all judgments in our favor.

[Signed]

"THOS. F. HUDSON & SON."

Appellee took that stock of goods to Fort Worth, where he established a large business in his own name with it, and additions thereto purchased in his own name, both for cash and on credit. From the stock of goods thus built up the goods for the conversion of which this action was brought were taken, and a business opened in Burleson county in the name of Thomas F. Hudson, Jr.

The theory of appellants' defense was that the entire business done in the name of Thomas F. Hudson, Jr., and having its inception with the purchase evidenced by the bill of sale of January 26, 1882, was the business of Thomas F. Hudson, or of himself and his son John A., and that all the goods held in the name of Thomas F. Hudson, Jr., were in fact the property of Thomas F. Hudson, Sr., or of himself and his son John A., and so held by Thomas F. Hudson, Jr., to place them beyond the reach of their creditors. There was much evidence tending to show that this may have been true, and much tending to show that Thomas F. Hudson, Jr., may have been the lawful owner. Under the charge of the court, the verdict in favor of appellee evidences the fact that the jury found the goods to be the property of appellee, and there is

no assignment of error which calls in question the sufficiency of the evidence to sustain the verdict. It is claimed, however, that many of the charges given were erroneous, and calculated to mislead the jury, and that thereby they reached a conclusion they would not otherwise have reached.

The charges given, in so far as objected to, are as follows:

"(3) If you find from the evidence that the plaintiff was the owner of the goods described in the petition; that defendants P. J. Willis & Bro. caused a levy to be made upon the goods, and had them seized by said Wilson by virtue of the execution read in evidence, and converted them, or the proceeds of the same, to their own use,—you will find for the plaintiff actual damages,—that is, the market value of the goods at the time and place of seizure,—and 8 per cent. interest per annum thereon from the date of the seizure to this date; the whole amount, including interest, not to exceed \$5,000.

"(4) If you find that plaintiff was holding the goods for Thos. F. Hudson, or for Thos. F. Hudson & Son, or if you find that the plaintiff, Thos. F. Hudson, Jr., was not the actual owner of the goods, he cannot recover under the allegations of his petition; and in such case you will find for the defendants.

"(5) If the goods seized under the execution against Thos. F. Hudson & Son, at Caldwell, were bought by the plaintiff, Thos. F. Hudson, Jr., upon his order, or by other persons for him, upon a credit, or for cash, with the intent on the part of Thomas F. Hudson, Jr., and on the part of the persons from whom the same were purchased, to put the title and right to the property in Thos. F. Hudson, Jr., then he, Thos. F. Hudson, Jr., would be the owner of the same for the purposes of this suit. The transfer of the stock of goods at Rockdale, by Thos. F. Hudson & Son to Thos. F. Hudson, Jr., as shown by the conveyance read in evidence, of date January 26, 1882, if the same was delivered, and if the goods so sold were delivered pursuant to the same to plaintiff, had the effect to vest the title to said stock in the plaintiff, Thos. F. Hudson, Jr., unless it appears from the testimony that it was the intention of the parties to so put the property under cover of a different name, while in truth it was understood to belong to Thos. F. Hudson & Son.

"(6) If the goods levied on by the execution at Caldwell were purchased in the name of plaintiff, upon his order, by the plaintiff himself, or by other persons for him, and were shipped to him, but the evidence shows that in truth Thos. F. Hudson & Son or Thos. F. Hudson were the actual owners of the same, or if it appears from the evidence that the name of Thos. F. Hudson, Jr., was substituted for the firm name of Thos. F. Hudson & Son, and that though the business was conducted under the new name, if it was in fact a continuation of the business of Thos. F. Hudson & Son, and if, in fact, the goods belonged to them, then plaintiff, Thos. F. Hudson, Jr., would not be the owner. If the transfer of the Rockdale stock was not intended by the parties to put the title in plaintiff, but was merely intended, under the semblance of a sale, to put the goods in a different name without changing the ownership, then the transfer would not put the ownership of the name in Thos. F. Hudson, Jr.

"(7) If you find that the plaintiff, Thos. F. Hudson, Jr., purchased the goods levied on, by agent or in person, or upon orders, and it was his intention, and the intention of the parties selling him the goods, to vest in him the title to the same, it makes no difference, and his ownership would not be affected by the fact, if you find that it existed, that he was so made the owner by arrangement with Thos. F. Hudson & Son, to avoid the payment of the debts of the said Thos. F. Hudson & Son, and to defraud their creditors. If the agreement existed between Thos. F. Hudson & Son and Thos. F. Hudson, Jr., that the plaintiff was to be the legal owner of the goods, and the agreement was valid, as between them, the fact, if you find that it existed, that it would be void as to creditors of Thos. F. Hudson & Son, would not invalidate the ownership of Thos. F. Hudson, Jr., because the defendants,

P. J. Willis & Bro., are not in a position, either under the pleadings or the evidence, to impeach the ownership of the plaintiff, for fraud against creditors. The execution of P. J. Willis & Bro. is no evidence of debt against Thos. F. Hudson & Son, and was not admitted in evidence to establish a debt, but it was admitted to show by what color of authority the levy was made, so that you might consider the same, not as a justification of the levy, but along with the other facts and circumstances under the claim of plaintiff for exemplary damages. If you find that plaintiff was the owner of the goods levied on, the execution will not affect plaintiff's right to actual damages, viz., the value of the goods and interest, as before explained, but you may consider the same under plaintiff's charge of malice, and in mitigation of exemplary damages, if you find any, under other instructions."

"(13) The burden is upon the plaintiff to establish his alleged ownership of the goods, their seizure and conversion, and their value; but if you find that the legal title to the goods vested in plaintiff by the bill of sale from Thomas F. Hudson & Son of the Rockdale stock, and by purchase of new goods from other parties, then the burden of proof would be upon defendants to show that the legal title was divested out of plaintiff by some affirmative act of his prior to the seizure of the goods. The burden of proof is upon the plaintiff to show that the conduct of the defendants in relation to the levy and seizure was malicious and oppressive, deserving punishment by exemplary damages, and if the evidence fails to show such conduct on the part of defendants as would justify you in finding exemplary damages against them, whatever may be your verdict as to actual damages."

Assignments of error are based on these charges, on the refusal to give charges requested, which will hereafter be set out so far as necessary, and upon the action of the court below in refusing to abate the action on exception of appellants after the dismissal of the action as to Wilson.

The petition alleged a trespass committed by all the parties originally made defendants, and that this was committed in Burleson county.

There was not that in the petition so qualifying this charge as to make it necessary, in order lawfully to fix the venue as to all in Burleson county, that Wilson should have been joined at all. If appellants desired to controvert the right of appellee to maintain his action against them in Burleson county, they might have done so by proper plea, putting in issue the existence of facts which would make it proper to sue them alone in that county, or to join them with Wilson. This they did not do, but pleaded to the merits, and only by amendment, filed long after this was done, by exception, sought to raise the question of their privilege to be sued in the county of their residence. The exception, if filed at proper time, in view of the averments of the petition, should have been overruled, had not Wilson been joined as a defendant.

Although appellants did not allege that the goods seized were conveyed by Thomas F. Hudson & Son in fraud of their creditors, or that they were bought with the funds of that firm, and really their property and in their possession, though standing in the name of appellee, yet they sought by the evidence to show that this was true, for the purpose of rebutting the proof made by appellee as to his ownership and possession. In attempting to do this they introduced evidence of such facts as they thought pertinent to trace the connection, and show the relation of appellee to the business conducted in his name. In this connection they introduced the bill of sale to appellee of date January 26, 1882, with evidence of the consideration paid by appellee. They now urge that the court erred in giving so much of the fifth paragraph of the charge as declared the legal effect of that instrument; and the objection now urged is that this was a charge on the weight of evidence, for that the goods seized and converted were not of the stock thereby conveyed, but of goods subsequently bought by appellee from merchants in New York and other cities. We do not understand that appellants, during the trial, conceded this to be true, and

the court could not assume it to be so simply because the evidence for appellee tended to prove it to be so.

From the evidence offered by appellee in connection with the bill of sale referred to, and bearing upon the question of the *bona fides* of the parties to it, we would conclude that it was the purpose of appellants to show by the evidence that some at least of the goods seized were of that stock, and that the instrument evidenced a sale made by its makers to defraud their creditors, by placing the apparent title in appellee, while, as between the parties, the real title and possession was to remain in them, or that it was the purpose of appellants, by such evidence, to show the true relation of appellee to the entire property with which business was done in his name. If they could satisfy the jury that the stock of goods named in that instrument, as between the parties, remained the property of Hudson & Son, and that it was mingled with stock subsequently bought in the name of appellee, the inference would be strong that the real ownership in all was the same, and for this purpose, no doubt, the evidence was introduced. Whatsoever may have been the purpose of appellants' act in offering the instrument in evidence, having brought it into the case to illustrate any issue involved, it was proper that the court should declare to the jury its legal effect, and there was nothing in that part of the charge bearing upon the weight of evidence.

The same objection is made to the parts of the sixth and thirteenth paragraphs of the charge that referred to the stock transferred by the instrument before referred to, but we do not see that those charges were subject to any such objection. The sixth paragraph presented the very issue the appellants attempted to make by the evidence, and the only issue under which, as the pleadings stood, it was possible for them to defend. Evidence as to the Rockdale stock was evidently brought into the case by appellants for the purpose of showing that the ownership of that, while placed by the bill of sale in Thomas F. Hudson, Jr., was, as between himself and his father and brother, really the property of the latter; that this was the foundation of the business carried on subsequently in the name of appellee; and that the mingling of this with goods subsequently bought in the name of Thomas F. Hudson, Jr., gave character to the entire business, and illustrated the question of ownership in all the goods held in his name.

The thirteenth paragraph of the charge, as to the burden of proof, was correct, and preceding paragraphs fully informed the jury under what state of facts appellee would or would not be entitled to recover.

Many of the assignments of error are, in effect, but repetitions, and therein complaint is made that the court below selected isolated parts of the evidence, and gave charges applicable thereto, whereby the jury were induced to give to such parts an undue influence. As to this we may say, once for all, that the charge is not subject to such construction, but in so far presented to the jury the law applicable to the facts, on which either party could fairly build up a theory on which to base a recovery or defense; and it would be a useless consumption of time here to discuss the several assignments which urge that the charge was upon the weight of evidence, or that it gave undue prominence to parts of the evidence. The charge speaks for itself, and in all these respects is a clear statement of the law arising on the facts through which appellee sought a recovery, and appellants sought to defeat it. The fifth paragraph presented the case the evidence offered for appellee tended to establish, and the sixth that which the evidence offered by appellants was intended to make, and neither was upon the weight of evidence.

It is urged that the court erred in giving the seventh paragraph of the charge given. The objections urged in brief of counsel to this charge are: "Because the same is a charge upon issues not made in the case, either by the pleadings or the evidence; and, further, because the same is a running criticism by the court on the fact that the defendants have caused the seizure of

the goods in controversy by the use of a void execution, when, in point of fact, the said defendants were not creditors, as asserted by the court, of the parties against whom the execution ran. The language of the court was intended and calculated to attract the attention of the jury to the fact that it was the court's view that whatever might have been the plaintiff's right, that the defendant had no rights under the execution which they had used; that the said language was not justified by any issue in the case, and was hypothetical and supposititious; and the charge on this question, when it was admitted that no such defense was made, 'either by pleading, evidence, or argument,' was calculated to and did divert the mind of the jury from the real issue as made in defense to the question of the right of defendants to seize the property, instead of the right of the plaintiff to claim the damages for the seizure." The charge, in effect, instructed the jury if the goods seized were the property of appellee, although they may have so become through facts that would make his ownership and possession fraudulent as to creditors of Thomas F. Hudson & Son, that this would not relieve appellants from liability for the seizure under an execution in their favor, and against Thomas F. Hudson & Son, issued under a judgment satisfied by the release appellants had made when accepting under the assignment made by that firm. The charge given was strictly correct, but it is said that it had no bearing on any issue in the case. If it served no other purpose than to prevent the jury from considering a mass of testimony introduced by appellants in support of propositions not really in issue, upon which, however, the evidence had a more direct bearing than it had on matters really in issue, the charge was properly given.

Much of the evidence introduced by appellants had only an indirect bearing on the question whether appellee or Hudson & Son owned and were in possession of the goods seized, but it had a direct bearing on the question whether Hudson & Son were once indebted to appellants, whether on that indebtedness a judgment had been recovered, and whether the goods in controversy had been seized under an execution that issued on that judgment; and had not the charge, of which complaint is made, been given, the jury most likely would have disposed of the case on issues not in the case, but which seemed to them to arise out of the evidence. Had the charge not been given, the jury would have been left to infer that the execution under which the seizure was made was valid, and the debt evidenced by the judgment under which it issued not discharged by the partial payment made by the assignee, and appellants, therefore, creditors of Hudson & Son, who had the right to enforce their claim through a seizure and sale of the goods, if they came into the hands of appellee under such circumstances as to make his holding fraudulent as to the creditors of that firm.

The language of the charge was calculated to induce the jury to believe that appellee's right to recover could not be affected by the fact that he acquired the goods, or the means through which they were purchased, from Hudson & Son, or either of them, in fraud of their creditors, if, as between themselves, it was intended that ownership and right to possession should be in appellee, and it in plain terms informed the jury that appellants could acquire no right under the execution they used. Such a charge was not only proper, but necessary, to enable the jury to understand their duties in the case; so much testimony calculated to confuse having been admitted. The charge clearly instructed the jury upon the issue on which depended the right of appellee to damages for the conversion of the goods, and stripped the case from everything brought into it in evidence from which the jury might have believed that the right of appellants to seize the goods was an issue in the case. The charge of the court, and those given at request of appellants, could not have left the jury uncertain as to the issues to be tried; were clear, and applicable to the facts in evidence, as all charges should be; and, but for this,

their commendable characteristic, in view of the manner in which the evidence was brought out under pleadings the most general, the minds of the jurors no doubt would have gone to the selection of issues seemingly presented by the evidence, but of no importance whatever in the determination of the rights of the parties, under the facts which established that appellants were not creditors of Hudson & Son, entitled to enforce payment of their debt through the execution.

The charge asked by appellants, and refused, which is referred to in fourth assignment, assumed a fact to be true which appellants doubtless would have been unwilling to admit; and, although there was evidence tending to show that the fact was as assumed, the court properly refused to give the charge on account of its assumption of fact. In the main, the charge refused was substantially embraced in the charges given.

Appellants asked the following charge: "If the jury find from the evidence that Thos. F. Hudson & Son, or Thos. F. Hudson, Sr., bought the goods with the money of Thos. F. Hudson & Son or Thos. F. Hudson, Sr., the firm of Thos. F. Hudson & Son or Thos. F. Hudson, Sr., would be no less the actual possessors and owners of the property because the goods were bought and shipped in the name of Thos. F. Hudson, Jr." The court gave this charge, after qualifying it as follows: "If the business conducted under the name of Thos. F. Hudson, Jr., was owned by him, and run for his benefit, and if it was understood between him and his father and brother that the goods purchased were in fact to be the plaintiff's, then it would be immaterial whose money bought or paid for the goods. The goods would be the plaintiff's." It is insisted that the charge should have been refused, or given without qualification. That course might have been properly pursued, but appellants have lost nothing by the failure of the court to follow it, unless the charge asked should have been given. The jury would have been authorized, under the charge asked, to have found that appellee was not, as against appellants, the owner of the goods, if bought with money of Thomas F. Hudson & Son or Thomas F. Hudson, Sr., although it may have been the intention of the person with whose money they were bought to make them the property of appellee. The charge asked would have been correct if appellants had been in position to attack a conveyance made by Hudson & Son or Thomas F. Hudson, Sr., on the ground that such a transaction would be fraudulent as to them as creditors of the firm or person whose money bought the goods; but, as the case admittedly stood, the charge asked was misleading, and could be given only with the qualification made by the court.

There is no complaint that the verdict, which was only for actual damages, was excessive. The trial seems to have been conducted with the utmost fairness, and there is no reason to believe that anything that occurred during the trial misled the jury as to the real issues involved, or induced them to give weight to evidence to which it was not entitled.

The judgment will therefore be affirmed, and it is so ordered.

CULLEN *et al.* v. DRANE *et al.*

(Supreme Court of Texas. December 7, 1888.)

APPEAL—PRACTICE—ASSIGNMENT OF ERRORS—SUFFICIENCY.

An assignment of error stating that "the court erred in overruling defendant's motion for a new trial on the grounds therein stated," there being more than one ground therein, is too general, and will not be considered.

Appeal from district court, Navarro county; SAMUEL R. FROST, Judge.
Scott & Ballew, for appellants.

GAINES, J. On motion of appellees on a former day of this term, the statement of facts was stricken from the record in this case. The transcript shows a bill of exceptions, which does not appear to have been filed, but which was signed by the judge after the court had adjourned for the term. The assignments of error complain of the rulings of the court upon the admission of evidence and the motion for a new trial, and raise questions which cannot be considered, in the absence of a statement of facts. If the bill of exceptions had been signed and filed at the proper time, and if it had appeared therefrom that the court had erred in its rulings, we could not determine, without knowing what the evidence was which was introduced upon the trial, whether the appellants were prejudiced by the rulings or not. The assignment that "the court erred in overruling defendant's motion for a new trial on the grounds therein stated," there being more than one ground, is too general; but, if it had been more specific, it could not be considered, in the absence of a statement of facts. The judgment is affirmed.

RUNGE v. FRANKLIN *et al.*

(Supreme Court of Texas. February 5, 1889.)

1. LIBEL AND SLANDER—PLEADINGS IN SUIT—PRIVILEGED COMMUNICATIONS.

Stockholders of a corporation filed a petition in a court having jurisdiction of the cause against the corporation, alleging that the president, with the approval of the directors, had been fraudulently conducting the management of the company, detailing the acts alleged to show a concerted scheme to reduce the value of the company's stock, and buy it in, and control the company's affairs, and thus destroy the plaintiffs' interests, and asked for the appointment of a receiver. Held that, as proceedings in courts are absolutely privileged, a director of the company, though not a party to the suit, could not maintain an action for alleged defamatory matter contained in the petition, though it was false and malicious, and made under color and pretense of a suit without right.¹

2. SAME—PLEADING—COMPLAINT—SPECIFICATION OF LIBELOUS MATTER.

The plaintiff also alleged that, after he had filed an affidavit denying the charges, the defendants caused the same to be published in a newspaper, "repeating through [its] columns the said libelous matter," and attached the newspaper article as an exhibit to its petition. The article contained a report of the suit, its object, the charges made, some of which were not declared on. The libelous matter relied on was not pointed out, except by declaring it to be a repetition of the matter contained in the petition, but the article contained much more matter, and the language was different. Held that, if an independent cause of action can be set up by borrowing from former allegations, the language relied on as libelous must be set out *in hæc verba*, and the damages alleged to result therefrom be specified.

Commissioners' decision. Appeal from district court, Galveston county.

Action for libel by Julius Runge against Joseph Franklin, Henry Seelingson, Charles Dalien, Royal T. Wheeler, J. H. Hurt, E. D. Hamner, H. W. Rhodes, and M. W. Shaw. The original petition was filed March 18, 1886. It was amended January 26, 1887. The alleged libelous matter is contained in a petition filed in the district court of Galveston county, February 2, 1886, by defendants against the Island City Ice Company. Plaintiff was not made a party to the suit, but it is alleged that he was a director. From an order sustaining a demurrer to the petition plaintiff appeals.

McLemore & Campbell and *George E. Mann*, for appellant. *Waul & Walker*, for appellees.

COLLARD, J. This is a suit for libel brought by Julius Runge, the appellant, against Joseph Franklin and others. It is predicated upon alleged defamatory matter contained in a petition filed by appellees in the district court of Galveston county against the Island City Ice Company, a corporation in

¹ See note at end of case.

the city of Galveston, having the usual officers; appellant being one of the directors, and the appellees being owners of much less than one-half the stock. The bill declared to be libelous attacks the management of the company, alleging that it has been fraudulently conducted by the president with the assent and approval of the directors. It asks for injunction to prevent sale or other disposition of the property, and the appointment of a receiver to wind up the affairs of the company. Only a part of the allegations of the bill are selected and declared on as libelous. Plaintiff alleges that the bill was false and malicious, and that the suit was brought by defendants, when they were fully advised that there was no cause of action against plaintiff, or right of petition, as a libelous cover and device under which to attack and injure the good name and fame of plaintiff as a man and a director, and to injure him by depreciating his stocks in several corporations of which he is a director. He further alleged that after he had filed his affidavit in court, specifically denying each and all the allegations of the bill, "defendants, on February 11, 1886, caused the same to be published in the Galveston News, a newspaper having an extensive circulation in the city of Galveston, and throughout the state of Texas, repeating through the columns of the News the said libelous matter; in a certain part thereof was and is contained in tenor as follows, hereby annexed, marked 'Exhibit A,' and made a part of this petition." It is further alleged that after defendants had vented their spleen "by publishing their said libelous allegations in said petition and said newspaper, and under pretext of a suit accomplished their wicked and malicious purpose of injuring plaintiff in character, business, and property, they then dismissed their pretended suit, paying the costs of court," before the demurrers to the same were acted on, which demurrers were alleged to show that in truth and in fact the bill set up no cause of action or basis of relief against the Island City Ice Company. The plaintiff was not made a defendant in the bill asking the appointment of a receiver. The Exhibit A, filed as containing the matter published in the News, is not a copy of the petition or its allegations in form, but is a somewhat condensed report of the same, and substantially restates the alleged libelous allegations of the bill extracted and copied in plaintiff's petition herein, as well as other allegations not extracted nor declared on by plaintiff. Defendants filed a general demurrer to the petition, and special exceptions, among which was one that the publication complained of was privileged; being by petition to a court of competent jurisdiction for injunction, and to appoint a receiver for the Island City Ice Company. The court sustained the exceptions, and, plaintiffs declining to amend, the cause was dismissed. The case comes here by appeal from this judgment of dismissal, with various assignments of error calling in question the correctness of the court's ruling.

The first and most important question raised by the assignments of error is, were the allegations set out and declared on as libelous, privileged, contained, as they were, in a petition or bill for injunction, and for the appointment of a receiver, and so far privileged that an action for libel cannot be maintained upon them, notwithstanding they are false and malicious, and were made under color and pretense of a suit without right? The object of the bill was to prevent a sale or other disposition of the property of the ice company at a sacrifice, to appoint a receiver, and have the business wound up. It does not appear to us that the allegations declared on as libelous were irrelevant, or impertinent or foreign to the end in view. It gives a history of alleged unlawful acts of the officers, assented to by the directory, plaintiff in the suit being one of the directors, in order to show that there was a concerted scheme among them to reduce the value of the stock, and enable them to buy it in, and control the company's affairs, and finally sell out its property to pay a doubtful debt for their own benefit, and thus effectually destroy all the interests of the small shareholders. It does not go outside of pertinent matters to make charges against the persons alleged to be leagued together to accomplish

such design. It denominates the acts complained of as "a fraud," "a wrong," and "an injury," sufficient to invoke the equity powers of the court, and to authorize the relief sought. The bill was filed in a court of competent jurisdiction.

The demurrer and exceptions to plaintiff's suit admit that all the allegations declared on in the bill were maliciously false. There are two classes of privileged publications,—absolutely privileged, and conditionally privileged. It is the occasion on which any publication is made that gives it privilege. Proceedings in courts of justice, legislative proceedings, and petitions and memorials to legislatures, are said to be absolutely privileged. *Townsh. Sland. & Lib.* § 209, and note 2; *Id.* §§ 217, 221; *Starkie, Sland.* § 669, top p. 676. Where the privilege is conditional only, it is a *prima facie* defense to the action, but such defense may be overcome and rebutted by proof of actual malice and the falsity of the charge. The cases of *Holt v. Parsons*, 23 Tex. 9, and *Behee v. Railroad*, (decided at the Tyler term, 1888,) are cases of conditional privilege only. See 9 S. W. Rep. 449, and *Bradstreet Co. v. Gill*, *Id.* 753.

When the privilege is absolute, it is a complete defense, and cannot be rebutted or overcome by evidence that the publication was false and malicious.

In *Hartsock v. Reddick*, 6 Blackf. 255, where there had been accusation made by affidavit before a magistrate charging plaintiff with obtaining goods under false pretenses, the court declared the law to be that the person making such an affidavit was not subject to suit of libel therefor. The court said: "It makes no difference whether the charge be true or false, or whether it be sufficient to effect its object. If it be made in the due course of a legal or judicial proceeding, it is privileged, and cannot be the foundation of an action for defamation."

In *Strauss v. Meyer*, 48 Ill. 386, the libelous charges were made in a bill in chancery for injunction to prevent the execution of a trust, in which it was alleged that the trustee's "general character for honesty was bad," and that he was an unfit and improper person to execute the trust.

The court upheld the doctrine in *Hartsock v. Reddick*, and said: "Numerous other authorities might be cited, if this were a doubtful question, but reason, as well as authority, fully sustain the rule. If it were not so, in almost every vigorously contested case one of the parties would render himself liable to an action for libel." See *Cook v. Hill*, 3 Sandf. 341.

Garr v. Selden, 4 N. Y. 93, is to the same effect. The scandalous matter was contained in an affidavit filed in a judicial investigation: In reference to it the court say: "If the matter of the affidavit were pertinent or material to the motion, the law will not allow its truth or innocence to be drawn in question in an action for libel. It would not in that case be necessary to deny malice, as the law does not permit a party to allege in this form of action that the publication was false and malicious." Other authorities might be cited bearing more or less directly upon the point, in support of the rule that proceedings in courts are absolutely privileged, but we deem it unnecessary to discuss them. The authorities are by no means uniform in support of the rule, some holding that the privilege of a pleading in a court of justice is only a *prima facie* privilege, and others qualifying the general rule to some extent,—in one case, where the accusation was that notes had been fraudulently altered with intent to defraud and swindle, upon which an action for libel was brought, Chief Justice MARSHALL sustains the privilege, but says "that words spoken or written in the course of justice, and pertinent to a legal proceeding within the jurisdiction of the tribunal, are not actionable, though they be false, unless the proceedings were resorted to merely for the purpose of conveying the scandal, and as a cover for the malice of the party, and not in good faith, as a remedy for the assertion of a right or the redress of a wrong." *Forbes v. Johnson*, 11 B. Mon. 48.

We think the qualification made to the rule in the foregoing case and similar

ones unsound. It destroys the distinction. It practically puts proceedings of courts upon the same footing as other conditional privileges. If pleadings are shown to be false and malicious, it might well be concluded by a jury that they were employed as a cover and vehicle of defamation. The proof that would establish the facts of malice and falsity would also establish the other fact of a fictitious suit, and so there would be an end of the privilege as claimed. The distinction would be lost altogether. Mr. Townshend, in his work on Slander and Libel, says: "The right of appealing to the civil tribunals is more extensive than the right of appealing to the criminal tribunals; for as to the former every one has the right, with or without reasonable cause for so doing, to prefer his complaint, and whatever he may allege in his pleadings, as or in connection with his ground of complaint, can never give a right of action for slander or libel. * * * The rule, as thus laid down, has been doubted by some; and it has been said that if the tribunal to which the complaint be made has no jurisdiction of the subject-matter, or if the defamatory matter be irrelevant to the matter in hand, or if the party complaining or defending maliciously inserts defamatory matter in his pleading, that in such cases the party aggrieved may maintain his action for slander or libel. Notwithstanding the *dicta* to the contrary, we believe the better and prevailing rule to be that for any defamatory matter contained in a pleading in a court of civil jurisdiction no action for libel can be maintained. The power possessed by the courts to strike out scandalous matter from proceedings before them, and to punish as for contempt, is considered a sufficient guaranty against the abuse of the privilege. But, whatever may be the reason, it seems certain that where there is a perversion of the privilege the policy of the law steps in, and controls the individual rights of redress." Townsh. Sland. & Lib. § 221. We adopt the foregoing as expressing our views upon the question. We believe it is and ought to be the law that proceedings in civil courts are absolutely privileged. Citizens ought to have the unqualified right to appeal to the civil courts for redress, without the fear of being called to answer in damages for libel.

Where property is attacked upon false charges, or where there is a malicious prosecution in a criminal court, the law affords ample remedies for the wrong done, but not by a suit for libel. No property was seized in the case at bar, and we are of opinion filing of the bill for injunction and appointment of a receiver gave plaintiff no cause of action for libel, or anything else. *Johnson v. King*, 64 Tex. 232; *Smith v. Adams*, 27 Tex. 30; *Halderman v. Chambers*, 19 Tex. 53.

We have now to consider the report in the Galveston News. It is alleged to be a repetition of the allegations in the bill. It is filed with the petition, and made a part of it. It contains a report of the suit, its object, the charges made, some of which are not declared on as libelous. The petition does not point out any particular part of it as libelous, except by declaring it to be a repetition of matter published in the court proceeding. It is not clear that plaintiff intended to declare on it as a distinct cause of action, as nothing in it is set out *in hæc verba*, as required in petition for libel. *Bradstreet Co. v. Gill*, *supra*. It is very probable it was mentioned as mere matter of aggravation. The only way in which the report in the News is alleged is that the slanderous matter before set out was repeated by publication in the News. We do not think it would be correct pleading to borrow from former allegations, and so set up a distinct and independent cause of action; but if it could be done the filed exhibit, showing what was published in the paper, does not verify the allegation that it was a repetition of the matters before alleged. On the contrary, it is a synopsis of the matter before alleged in different language, and contains much more matter of a slanderous character connected with the bill. The very language relied on as libelous must be set out in a petition for libel, not the substance and meaning of the language. The office

of the innuendo is to show the effect and meaning of the language. *Bradstreet Co. v. Gill, supra*. The cause of action consists in the language written.

Again, if the counts as to the newspaper publication were relied on as an independent cause of action, they are insufficient for the purpose, because they do not lay the basis for damages as to amount resulting from this publication alone. It is connected and blended with the alleged wrong of publishing by the filing of the bill in court, and the prayer is for \$10,000, on account of "the several grievances aforesaid." There is no measure or limit of damages set up or claimed for the particular grievance by the newspaper publication. The court is not advised as to what part of the \$10,000 claimed as special damages results from the newspaper publication, and could not say where a verdict should stop, or what amount it might reach for this distinct cause of action, if it be one. The verdict must respond to the issues, and the judgment must conform to the pleadings. Rev. St. arts. 1327, 1335. Upon this count there is no guide for either. The discussion of this question may have been needless; for, as before said, the allegation was probably intended as matter of aggravation. We thought it best to notice it, lest it might be supposed we had overlooked it. If it was intended as an additional cause of action, it was bad on general demurrer, and the court did not err in so holding.

We conclude that the judgment of the court below should be affirmed.

STAYTON, C. J. Report of commissioners of appeals examined, approved, and judgment affirmed.

NOTE.

LIBEL AND SLANDER—PRIVILEGED COMMUNICATIONS—PLEADINGS AND AFFIDAVITS IN JUDICIAL PROCEEDINGS. In his opinion in *Bartlett v. Christliff*, (Md.) 14 Atl. Rep. 518, *MOSHERY, J.*, cites numerous authorities, which he says "hold that statements made in any of the pleadings or proceedings in a cause before a court having jurisdiction of the subject are absolutely privileged, even though made maliciously and falsely," and he continues that "this privilege, protecting against a suit for libel or slander, is founded upon what would seem to be a sound public policy, which looks to the free and unfettered administration of justice, though as an incidental result it may, in some instances, afford an immunity to the evil disposed and malignant slanderer." Under the circumstances of that case, he does not find it necessary to determine whether the privilege is absolute or qualified, but rules that an action for libel will not lie for statements contained in a petition by a receiver against his co-receiver, that such co-receiver was unlawfully withholding a portion of the assets, and was obstructing their collection, and that he was acting in contempt of court, and had embezzled some of the trust money, even though such statements are malicious and false; they being made in the course of judicial proceedings. In *Wilson v. Sullivan*, (Ga.) 7 S. E. Rep. 274, the court says, on this subject, that "all charges, allegations, and averments contained in regular pleadings addressed to and filed in a court of competent jurisdiction, which are pertinent and material to the redress or relief sought, whether legally sufficient to obtain it or not, are absolutely privileged. However false and malicious, they are not libelous. This privilege rests on public policy, which allows all suitors (however bold and wicked, however virtuous and timid) to secure access to the tribunals of justice with whatever complaint, true or false, real or fictitious, they choose to present, provided only that it be such as the court whose jurisdiction is invoked has power to entertain and adjudicate."

An affidavit filed in support of an application requesting a justice of the peace to designate some officer other than the one proposed, to summon the jury in a pending prosecution, and charging the proposed officer with prejudice and collusion, is a privileged communication, if made in good faith and the matters therein alleged are pertinent. *Rainbow v. Benson*, (Iowa,) 32 N. W. Rep. 352. Statements in an affidavit in support of an answer to a bill for injunction are privileged, if not impertinent nor irrelevant. *Hart v. Baxter*, (Mich.) 10 N. W. Rep. 198; so are statements in a written specification of charges filed to oppose the application of a debtor for discharge in insolvency. *Hollis v. Meux*, (Cal.) 11 Pac. Rep. 248. See, also, note, *Id.*; *Hawk v. Evans*, (Iowa,) 41 N. W. Rep. 368. The communication, to a magistrate having jurisdiction of the case, of a suspicion that a certain person has committed a specified crime, is privileged only where there exists reasonable and probable cause for such suspicion. *Pierce v. Oard*, (Neb.) 37 N. W. Rep. 877. The publication of defamatory matter cannot be justified on the ground that it was in aid of legal proceedings, where it is not shown that any criminal proceedings were ever begun or contemplated against the person defamed. *Malloy v. Pioneer Press Co.*, (Minn.) 26 N. W. Rep. 904.

BERRY *et al.* v. TEXAS & N. O. RY. Co.

(Supreme Court of Texas. February 8, 1889.)

1. CONTINUANCE—ABSENT WITNESSES—APPLICATION.

In an action for the wrongful death of a brakeman by the negligence of the engineer, plaintiffs filed an application for continuance, sworn to on information and belief, stating that the deceased's widow, a plaintiff, whose testimony was material, would be unable to attend the trial, owing to the sickness of her child, a co-plaintiff, but did not state what her testimony would be, further than that, in addition to her written evidence on a former trial, not set out, she would testify to dissatisfaction among the railroad employes over the engineer's incapacity, and that some, including her husband, had threatened to quit work; also to statements not set out by her husband, as to the cause of his death. The application also stated that other witnesses, who had been attached, were absent, but it was not stated what facts they were expected to testify to. *Held*, that it was proper to deny the application.

2. APPEAL—REVIEW—HARMLESS ERROR.

Appellant assigned as error that the court refused to instruct the jury on the law of the case, and ordered a verdict for defendant, stating, in the hearing of the jury, that plaintiff had failed to prove his case. The record failed to show that the court charged the jury at all, and no bill of exceptions was taken, showing that he made the remarks attributed. *Held*, that it appearing that plaintiff had failed to make out his case, whatever error was committed, if any, was harmless.

Appeal from district court, Orange county.

John T. Stark, for appellants. *Perryman & Gillaspie*, for appellee.

HENRY, J. The original petition in this case was filed in 1882, by appellant, in behalf of herself and minor child, to recover of appellee damages for the death of Clarence B. Berry, husband of one and father of the other. The cause of action, as stated in the brief of appellant, is that the said Clarence B. Berry was in the year 1881 in the employ of the defendant railroad company, as a brakeman at Orange, Tex.; that at the same time one Charles Sunburg was in the employment of said corporation as an engineer; that Sunburg was an incompetent and untrustworthy engineer, and known to be such by his employer; that in the year 1881, while said Clarence B. Berry was in the discharge of his duty as brakeman, the corporation by said Charles Sunburg carelessly and negligently propelled its cars, and left an open ditch on its side track, so that while attempting to make a coupling of cars said Berry fell into the ditch, and was run over by the cars, causing his leg and hand to be crushed, from the effects of which he died. The cause was tried at the spring term, 1888, of the district court, resulting in a verdict and judgment for the defendant, from which plaintiffs prosecute this appeal. There is in the record a statement of facts, which need not be considered further than to state that it fails to disclose the existence of any relationship between deceased and either of the plaintiffs, or that any damage to anybody resulted from the death of Berry. There is no evidence on these issues. As to the ditch and engineer, the evidence fails to disclose any negligence with regard to the ditch, and tends only to establish that the engineer was competent and skillful, and guilty of no negligence.

The plaintiffs applied for a continuance, which the court denied. This ruling is assigned as error. Application for the continuance was made and sworn to by plaintiff's attorney. There is nothing in the record showing whether the case had ever been continued before this application was made. The ground stated is the want of the testimony of Mrs. M. R. Parker, (plaintiff,) who it is stated resides in Chambers or Liberty county, Tex. It is stated, on information and belief, that she had been in attendance at the different terms of the court since her suit was filed. Extracts from an undated letter from her to her attorney are included in the application, showing that her absence from the trial, which was anticipated, would be owing to the sickness of her child and co-plaintiff.

It is stated that the evidence of the plaintiff is material, but what it would be is not disclosed, further than that, in addition to her written evidence on a former trial, she would testify "that there was dissatisfaction among the employees of the company about Sunburg's being placed in the position of engineer, and that some of them, her husband in the number, had declared they would abandon the service of the company if he was not discharged;" also that the declarations of Berry, made shortly after his injury, as to the cause of his injury, would be proved by this witness. What the declarations were is not stated. The application also shows that in 1882 attachments were sued out by plaintiffs for a number of witnesses residing in Orange county, which were returned by the sheriff as executed "by summoning said witnesses." The application states that the evidence of said witnesses is material for plaintiffs, and that they were not in attendance then. It fails to disclose what facts the witnesses were expected to testify to. What the written evidence of the plaintiff, on a former trial alluded to in the application for continuance, was, is not disclosed by the application, and only appears as part of appellants' assignment of errors. As it appears there, it does contain some matters of substance that would have been useful if developed earlier in the proceedings. In an amended motion for new trial, it is shown that another writ issued for the attached witnesses was executed in 1883 by arresting the witnesses. This was not shown in the application to continue. The application to continue is defective in so many particulars that it is useless to particularize them, or discuss it.

Objections to the admissibility of certain evidence offered by the defendant were made by plaintiffs. The objections were not well taken. The result to the plaintiff would not have been different if all the evidence of the defendant had been excluded.

Other errors insisted upon by appellant are to the effect that the court refused to allow plaintiffs' counsel to read the authorities relied on by him, and that the court refused to instruct the jury on the law of the case, but ordered a verdict for defendant; stating, "in the hearing of the jury," that plaintiffs had failed to prove their case. In fact, the record fails to show that the judge charged the jury at all. No bill of exceptions was taken showing that he made the remarks attributed to him. We do not understand that the law requires a district judge to charge the jury, unless requested by one of the parties. If he does charge, it should be in writing. Whatever error was committed in this respect it would not lead to a reversal, unless it was apparent that it may have injuriously affected plaintiffs' case.

If, under any circumstances, a charge can be properly omitted, this seems a proper case for such omission. No charge would have been proper that did not direct a verdict for the defendant.

The judgment is affirmed.

MOODY'S HEIRS v. MOELLER *et al.*

(Supreme Court of Texas. February 8, 1889.)

1. EXECUTION—SALE BY UNITED STATES MARSHAL—COLLATERAL ATTACK.

A sale by a United States marshal under an execution from a United States court, made before the door of the United States court-house, instead of the door of the court-house of the county in which the land is situated, is void, and incapable of ratification, and may be collaterally attacked.

2. TRESPASS TO TRY TITLE—EVIDENCE.

In trespass to try title, plaintiff, to obviate the apparent bar of the statute of limitations, offered in evidence such a deed to the United States, together with a judgment in favor of the United States against plaintiff's ancestor, on which the execution and sale were based, and a deed from the United States to plaintiff, in consideration of the payment of the judgment. *Held*, that its exclusion was not error as it showed no title in the United States, or any obstacle to a suit for the recovery of the land by plaintiff or his ancestor.

Error from district court, Victoria county.

Trespass to try title, by the heirs of J. A. Moody against Albrecht Valentine Moeller, A. B. Peticolas, Munson and wife, Pickering & Sterne, and others. Judgment for defendants, and plaintiffs bring error.

Fly & Davidson and *Joe L. Hill*, for plaintiffs in error. *C. F. Carsner*, for Moeller and Peticolas. *W. L. Davidson*, for Munson and Pickering & Sterne.

GAINES, J. This is an action of trespass to try title, brought in the court below by plaintiffs in error as the heirs of J. A. Moody against defendants in error, to recover a parcel of land in the city of Victoria, known as "Block 230." The defendants each claimed a separate parcel of the block, and disclaimed as to the remainder. They pleaded not guilty, and the statute of limitations. The cause was submitted to the judge without a jury, and he gave judgment for the defendants.

Both plaintiffs and defendants claim title under the city of Victoria,—the plaintiffs under a sheriff's deed to their ancestor made in 1849; the defendants under a sheriff's deed made to Valentine Moeller, one of defendants, in 1868. It was admitted on the trial that J. A. Moody, plaintiff's ancestor, died on March 6, 1874; and it is admitted in the statement of facts "that defendants proved occupancy and exclusive possession of all the block sued for herein since February, 1878, continuous, adverse, and peaceable, to this date." We presume it is meant that the possession was peaceable until the commencement of this suit, the date of which the record does not disclose. We infer, however, that the petition was filed more than 10 years after the adverse occupancy began. There is a bill of exceptions which shows that the court sustained the defense of the statute of limitations of 10 years; and, in the absence of the date at which the petition was filed, this inference should be indulged in support of the judgment. The trial was not had until May, 1886. The plaintiff's ancestor having died after the adverse possession commenced, the statute of limitations continued to run, notwithstanding any disability of coverture or minority that may have existed on part of any one or more of his heirs. In order, therefore, to obviate the apparent bar of the statute, the plaintiffs offered in evidence a judgment in favor of the United States against J. A. Moody and another, in the district court of the United States of the Eastern district of Texas, rendered in 1867; an execution upon the judgment, with the return of the marshal showing a levy upon the land in controversy; an order of sale in pursuance of such levy, together with a return and marshal's deed showing a sale of the land to the United States, and a conveyance in accordance therewith. The sale was made on the 3d day of November, 1868, "in front of the United States court-room in Galveston." The marshal's deed was not executed until the 10th of January, 1884. The delay, it seems, was caused by an offer on part of Moody to settle or compromise the judgment. In connection with the foregoing evidence, the plaintiffs offered a deed from the United States, dated December 29, 1884, conveying the land to them in consideration of the payment by them of the claim of the government against their ancestor. All this evidence was excluded by the court, upon objection by defendants. This ruling of the court was excepted to at the time, and is now assigned as error.

The ground of objection to the evidence was that the sale by the marshal was made at a place not authorized by law, and was therefore void. The question of the validity of a sale by a marshal under an execution from a United States court, made before the door of the United States court-house, instead of the door of the court-house of the county where the land is situated, came before this court in the case of *Sinclair v. Stanley*, 64 Tex. 67, and it was there held that such a sale was "not voidable, but void." A voidable sale passes the legal title, subject to be avoided by a direct proceeding

for that purpose, and it is not subject to a collateral attack. It may be ratified. But a void sale conveys no title, is incapable of ratification, and may be shown to be a nullity, even in a collateral proceeding. In all the cases cited by appellants' counsel to support a contrary ruling, the sales were held to be voidable and not void.

There was evidence tending to show that plaintiffs' ancestor acquiesced in the sale of his land by the marshal, and appellants insist that because of such acquiescence the sale was made valid. They cite in support of their proposition: *Brown v. Christie*, 27 Tex. 73; *Ayres v. Duprey*, Id. 594; *Howard v. North*, 5 Tex. 290; *Peters v. Caton*, 6 Tex. 554; and *Sydnor v. Roberts*, 13 Tex. 598. *Howard v. North* is the only one of these cases in which the sale was held to be void, and it was there decided merely that if the owner of land sue to set aside a void sheriff's sale, he must pay back the purchase money. None of these cases give any countenance to the doctrine that the mere acquiescence by the defendant in execution in a void sale of his land made by the sheriff will give validity to the sale. It follows that the court did not err in excluding the evidence of the marshal's sale, offered by plaintiffs. It did not show that any title passed by it to the United States, or that the government had any title which passed by its deed to them. Nor did it show any bar to the operation of the statute of limitations. It was not an obstacle to a suit for the recovery of the land by plaintiffs' ancestor in his life-time, or by them after his death. It is too plain for argument that, if plaintiffs had brought suit for the recovery of the property in controversy, even before the execution of the deed of the United States to them, the defendants could not have set up the claim of the government as an outstanding title to defeat the recovery.

This renders it unnecessary to consider the question whether or not the statute would have run in favor of defendants, if the title had been in the United States. Upon the uncontroverted evidence introduced in the case, the defendants showed title by limitations. That offered and rejected was properly excluded, since, if it had been admitted, it could not have been looked to for any purpose. The judgment is therefore affirmed.

KINLOW v. KINLOW *et al.*

(*Supreme Court of Texas. February 8, 1889.*)

MARRIAGE—COHABITATION—RESULTING TRUST—SLAVERY.

Defendant and K., who were once slaves, lived together as husband and wife for some time after emancipation, representing themselves and being regarded in the community as husband and wife, but they were never married according to the forms of law. During such cohabitation land was purchased by K. with money earned by defendant, the deed being executed to K. Afterwards K. was married according to forms of law to plaintiff. Held, in trespass to try title after K.'s death, that defendant was entitled to the land, whether she was to be regarded as K.'s lawful wife or not; if not, a trust resulted in her favor, K. having no right then to her earnings.

Appeal from district court, Washington county.

Bassett, Muse & Muse, for appellant. *Eddins & Ewing*, for appellee.

GAINES, J. John Kinlow, as plaintiff in the court below, brought this action in the statutory form, to try the title to a lot in the city of Brenham. Mrs. Piner Green and Anna Kinlow were made defendants. John Kinlow died while the suit was pending, and Creacy Kinlow intervened, alleging that she was the surviving widow and sole heir of the original plaintiff. Mrs. Green did not answer, and there was a judgment by default against her. Anna Kinlow answered, alleging that she was the lawful wife of John Kin-

low before and at the time of his marriage to Creacy Kinlow, and that the property was acquired during the marriage of herself and her husband, and was their homestead; and also that the property was paid for with her own money, and that the title to the same was taken by John Kinlow in his own name, in fraud of her rights. The case was tried by the court without a jury, and resulted in a judgment in favor of Anna Kinlow. Creacy Kinlow appeals, and assigns as error that the court erred in its conclusions of law.

The following facts were found by the court: "Some time after emancipation, and prior to 1869, John Kinlow and the defendant Anna Kinlow, formerly Anna Tarver, both of them having formerly been slaves, while living in the state of Alabama, commenced living together as husband and wife, under some sort of ceremony or agreement, but were never legally married, and were living together in that relation on the 15th day of August, 1870. They continued to live together in Alabama until 1871, when they removed to Washington county, Tex., where they lived together as before, representing themselves as husband and wife, and were so regarded in the community in which they lived, until the early part of 1877, and raised a family of children; and while so living and cohabiting together the land in controversy was purchased and paid for with money earned by the labor of Anna Kinlow, but the deed to the same was taken in the name of John Kinlow." The court also found that John Kinlow and Creacy Kinlow were "married according to the forms of the law" in 1887. As conclusions of law, the court held: "(1) That John Kinlow and Anna Kinlow are to be considered as having been legally married. (2) The marriage between John Kinlow and Creacy Davis was a nullity, and she can take nothing as his surviving widow. (3) The property in controversy was the community property of John Kinlow and Anna Kinlow, and was their homestead, and Anna Kinlow, as the surviving widow of John Kinlow, is entitled to hold the same."

We deem it unnecessary to determine whether the court's conclusion as to the relation between John Kinlow and appellee is correct or not. If they are not to be considered as husband and wife, then he had no claim upon the earnings of the reputed wife, which paid for the property; and we are of opinion that, under the peculiar facts of the case, a trust resulted in her favor. In the absence of some evidence, either direct or circumstantial, that it was understood between the parties that the relation of debtor and creditor was to be created, the presumption is that the parties intended that the grantee in the conveyance should hold for the benefit of the party who paid the purchase money. From the conclusions of the court upon the evidence, (which is not before us,) the real fact seems to be that the parties to the transaction considered themselves husband and wife at the time of its consummation; and that the supposed existence of this relation was the consideration which induced appellee, at least, to permit the money she had earned to be invested in the lot. She did not regard John Kinlow as a stranger to whom she was lending money, but as her husband and agent, whom she intrusted with the money to invest for her benefit, or at least for the benefit of both. If he could have successfully denied the marriage, and have repudiated his reputed wife, he could not have repudiated the trust reposed in him by her upon faith of the supposed relation. If she was not his wife, the money which paid for the lot was hers, and the property should be held to have been purchased for her benefit. Appellant finds herself in this dilemma: If appellee was the lawful wife of John Kinlow, then appellant's marriage with him was void, she was not his widow, and could claim nothing in his estate; if appellee was not the lawful wife, then, upon the conveyance of the property to her reputed husband, a trust in it resulted in her favor. It follows that upon either view of the case the judgment appealed from is correct, and it is therefore affirmed.

MISSOURI PAC. RY. CO. *et al.* v. WATSON.*(Supreme Court of Texas. February 8, 1889.)*

1. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE—AMENDMENT OF PLEADING.

The petition in an action by a husband and wife for injuries to the wife stated facts on which both the husband and wife sought a recovery, and contained nothing indicating that the action was to recover in the separate right of the wife. On demurrer for misjoinder of parties, the name of the wife was dropped by amendment. Held that, the action having been brought in proper time, the husband could carry it on, though the limitation had expired when the wife's name was dropped.

2. NEGLIGENCE—PLEADING—ANSWER—CONTRIBUTORY NEGLIGENCE.

Where the petition in an action for personal injuries states a cause of action, and does not show a case from which it appears that the injury was caused by contributory negligence, defendant, in order to rely on such defense, must allege it.¹

3. CARRIERS OF PASSENGERS—INJURY TO PASSENGER—DEFECTIVE APPLIANCES—EVIDENCE.

Where it appears that a woman in pregnancy was seriously injured in boarding a train at a regular station; that she was obliged to step from the ground to a height of 30 or 36 inches, no intervening step being provided, as was the custom, and that she used due care, with the means provided,—judgment for damages will not be disturbed on the ground of contributory negligence, though it also appears that she had some assistance from the company's employes, and that other women, and possibly at times she herself, had boarded the train in a similar manner, without injury.

Appeal from district court, Leon county.

Action by Frank Watson against the Missouri Pacific Railway Company and the International & Great Northern Railroad Company for injuries to plaintiff's wife. Judgment for plaintiff, and defendants appeal.

Dotson & Richardson, for appellants. *F. M. Etheridge* and *B. S. Dashiell*, for appellees.

STAYTON, C. J. This action was first brought by Frank Watson and wife, to recover damages for injuries alleged to have been received by her while entering the car of appellants as a passenger. The petition stated facts on which both husband and wife sought a recovery, and there is nothing in the petition which characterizes the action as one brought to recover in the separate right of the wife. The petition was demurred to on the ground of misjoinder of parties, and this was sustained, but by trial amendment the name of the wife was dropped from the case as a party.

It is claimed that, after this was done, the cause should have been dismissed; and, more than one year then having elapsed after the injury, it is claimed that the defense of limitation should have been sustained. The petition set up the facts that authorized a recovery in the right of the community, and there was no intimation of desire or intention to recover in the separate right of the wife; and while the wife was an unnecessary, or even improper, party, when her name was stricken from the case as a plaintiff, we see no reason why the husband might not prosecute the cause to final judgment as though the wife had never been joined. The cause of action, as before said, was one in favor of the community, and no other or different cause of action was set up from the inception of the cause, and, the action having been brought within one year after the injury was received, the defense of limitation was properly overruled.

The petition stated a good cause of action, and did not develop a case in which it appeared that the injury to Mrs. Watson was caused by the contributory negligence of herself or husband; and, in such case, it rested with ap-

¹ Concerning the requisites and sufficiency of the averments in the complaint in actions for negligent injuries, see *Railway Co. v. Lee*, (Tex.) 7 S. W. Rep. 857, and note; *Railroad Co. v. Crist*, (Ind.) 19 N. E. Rep. 810, and cases cited; *Railway Co. v. Sandford*, (Ind.) 19 N. E. Rep. 770.

pellant to allege that the injury was so caused, if it desired to rely upon such a defense.

The other assignments necessary further to consider, in effect, urge that the evidence was insufficient to sustain the verdict. It appears that appellee and wife desired passage on appellants' train from Buffalo to Marquez, a distance of about 20 miles, and to secure this bought tickets. When the train reached Buffalo, where it made but a very short stay, appellee and his wife entered the car of appellants, but in doing this the evidence justifies the holding that the wife of appellee was seriously injured. There seems to have been no platform or other arrangement made to enable passengers with ease to enter the cars, which made it necessary, on the particular occasion, that Mrs. Watson should reach the car-step from the ground, and between the lower step of the car and the ground the distance is shown to have been from 30 to 36 inches. Some assistance seems to have been given to Mrs. Watson by the employees of appellants, but to enter the car it was necessary she should step from the ground to the lower step of the car without any intervening foot-rest. At the time, she was in pregnancy, advanced about two months, and received such injury that on the arrival of the train at Jewett, an intermediate station, it was found necessary to remove her from the train for medical attention. The physician who there attended her stated fully the nature of her injuries, and that "had she gone to Marquez from Jewett [12 miles] in the condition I found her on June 19, 1887, the chances would have been against her life. In all probability, the injuries I found her suffering with would have proved fatal." The evidence further shows that women had frequently entered the train at Buffalo in the manner Mrs. Watson did without injury, and Mrs. Watson had frequently entered the cars at Buffalo, but on those occasions a step-box was usually, if not always, furnished to make the ascent easy and safe. It is shown that Mrs. Watson used due care in entering the car with the means provided; that she was not negligent, unless the attempt to enter the car at all, with the means furnished, was negligence. There is no claim that her injuries were not received in entering the car, nor that they were not of such character as to authorize the damages awarded, but it is claimed that the attempt to enter the car with the facilities furnished by appellants was such contributory negligence as must defeat a recovery. Such a proposition, coming from appellants, through whose servants she was invited to attempt to enter the car by the use of the means furnished, and so in the hurry requisite in boarding a train that stopped but a brief period to enable passengers to enter the cars, comes without much to recommend it to favorable consideration. The jury were very clearly instructed as to the degree of care which should have been used by each party, and as to the effect contributory negligence on the part of appellee or his wife would have upon his right to recover. When a passenger has carefully used the means provided by the carrier to enter its cars at a regular station, the danger of attempting to enter would have to be very apparent, even to a person without experience in such matters, to justify this court in setting aside a judgment entered on the finding of a jury, under a proper charge, that the passenger was not guilty of contributory negligence.

No facts are shown in this case that would justify such action, and the judgment of the court below must be affirmed. It is so ordered.

MIDDLEBROOK *et al.* v. ZAPP *et al.*

(*Supreme Court of Texas.* February 12, 1889.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY.

Where a wife contributes from her separate property to the original capital stock of a firm engaged in selling merchandise, and the stock is replenished from time to time, purchases being made for cash and on credit, the interest in the partnership held in the name of the wife becomes community property.

2. SAME—ACTION BY WIFE—JOINDER OF HUSBAND—VARIANCE.

Where the wife in such case sues for damages to her separate property on account of a wrongful levy upon the partnership effects, and the husband is joined only as a nominal party, the variance will be held fatal.

Appeal from district court, Fayette county.

Phelps & Lane, for appellants. *Scott & Levi* and *W. H. Ledbetter*, for appellees.

HENRY, J. The record in this case discloses that, in the year 1885, I. Middlebrook, R. O. Middlebrook, and Mrs. Julia Meyer, then and now the wife of W. C. Meyer, entered into a written agreement of partnership to buy and sell merchandise in the town of Ellinger, in this state, under the firm name of Middlebrook Bros. Mrs. Meyer contributed one-half of the capital originally invested by the firm, and was to have one-half of the profits. The Middlebrooks were to have the other half. The business was conducted by C. W. Meyer, the husband of Julia Meyer, as an employed clerk or manager, at a monthly salary of \$50; and, as retail mercantile establishments usually are, for something over two years, without profit. In the mean time the original stock had been sold and replenished from time to time, the purchases being made for cash, and on time. In August, 1887, Leon & H. Blum caused the sheriff of Fayette county to levy an execution in their favor, and against C. W. Meyer, on a portion of said stock of merchandise valued at about \$1,000. The sheriff took actual possession of the goods levied upon, sold them, and paid the proceeds to Leon & H. Blum. This suit was brought by the two Middlebrooks and Mrs. Julia Meyer, joined by C. W. Meyer, the husband, as nominal plaintiff, for damages on account of said levy and sale. After exceptions had been filed by defendants for misjoinder of parties, plaintiffs amended, alleging that I. W. Middlebrook, R. O. Middlebrook, and Mrs. Julia Meyer were partners in business in the town of Ellinger; that C. W. Meyer was in charge of the business as clerk and agent of plaintiffs; that he had no interest in the stock of merchandise; and that the money put into the enterprise by Mrs. Meyer was her separate property. Under the authority of former decisions of this court, it must be held that, notwithstanding the fact that the capital paid into the firm by Mrs. Meyer was her separate property, the stock of goods at the time of the levy belonged to the Middlebrooks and the community estate of herself and husband. *Epperson v. Jones*, 65 Tex. 425; *Smith v. Bailey*, 66 Tex. 553, 1 S. W. Rep. 627.

The interest in the partnership held in the name of Mrs. Meyer, being community property, was under the control of her husband, and was subject to be seized and sold for his debts. It does not follow, however, that any portion of the partnership effects were subject to seizure and sale, as was done in this case. Our statutes point out the mode of levying upon the interest of a partner for his individual debt. That mode not having been pursued in this case, and an unwarranted trespass having been committed, the defendants in this suit made themselves liable to the owners of the goods for whatever damages they sustained by reason of the unlawful seizure. Rev. St. art. 2295. The Middlebrooks and C. W. Meyer, as the representative of the community estate of himself and wife, owning the goods, the cause of action was theirs. Mrs. Meyer, owning no separate estate in the goods seized, had no cause of action for damages done her separate property. If this suit had been to recover damages to the community property, she would have been an unnecessary and improper party; and exceptions to the petition on that ground, if made, ought to have been sustained, when she could have been dismissed by amendment. If not excepted to, her misjoinder would not necessarily have been fatal to plaintiffs' suit, if the cause of action declared upon had been alleged to belong to the community estate. *Edrington v. Newland*, 57 Tex. 684. It is an elementary rule of pleading that the *allegata* and *probata* must

correspond, and that a recovery cannot be had on a cause of action not alleged in the pleadings, however well it may be supported by proof. *Longcope v. Bruce*, 44 Tex. 436; *Speake v. Prewitt*, 6 Tex. 252; *Stachely v. Petree*, 28 Tex. 335; *Salinas v. Wright*, 11 Tex. 577, 578; *Paul v. Perez*, 7 Tex. 345; *Walker v. Lewis*, 49 Tex. 125.

In this case the wife, having no cause of action, joins as plaintiff in the suit. The husband, having one distinctly, declines to join as a real party. The proof clearly shows that the damages sued for belonged to the community estate, and were not the separate property of the wife. The petition charges that they are the separate property of the wife, and negatives the idea of their belonging to the community. The distinction between the two estates is substantial and important. To permit plaintiffs to recover, upon a petition so clearly charging as does the one in this case that the suit is by the wife for an injury done her separate estate, damages shown with equal clearness by the evidence to belong to the community would be a striking illustration of a judgment rendered upon the evidence, and not upon, but rather against, the pleadings. The court below correctly charged the jury to find for defendants. As the judgment is rendered on questions not affecting the merits of the controversy, it ought to be without prejudice, and we do not understand that it precludes a suit by the proper parties upon the same cause of action.

The judgment is affirmed.

WESTERN UNION TEL. CO. v. BROESCHE.

(Supreme Court of Texas. February 12, 1899.)

1. TELEGRAPH COMPANIES—DELAY IN DELIVERY OF MESSAGE—AGENCY.

In an action for delay in delivering a telegram, of which the operator knew the importance, sent by a third person in plaintiff's presence, the latter paying the charges, an instruction that, if the telegram was delivered to defendant's agent as alleged, the jury should then find whether the person delivering it was acting for plaintiff and at his request, is not erroneous, as failing to submit the question whether defendant had notice of the agency, as such question could not affect the rights of the parties, nor influence the conduct of defendant's agents.

2. SAME—MEASURE OF DAMAGES.

The telegram announced the bringing of a corpse. The operator to whom the message was delivered testified that he knew plaintiff's wife was dead, and that the body was to be conveyed to another town, and that unless the message was sent that night the body would reach there first. The court having charged that plaintiff could only recover for the direct and natural result of the failure to transmit and deliver the message, *held*, that an instruction that he could not recover for his failure to accomplish any purpose, not shown by the face of the message, unless defendant had notice of such purpose, was properly refused.

3. SAME—ELEMENTS OF DAMAGE—MENTAL ANGUISH.

Mental anguish and suffering are proper elements of damage for delay in delivering such a telegram.¹

4. DAMAGES—EXCESSIVE.

A verdict of \$1,168 in such case will not be disturbed as excessive.

5. TELEGRAPH COMPANIES—GROSS NEGLIGENCE.

Gross negligence of defendant is not essential to plaintiff's right of recovery for delay in delivering a telegram.

6. SAME—LIMITING LIABILITY.

A stipulation on a telegraph blank limiting the company's liability, unless the message is repeated, is no defense to an action for delay in delivering an unrepeatable message.²

¹Respecting injury to mental feelings as an element of damage in actions for failure to deliver telegrams, see *Telegraph Co. v. Cooper*, (Tex.) 9 S. W. Rep. 598, and cases cited; *Telegraph Co. v. Brown*, (Tex.) 10 S. W. Rep. 323.

²A stipulation limiting the liability of a telegraph company for mistakes or delays in the transmission or delivery of an unrepeatable message does not extend to a failure to transmit such a message from the receiving office. *Telegraph Co. v. Way*, (Ala.) 4 South. Rep. 844, and note. See, also, on the general subject of the power of telegraph companies to limit their liability by contract, *Telegraph Co. v. Crall*, (Kan.) 17 Pac. Rep. 309, and note; *Fowler v. Telegraph Co.*, (Me.) 15 Atl. Rep. 29, and note; *Bealett v. Telegraph Co.*, 2 N. Y. Supp. 365.

7. SAME—DEFENSES—OFFICE CLOSED.

The fact that defendant's office, at the place to which the telegram was to be sent, was closed when the telegram was received for transmission, is no defense.

Commissioners' decision. Appeal from district court, Washington county. Action by W. A. Broesche against the Western Union Telegraph Company, for damages for delay in delivering a message. Judgment for plaintiff, and defendant appeals.

Stemmons & Field, for appellant. *Basset, Muse & Muse*, for appellee.

ACKER, C. Appellee carried his wife from their home, near Burton, to Austin, for medical treatment; Dr. Hons, their family physician, accompanying them. The wife died at Austin on Sunday, July 17, 1887, and Dr. Hons and appellee went to appellant's office in Austin, between 6 and 7 o'clock P. M. on that day, and delivered to appellant the following message: "Mrs. Broesche is dead; will bring corpse on train to-night. J. M. HONS." This telegram was addressed to appellee's brother-in-law, Hoffman, at Burton. Appellee paid the charges for transmitting the message, and left Austin with his wife's body that night by train, arriving at Burton about 1:30 A. M. on the 18th of July. The message was not delivered until about 8:30 A. M. the next day, after it was deposited with appellant's agent in Austin, and some hours after the arrival of the corpse. This suit was brought by appellee to recover damages for the alleged negligent delay in delivering the telegram. The trial was by a jury, and resulted in verdict and judgment in favor of appellee for \$1,168, from which this appeal is prosecuted.

The court charged the jury to the effect that, if they found that Hons delivered the telegram to appellant's agent in Austin as alleged, they would then find whether or not in so delivering it Hons acted on behalf of appellee and at his request, and that, if they found Hons did not so act, they should return a verdict for appellant.

It is insisted that the court erred in giving this charge, in this, that it fails to submit the question whether appellant had notice that Hons was acting as appellee's agent in contracting for the delivery of the message. No special instruction was requested to cure the alleged omission here complained of. Besides, we are of opinion that it was immaterial whether appellant was notified that Hons was acting as agent for appellee or not. We cannot see how this could have affected the rights, or influenced the conduct, of appellant's agents. Appellee and Hons were together in the presence of the agent to whom the message was delivered at Austin. Appellee paid the charges for transmitting the message. The operator to whom the message was delivered testified that he knew from the wording of the message that it demanded prompt delivery. Conceding that appellant was not informed that Hons was acting as agent for appellee, we are unable to understand how the lack of this information affected, in any way, the conduct of appellant's agents. It does not appear that they would have done more or acted differently under the contract. Story, Ag. §§ 418, 420. We think, however, that appellant was sufficiently informed of the agency of Hons.

We think there was no error in the omission in the charge complained of by the third and fourth assignments of error.

The court charged the jury to the effect that the fact that appellant's office at Burton was closed at the time its agents at Austin received the message for transmission would be no defense for failing to transmit and deliver the message, and it is contended that the court erred in this charge. We think the court did not err in giving this charge. The contract to transmit the message was made by appellant through its agent, who was fully authorized and empowered to make it. We do not think appellant can excuse its failure to perform the contract upon the ground that another one of its servants, act-

ing under authority from appellant, had rendered the performance of the contract impracticable.

It is also contended that the court erred in charging that the jury might take into consideration mental anguish and suffering as elements of damage, if they should find for appellee. The point here presented has been ruled against appellant by several decisions of this court. *Stuart v. Telegraph Co.*, 66 Tex. 581, 586.

It is also contended that the message having been written on a printed blank, containing a stipulation that appellant would not be liable in damages for delay in transmitting or delivering the message beyond the cost of transmitting, unless it was repeated, the court should have charged the jury that, if they found that the message had not been repeated, then they should return a verdict for appellant. We think the court did not err in refusing to give the special charge asked by appellant upon the stipulation contained in the printed blank. It has been decided that the stipulation requiring messages repeated cannot be invoked in defense of an action to recover damages for delay or failure in delivering the message. *Railway Co. v. Wilson*, 69 Tex. 739, 7 S. W. Rep. 653.

We do not think that appellee's right of recovery was dependent upon the jury finding appellant guilty of gross negligence, and we think the court did not err in refusing the special charge requested by appellant to that effect. Negligence by appellant in failing to deliver the message, without regard to the degree of such negligence, would render it liable for such damage as was the direct and natural result of such failure to deliver. *Railway Co. v. Wilson*, *supra*.

Appellant requested the court to instruct the jury to the effect that appellee could not recover damages by reason of his failure to accomplish any purpose not shown by the face of the message, unless appellant had notice of such exterior purpose at the time the contract was made. The special instruction was refused, and this is assigned as error.

The court charged the jury that appellee could only recover such damage as was the direct and natural result of the failure to transmit and deliver the message. The operator at Austin, to whom the message was delivered, testified that he knew from the message that appellee's wife was dead, and that they expected to convey her body to Burton by the train that night; and that, unless the telegram was delivered the evening he received it, the corpse would reach Burton before the telegram. The purpose of appellee in informing Hoffman of the death, and the fact of carrying the corpse to Burton by train, was too obvious to require explanation. We think the special charge asked and refused was not called for nor authorized by the facts, and that the court did not err in refusing to give it.

It is also contended that the verdict is excessive, but, under the previous decisions of this court, we cannot say that it is. Mental anguish or distress being an element of actual damage for which the law furnishes no rule for estimating, its measure is left to the discretion of the jury. Unless it appears that the jury have acted from passion, prejudice, or other improper influence, the verdict will not be vacated on the ground of excessiveness alone. We are of opinion that the judgment of the court below should be affirmed.

STAYTON, O. J. Report of commission of appeals examined; their opinion adopted; judgment affirmed.

DANIEL *et al.* v. WATSON.

(Supreme Court of Texas. February 8, 1889.)

VENDOR AND VENDEE—VENDOR'S LIEN—ENFORCEMENT—PLEADING.

In an action on a note given for the price of land, the complainant averred that the vendor's lien on a portion of the land had been relinquished, and only asked for a foreclosure of the lien as to the remainder, and there was nothing in the petition to identify the portion upon which foreclosure was sought. *Held*, that it was error to enter judgment for the enforcement of a lien as to the whole or any portion of the land.

Appeal from district court, Freestone county.

Kirven, Gardner & Etheridge, for appellant.

STAYTON, C. J. This action was brought by C. L. Watson, surviving partner of a firm originally composed of himself and H. C. Watson. It was brought to recover a balance alleged to be due on a promissory note for \$1,430, given for the purchase of two tracts of land described in the petition, and together containing 703 acres. The petition alleged that \$1,197 had been paid on the note, and that the vendor's lien on 500 acres of the land had been relinquished, and it only prayed for a foreclosure of the lien on 200 acres of the land. Whether the relinquishment of lien was on an undivided 500 acres, or upon a particular part of one of the tracts, or upon particular parts of each, was not averred. There was nothing in the petition to identify the land on which the lien had been released, nor to identify the 200 acres on which foreclosure was asked. The court below rendered a judgment for the balance due on the note, and established a lien on the entire 703 acres, which it directed to be sold in satisfaction of the judgment. This is assigned as error. The petition did not state facts which identified the 200 acres on which the court was asked to establish and foreclose a lien, but upon its face did show that the plaintiff was not entitled and did not seek to have a lien foreclosed on the entire lands for which the note was executed. It not furnishing a basis on which the relief sought could be granted, it was error to enter a judgment enforcing a lien on any part of the lands described in it; and the judgment is oppressive, in that it enforces a lien against land on which plaintiff expressly averred the lien had been extinguished, and against which he sought not to enforce any claim.

The judgment of the court below will be reversed, and, as there is nothing in the pleadings from which it can be here correctly entered, the cause will be remanded. It is so ordered.

POE v. STATE.

(Supreme Court of Texas. February 8, 1889.)

1. COUNTIES—TAX COLLECTORS—ADDITIONAL BONDS.

Under Rev. St. Tex. art. 4733, providing that the commissioners' court may require a tax collector to furnish a new bond, whenever such a proceeding is deemed advisable by the court, a tax collector may be required to give a new bond without first having been cited to appear and show cause.

2. SAME—REMOVAL FROM OFFICE—CONSTITUTIONAL LAW.

Const. Tex. art. 5, § 24, providing that county officers may be removed for incompetency, etc., upon the cause therefor being set forth in writing, does not prevent more than one ground for such removal being included in a petition filed therefor.

3. SAME—SUSPENSION FROM OFFICE.

Such provision of the constitution, authorizing the district judge to remove a county officer only on the verdict of a jury, does not render a statute unconstitutional authorizing the judge to temporarily suspend a county officer without such verdict, pending proceedings for his removal.

4. SAME—REMOVAL FROM OFFICE—PETITION—AMENDMENT.

Under Rev. St. Tex. tit. 66, c. 2, providing that the trial and all proceedings on a petition for the removal of a county officer for misconduct, etc., shall be conducted, v.10s.w.no.11—47

so far as possible, in accordance with the practice in other civil cases, the petition may be amended under rules applying in other cases; and, where the cause of removal alleged is the failure of the officer to pay over money, the petition may be amended so as to charge such delinquency to have been willful.

5. SAME—FAILURE TO ATTACH SEAL OF CLERK OF COURT.

In such case, where the petition is sworn to before the clerk of the court in which the petition is filed, the fact that he did not attach his seal to the certificate will not be held an objection, where he afterwards readministered the oath to the petition as amended.

6. SAME—SUSPENSION FROM OFFICE—EFFECT OF APPEAL.

Where the district judge exercised the power conferred upon him by such statute, of suspending a county officer pending proceedings for his removal, an appeal from a subsequent judgment of removal, and the execution of a *supersedeas* bond, had no effect on the order of suspension.

7. SAME—JOINDER OF CAUSES OF REMOVAL—JUDGMENT.

Where several causes are alleged for the removal of a county officer in the petition therefor, it is not necessary to sustain a judgment of removal that all the grounds should be found to be true.

Appeal from district court, San Jacinto county.

R. S. Lovett, for appellant.

HENRY, J. On the 16th day of August, 1888, a petition was filed in the district court of San Jacinto county against appellant, who was then the sheriff and *ex officio* tax collector of said county. The petition was sworn to by the relators before the clerk of the county court of San Jacinto county, (he being clerk of the district court also,) but he did not attach his seal of office to his certificate. The petition and an application for citation to the defendant were presented to the judge of the district court in chambers, on August 18, 1888, when he indorsed on the petition an order to the clerk to cite the defendant to appear at the next term of the district court for said county on a day named. At the same time the district judge, in accordance with a prayer of the petition, suspended the defendant from office, and appointed his successor, upon his giving bond for \$1,000, payable to the defendant. On the day named for the hearing the defendant appeared and answered. The record contains no statement of facts. The answer contained a general demurrer, and a number of special exceptions. Some of the special exceptions were sustained. The general demurrer and other special exceptions were overruled. The relators filed a trial amendment, setting up substantially the same grounds contained in their original petition, and supplying the omissions which had been made the grounds of the exceptions sustained by the court. The trial amendment was sworn to, and, in addition, the certificate of the officers who administered the oath recited that the relators swore "that their original petition filed August 16, 1888, was true." The grounds for removing appellant from office remaining after the court had acted on appellant's special exceptions, and after plaintiff's trial amendment was filed, were substantially: *First*, that the sheriff and *ex officio* tax collector willfully refused to comply with an order of the county commissioners' court requiring him to give a new bond as tax collector; *second*, that said officer willfully failed to pay over, when properly demanded by the commissioners' court, on the 16th day of June, 1888, the sum of \$1,738.61, ascertained on final settlement to be due by him to the county on account of collections of county taxes made by him; *third*, that he willfully failed to collect the occupation taxes; *fourth*, that at the May term, 1887, of the county commissioners' court, that being a regular term of said court, and the time for a regular quarterly settlement with him, he willfully refused to pay over to the county treasurer the sum of \$1,377.45 of county taxes previously collected by him; *fifth*, that at the May term, 1888, of said commissioners' court, that being the regular time for him to make a quarterly settlement, both as sheriff and tax collector, he willfully refused to make any settlement whatever. The jury rendered a verdict finding all of the

charges true, upon which judgment was rendered removing the defendant from office.

The provision of the constitution on the subject is that "county officers may be removed by the judges of the district courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefor being set forth in writing, and the finding of its truth by a jury." Section 24, art. 5. Section 23, art. 5, prescribes that vacancies in the office of sheriff "shall be filled by the commissioners' court until the next general election for county or state officers." The mode of removal of such officers is fully provided for in chapter 2, tit. 66, Rev. St. The law provides that proceedings for that purpose may be commenced in term-time or vacation, by filing a petition in the district court of the county where the officer resides; that the "cause or causes" alleged as grounds of removal shall be set forth in plain and intelligible words; and that the petition shall be sworn to "at or before the filing of the same;" that the judge shall instruct the jury to find from the evidence "whether the cause or causes of removal set forth in the petition are true in point of fact or not, and, when there is more than one distinct cause of removal alleged, the jury shall by their verdict say which cause they find sustained by the evidence before them, and which not sustained;" that, at any time after the issuance of the order for the citation, the district judge may suspend temporarily from office the officer against whom the petition is filed, and appoint for the time being some other person to discharge the duties of the office, but not until the person appointed shall execute a bond, with such conditions as the judge may impose, to pay to the person suspended all costs and damages that he may sustain by reason of his suspension, in case it should appear that the cause or causes of removal are insufficient or untrue; "that the trial, and all proceedings connected therewith, shall be conducted, as far as it is possible, in accordance with the rules and practice of the court in other civil cases;" and that "an appeal or writ of error may be sued out as in other civil cases."

The assignments of error involve substantially the following propositions: (1) That, under the constitution, but one ground of removal can be set up in any one proceeding; (2) that plaintiff's original petition was not properly sworn to, because the county clerk did not attach his seal to his certificate of the administration of the oath, and that on account of such defect all subsequent proceedings were unlawful; (3) that, the original petition not having charged that the alleged delinquencies of the sheriff were corrupt or willful, no amendment of it ought to have been allowed; (4) that the order of the commissioners' court requiring defendant to give a new bond was void upon its face, because it was made without first citing him to appear, etc.; (5) that the district judge has no power to suspend one officer, and appoint another in his stead, until there has been a verdict of a jury, and that the statutes on the subject are unconstitutional; (6) that a want of power, under the constitution, in a district judge, to remove a sheriff from office, involves a want of power to suspend him temporarily, and bestow his office on another.

Clearly the constitution does not intend to limit the legislature in defining the number of causes for which officers may be removed, or, where more causes than one exist, to prevent all from being jointly prosecuted in the same proceeding.

We are not satisfied that the county clerk was required to attach his seal to his certificate, and, if it was necessary, we see no reason why he, being the clerk of the court in which the cause was pending, might not have been allowed to amend the certificate by attaching his seal, or, instead, do what was done in this case, to-wit, readminister the oath to the pleadings as amended. The facts constituting the grounds for removal were set out in the original petition. Some of the grounds, not all, were not charged with the technical precision prescribed by the statute. The defendant exercised his legal right

to except to the defective pleadings, and the court sustained both the right and the law by allowing his exceptions; but the same act of the legislature that conferred upon the defendant the right to object to the pleadings on the grounds taken by his exceptions made it the duty of the court to allow the defective proceedings to be amended under the rules applying to other causes. Not to allow the defective pleadings to be amended, so as to perfect them, would have been fully as flagrant error as to have overruled exceptions taken to them.

The objection urged to the constitutionality of the act of the legislature conferring upon district judges power to suspend the sheriff temporarily, during the pendency of the removal proceedings, is not well taken. It is unquestionably true that the constitution does not allow the legislature to confer upon district judges authority to appoint a sheriff to fill a vacancy. It is equally true that it does not allow the legislature to give him the power to remove one, and thus create a vacancy, without the verdict of a jury. The suspension of an officer may be inconvenient, and may even prove to be a great wrong to him. While the suspension is by the terms of the law only a temporary deprivation of the office, it in every case may be, what it, in effect, was in this, a permanent deprivation of the office. Still a "suspension" is, in no proper sense, the same thing as a "removal." We are not at liberty, by construction or otherwise, to hold that the provisions of the constitution with regard to removals apply equally to suspensions from office. The legislature, finding the power to suspend undefined by the constitution, has regulated its exercise with due regard to the rights of the office-holder. The act, while allowing an appeal, authorizes it to be returned to the next term of the supreme court, wherever it may be in session, and to have there precedence of the ordinary business, and requires it to be decided with all convenient dispatch. The mandate of this court is required to be issued, unless there be cause to the contrary, within five days after the judgment is rendered. The law, through the instrumentality of a bond to the suspended officer, undertakes to preserve him from pecuniary loss, if it shall be ascertained by the verdict of a jury that the alleged causes for his removal are insufficient or untrue. The public interests, as well as those of the office-holder, are to be regarded. The law does not compel the district judges to suspend the officer, but intrusts them with the discretion to do it, as it in like manner trusts to their discretion in many other matters equally important. The safety of the public, and every citizen, is found in the judicious exercise of that discretion. We do not deem it material to decide upon the objection taken that the order of the commissioners' court, requiring the sheriff to give a new bond as tax collector, was void because it shows that it was made without first citing him to appear and show cause. When the right to require a new bond depends, as it does in most cases, upon article 3440 of the Revised Statutes, we think the order would be a nullity if made without first citing the officer to appear and show cause. This article is, however, a general provision for all officers of a certain class, including tax collectors. A different article of the statutes, relating exclusively to tax collectors, confers upon commissioners' courts authority to require them to furnish a new bond or additional security "when-ever, in the opinion of the commissioners' court or comptroller of public accounts, it may be advisable." Article 4733. We think this article controls this question, and that the defendant was properly required to give a new bond without its being necessary to cite him before the order was made. The court below correctly charged the jury that he was entitled to have a reasonable time to comply with the order before being removed for disobedience to it.

To make the judgment in this case correct, it was not necessary for the jury to find all the grounds true that were alleged in the petition. We think either of the charges submitted to it was amply sufficient to sustain the judgment rendered.

It is also assigned that the court erred in refusing, after judgment, to make an order restoring defendant to his office pending his appeal to this court, upon his executing a *supersedeas* bond. The right to suspend exists under the law as long as the litigation continues. The suspension existed prior to, and did not at all depend upon, the judgment. An appeal with a *supersedeas* bond had only the effect of suspending the execution of the judgment. The judgment appealed from removed, but did not suspend, him. The appeal prevented defendant's removal from office during its pendency. His suspension continued afterwards, as before, to await the termination of the litigation. The judgment is affirmed.

MISSOURI PAC. RY. CO. *et al.* v. WORTHAM.

(*Supreme Court of Texas.* February 12, 1889.)

1. CARRIERS OF PASSENGERS—INJURY TO PASSENGERS—WEIGHT OF EVIDENCE.

A judgment for injuries received by a woman in alighting from a train will not be disturbed, as contrary to the evidence, where she was obliged to step down onto a box about 11 inches square at the top, and somewhat larger at the bottom; and plaintiff and several witnesses testify that she was unassisted, that the box was standing on rough stones, and that it tipped as she stepped on it, though several witnesses for defendant testify that plaintiff was assisted in alighting, that the box stood on level gravel, that the accident was due to her stepping on its edge, and that several others alighted by means of the box with safety.

2. SAME—DANGEROUS DEPOT GROUNDS.

An instruction, in such case, that if defendants failed to furnish such facilities or assistance to plaintiff in alighting as prudent and competent persons in the same business would commonly employ in like circumstances, and the injury resulted therefrom, plaintiff should recover, unless guilty of contributory negligence, is not erroneous as against defendants.

3. SAME—ASSISTING PASSENGERS TO ALIGHT—USE OF GROUNDS.

A instruction that it was not defendants' duty to assist plaintiff to alight if reasonably safe and proper appliances were supplied, so that she could with reasonable care have alighted safely, and that if the platform or depot ground at the time of the injury had been in daily use for years, and had proved adequate and safe, then defendants could use the same without the imputation of negligence, and verdict should be for defendants, was properly refused, as the company is bound to furnish the safest appliances.

4. SAME—SAFE APPLIANCES.

A charge, requested by defendants, that if the stepping-stool was a reasonably safe appliance, and was properly placed on ground sufficiently smooth to prevent it from turning by the use of due care by passengers, the jury should find for defendants, was properly qualified by adding the condition that defendants should not be guilty of negligence in using it, nor otherwise guilty of negligence.

5. SAME—CONTRIBUTORY NEGLIGENCE.

An instruction that if plaintiff stepped carelessly or accidentally on or near the edge of the box, and her fall was occasioned thereby, the jury should find for defendants, was properly refused; a proper instruction on contributory negligence having been given.

Appeal from district court, Houston county.

Action by Mrs. C. A. Wortham against the Missouri Pacific Railway Company and the International & Great Northern Railroad Company for injuries received in alighting from a train. Judgment for plaintiff, and defendants appeal.

Burnett & Hays, for appellants. *Nunn & Denny*, for appellee.

GAINES, J. This was an action brought in the court below by appellee against the Missouri Pacific Railway Company and the International & Great Northern Railroad Company to recover damages for a personal injury alleged to have been received by the appellee in descending from a car of the appellant companies. The injury is alleged to have occurred by reason of the negligent failure of appellants to provide safe means for her descent. The undisputed facts are that appellee and her daughter purchased tickets at San

Antonio, and took passage on appellants' train from that point to Crockett. At Taylor it became necessary to change cars. On approaching the last-named place, the car upon which they were traveling stopped at the regular stopping place, but at a point where there was no platform. A stool in the shape of a box, about 11 inches square on the top, and somewhat larger at the bottom, and constructed for the purpose, was placed upon the ground in front of the car-steps to aid passengers in alighting. The appellee left the car after it had reached the station, but in descending she fell, and received the injury of which she complains. There can be but little doubt that the box overturned with her as she stepped upon it. As to the circumstances attending the accident the testimony was conflicting. The appellee, her daughter, and another passenger deposed that she was not assisted in descending from the car by any one. The conductor, the brakeman, and porter on the train testified that they saw the accident, and that the brakeman assisted her in alighting. They were corroborated on this point by two of the passengers. The appellee and her daughter testified that the ground upon which the box was placed was rocky and uneven, but the kind and size of the stones they do not state. The passenger who testified for appellee gave testimony to the same effect, but it is evident he did not know whether stones were broken rocks or mere pebbles. A son-in-law of appellee testified that he saw the ground some time previous to the accident, and that there were fragments of broken rock upon it. Four of defendants' witnesses deposed that the ground was covered with gravel, and was level and smooth as gravel could make it. The testimony of these witnesses also tended to show that plaintiff's fall was caused by her stepping upon the edge of the stool. Such being the evidence, we must hold that appellants' first assignment of error, which calls in question its sufficiency to sustain the verdict, is not well taken. Notwithstanding the testimony of part of appellants that boxes of this character were in general use upon railroads to assist passengers in alighting, and that several passengers used the same box upon this occasion, and that none of them were injured, we do not think that the jury were bound to conclude that the appellants, in using it, exercised that high degree of care which their duty to the appellee required. She was a passenger alighting from the car upon which she had been traveling, to take another, and to complete her trip under her contract with appellants. They owed her the duty of providing, not only a reasonably safe appliance for enabling her to alight, in order to make the transfer, but the safest that had been known and tested. It would be unreasonable to say that a small box or stool which presented the surface of about one square foot, and rested upon a base but a little more extensive, and which was shown to be capable of being overturned, at least by an incautious step, could be as safe as a platform, such as is in ordinary use among railroads. If it were not, the jury were authorized to find that the companies had not exercised the degree of care required of them. It is apparent, from the testimony in the case, that if a platform had been provided, or even a safe substitute, such as could not have been overturned by a step on the edge, the injury in this case would not have resulted; and it follows that no amount of testimony as to the length of time it had been used, and the number of persons who had passed over it securely, or of expert opinion as to its safety, ought to be permitted to overcome the undoubted physical facts in evidence. It follows that, in our opinion, the court did not err in giving the charge complained of in the third assignment of error. The statement under the assignment in the brief is that "the court charged that if defendants failed to furnish such facilities, appliances, or assistance to plaintiff in alighting at Taylor as prudent and competent persons in the same business would commonly employ in like situations and circumstances, and plaintiff's injury resulted therefrom, to find for her, unless she was guilty of contributory negligence." If there is error in this, it is an error which is favorable to appellants.

The appellants also asked the following instructions, which were refused: "It was not the legal duty of defendants to have assisted plaintiff in alighting from the car, if reasonably safe and proper appliances were supplied, so that she could with reasonable care have safely alighted therefrom." "If the platform or depot ground at Taylor, at the time of the injury received by plaintiff, and the stepping-stool on which she alighted, had been in daily use for years, and had proved adequate and safe for receiving and delivering passengers, then defendants could use the same without the imputation of negligence; and, if you so find the facts, you will find for defendants." It may be conceded that if appellants had had a proper platform at the station, upon which the passengers could have alighted, their duty as to this matter would have been discharged, and that they were not called upon to render personal assistance. But we think, in order for them to claim immunity for the failure in this particular, and for the use of an appliance less safe, it was their duty at least to render such assistance to passengers as to make the use of the stool as safe as a platform would have been. From what we have already said, it is obvious that the latter instruction requested should not have been given. The carrier must furnish the passenger not only a reasonably safe appliance, but the safest.

It is also complained that the court erred in qualifying charge No. 3 asked by appellants. The charge, as qualified, is as follows: "If you believe from the evidence, or a preponderance of the evidence, that the stepping-stool used by defendants for passengers to alight on, at the time plaintiff was injured, was a reasonably safe appliance for the purpose, and it was properly placed on ground sufficiently smooth or even, so as to prevent it from turning or tilting by the use of due care on the part of passengers, *and the defendants were not guilty of negligence in using it, nor otherwise guilty of negligence*, you will find for defendants." The modification consisted in the insertion of the words which appear in italics. We think the charge was not proper without the qualification, and with it is quite as forceable as appellants had a right to demand.

The appellants also asked a charge to the effect that "if the plaintiff stepped carelessly or accidentally on or near the edge of the box, and her fall was occasioned thereby," the jury should find for defendants. This charge was also refused, and in this there was no error. A proper instruction upon contributory negligence had been given in the general charge. This, counsel for appellants admits in his brief. There is no middle ground. If plaintiff exercised due care in stepping upon the box, and she was thrown down and injured, it follows that it was not the best appliance that could have been used to insure the safety of passengers in descending from the cars, and the companies were guilty of negligence. If there had been a platform, the accident could not have happened. There was negligence either upon the one side or the other, and hence there was no evidence upon which to base a theory of pure accident.

The whole case comes to this: that if the plaintiff's own negligence did not contribute to the injury, (upon which the jury were fairly and pointedly instructed,) upon the undisputed facts in evidence, the appellants are responsible for the injury. Even if it had been proved that assistance was rendered to plaintiff in descending from the car, it would but have shown that, despite the help, the stool was still unsafe.

We find no error in the judgment, and it is affirmed.

GULF, C. & S. F. RY. CO. v. JAMES.

(Supreme Court of Texas. February 12, 1889.)

1. MALICIOUS PROSECUTION—DAMAGES—EXCESSIVE.

In an action against a corporation and its agents for malicious prosecution, in which \$15,000 actual and \$15,000 exemplary damages were demanded, the court charged that a corporation and its agents are jointly and severally liable for the willful acts of the agents within their authority or ratified, done with malice, and without probable cause. There was evidence that the prosecution prevented plaintiff from obtaining employment, or made it necessary to do labor he was not accustomed to, and estranged him from his associates. *Held*, that a verdict for \$3,000 actual damages against the corporation alone did not appear to be the result of improper influences, or contrary to law, so as to require a reversal.

2. SAME—EVIDENCE—MALICE—ACTUAL DAMAGES.

The alleged malicious prosecution was for perjury in testifying that a passenger coach of defendant corporation had a loose wheel before it was wrecked. There was evidence that soon after the accident a telegram between defendant's agents contained the words, "loose wheel;" that its general manager said, "Of course, we understand it, but the world does not;" and the general manager had heard that in a previous proceeding another witness had testified that the wreck was caused by a loose wheel. *Held*, that the jury were authorized to find a want of probable cause, and from that to infer malice, and that, a verdict for exemplary damages being therefore authorized, a verdict for actual damages only would not be set aside.

3. SAME—ADVICE OF COUNSEL.

That defendant acted under advice of counsel is not conclusive of probable cause.

4. RAILROAD COMPANIES—AUTHORITY OF MANAGER.

The jury may find that one who has the control and direction of the entire business affairs of a railroad company, and whose duty it is to prepare the case of the company in litigations affecting it, has authority to institute a prosecution for perjury, alleged to have been committed in any such litigation.

5. TRIAL—INSTRUCTIONS.

Where the evidence on the issue of probable cause is conflicting, the court is not required to state the evidence, which, if true, would establish a want of probable cause, and instruct that, if such evidence is believed, there was not probable cause; or to state that which, if true, would establish probable cause, and instruct that, if that is believed, there was probable cause.

6. JUDGMENT—RES ADJUDICATA—SETTING ASIDE.

Where a judgment on a verdict against one and in favor of the other defendants, who are jointly and severally sued, is set aside, and a new trial granted on the motion of the former, such judgment is not *res adjudicata* as to the latter defendants.

7. TRIAL—VERDICT—SEVERAL DEFENDANTS.

Where the jury are instructed that their verdict, if against some, but not all, of several defendants, should state the defendants against and in favor of whom they find, a verdict stated to be in favor of the plaintiff against a defendant named is sufficient, and upon it the other defendants are properly discharged with their costs.

Commissioners' decision. Appeal from district court, Galveston county.

Action by W. W. James against the Gulf, Colorado & Santa Fe Railway Company, Webster Snyder, and James Spillane, for malicious prosecution. The interview between James and Snyder, concerning the cause of the wreck in question, occurred September 16, 1884. The prosecution was instituted September 26, 1884. Defendant railroad company appeals.

R. S. Walker, M. C. McLemore, and J. W. Terry, for appellant. F. C. Hume and Howard Finley, for appellee.

HOBBY, J. This suit for damages grew out of the arrest and alleged malicious prosecution of the appellee, James, for the offense of perjury by the appellant, acting through its general manager, Webster Snyder, and Spillane, his clerk, acting under said manager's directions, all of whom are jointly and severally sued. The petition contains all of the allegations necessary to maintain the action.

The defense was a general denial, plea of *res adjudicata*, probable cause, and that appellant acted without malice. Exceptions were sustained to the plea of *res adjudicata*. A trial resulted in a verdict for plaintiff against the

appellant alone, for the sum of \$8,000 actual damages, upon which judgment was rendered against appellant for that sum in favor of the plaintiff, and the defendants Snyder and Spillane were discharged with their costs.

The affidavit made by Spillane, upon which the arrest and prosecution of James were had, charged that in a civil cause pending in the district court of Galveston county, wherein one A. W. Fly was plaintiff and appellant was defendant, brought to recover damages for personal injuries caused by the derailment and wreck of a passenger train of appellant, the said James testified by deposition falsely, willfully, and knowingly as follows: "I saw a loose wheel on a hind passenger coach, with a hot box," (referring to a passenger train of appellant at Rosenberg, about the 20th or 25th of April, 1884,) "and the car inspector of appellant packing said box. The wheel had slipped from its proper bearings, and the axle had worn bright by the friction of the wheel. The car inspector of appellant and the Sunset route were both present, and saw the condition of the wheel; and while the box was being packed the inspector of the Sunset route remarked, 'That if the car was on his line he would set it out.' This remark was made in my hearing. Cannot remember the exact conversation that took place, but it was to the effect that it was dangerous to send that car on. I was under the impression that the car would be set off; but when I saw the train go on, remarked to the inspector of appellant, 'It was a d—d bad job.' He remarked, 'I guess she'll run.' I saw the train on its arrival at Rosenberg depot. It was not in a condition to proceed on its journey with safety, in consequence of the wheel of one of the coaches being loose. Am satisfied the train was wrecked in consequence of the condition of the wheel. Appellant's inspector afterwards told me he was required to report the condition of the train on the morning of the accident, and asked me what he should say. I told him to tell the truth. He said he would do no such thing; he would report only a few hot boxes. On the morning of the day of the accident one of appellant's coaches had one loose wheel. My attention was attracted by the condition of the wheel. It was so glaring I could not pass it unnoticed. I did not ask Snyder, general manager of appellant, for a position on his road, or intimate that I desired one."

Under the first assignment the objection is made that the verdict is not responsive to the charge, which directed the jury, in the event their verdict should be against some of the defendants and not all of them, the verdict should state the defendant or defendants against and in favor of whom the jury should find. This objection is one which, we think, goes rather to the form than the substance of the verdict. All of the defendants were sued, and the verdict was in plain language in "favor of the plaintiff against the defendant the Gulf, C. & S. Fe Ry. Co." The verdict, by necessary implication, found in favor of the defendants Snyder and Spillane. If they entertained any doubt as to that it could have been corrected at the time. There was certainly no ambiguity in the verdict as to appellant. In cases where the verdict was not altogether certain, it has been uniformly held in this state that it should be upheld when its meaning can be made manifest beyond doubt by reference to the entire record. *Pearce v. Bell*, 21 Tex. 691; *Avery v. Avery*, 12 Tex. 57. In a case where separate issues were submitted to the jury, with directions to find upon each, and the verdict responded in general terms, the failure to find upon the issues as instructed was held not to affect the verdict. *Johnson v. Richardson*, 52 Tex. 483. In this case the judgment correctly interpreted the finding of the jury in favor of defendants Snyder and Spillane by discharging them with their costs.

The exception to defendants' plea of *res adjudicata* we think was properly sustained. At a previous trial a verdict had been rendered in favor of the plaintiff against defendant Snyder, and finding appellant and defendant Spillane not guilty. Upon this verdict judgment was entered in their favor, that plaintiff take nothing by his suit, and they were discharged with their costs.

This judgment was set aside, and a new trial granted upon motion of the defendant Snyder alone. Upon this trial it was pleaded in bar of plaintiff's right to recover from appellant. The effect of the order granting a new trial on the motion of defendant Snyder, who was, with appellant and Spillane, jointly and severally sued, was to vacate the former judgment, and operated as a new trial as to all of the defendants. *Long v. Garnett*, 45 Tex. 401; *Wootters v. Kauffman*, 67 Tex. 488, 3 S. W. Rep. 465.

The court charged the jury that "where the agents of a corporate company act for and in behalf of the company, and within the scope of their powers, or are ratified by the company, and such acts are willfully and purposely done with malice and without probable cause, the company and their said agents so acting are all, and each jointly and severally, liable for the damages which such acts cause to the injured party." It is contended that as the verdict is against only the appellant, and as the appellant could have only acted through its agents, its co-defendants, who were held guiltless of any wrong, that therefore the verdict is in total disregard of the law, and the charge of the court. It is claimed that the verdict is capricious, and not accounted for by the evidence, and is manifestly found without reference to the law or evidence, because all of the evidence showed that the appellant only acted in the prosecution of James, if at all, through Snyder and Spillane, its co-defendants; and that, if any wrong was done, it consisted in the institution and conduct of the prosecution of appellees by Snyder and Spillane, or one of them, and not otherwise through any act of appellant; and that, notwithstanding the charge that there arose a joint and several liability as between all of the defendants, yet appellant alone was found guilty. It may be admitted, we think, that for the reason assigned the verdict is not altogether consistent, and it may be said to be contradictory; but it does not necessarily follow that this alone will be sufficient to impair or destroy the validity of a verdict. In actions growing out of that class of torts characterized by the existence of a wrongful intent, as distinguished from torts arising from negligence, the rule is recognized as just which compels each of the wrong-doers, when such, to bear and assume the responsibility of all. The injured party may sue one, any number, or all, chargeable with the tort, and it is no defense, if one is sued, that the others are not required to share his responsibility; nor, where all are sued, would it be any defense that one only is made to assume the liability for the acts of all. The reason is, there can be no contribution as between them. Cooley, Torts, *193. "While the law permits all the wrong-doers to be proceeded against jointly, it also leaves the party injured at liberty to pursue any one of them severally, or any number less than the whole, and to enforce his remedy regardless of the participation of the others." *Id.* Had the verdict in this case been against all of the defendants, the liability of the appellant would not have been less than this, as the verdict now stands. The verdict, then, not being in a violation of the principles of law applicable to this class of torts, the question involved in the proposition contended for is simply whether a capricious or inconsistent verdict alone will impair its validity and of itself authorize a reversal? We think not. That it may be a significant circumstance illustrative of passion or prejudice or misconduct, when connected with other circumstances sufficiently strong to indicate these, is no doubt true; but alone, unsupported by anything else in the record tending to show misconduct, it has been held not to be, of itself, adequate cause for a reversal.

In the case of *Railroad Co. v. Gordon*, 70 Tex. 90, 7 S. W. Rep. 695, it is said "that if the verdict in one material respect was the result of prejudice, passion, or other influence, not arising from a dispassionate consideration of the evidence, the inference is very strong," when it was for a large sum, that that feature of it was similarly controlled. In the case cited special issues were submitted to the jury, directing them to respond in their findings as to whether the accident was caused by a defective road-bed, or was the result

of a defective locomotive. There was an affirmative reply to each issue thus submitted. The objection was made to the verdict in that case, as in this, that it indicated passion and prejudice, and was contradictory. The court recognized it as being inconsistent, so far as it held that both were the efficient cause of the accident. But it was said that this did not furnish a sufficient reason for a reversal if, by looking to the entire case, it was ascertained that the verdict was uninfluenced by other improper motive. It was ascertained, in looking to the assignment in that case as to the excessive verdict, that the amounts sued for—\$25,000 actual, and \$25,000 exemplary, damages for personal injuries—were assessed by the verdict.

Pursuing the rule adopted in the case cited, and considering the assignment in this case complaining of the verdict being excessive, we find the amount sued for as damages caused by the alleged malicious prosecution of appellee for the offense of perjury to be \$15,000 actual, and \$15,000 exemplary damages, and the amount found in his favor to be \$8,000 actual damages,—but little in excess of one-half of the actual damages claimed, and under evidence to the effect that the result of the prosecution was to break the appellee up; prevented him in a measure from obtaining employment; required him to perform labor he had not previously done; and estranged from him those, or many of them, with whom he had associated in his business vocation. It will be seen, then, that in looking to the amount of damages assessed, and considering it in connection with the inconsistency of the verdict with respect to the feature of it referred to, it cannot, we think, be said that it shows that the verdict was the result of improper influences, or is contrary to law, or indicative of that misconduct which would authorize a reversal upon that ground.

It is insisted in the argument of appellant under the eighth assignment that, the verdict being confined to actual damages, demonstrates that the defendant did not act with malice or without probable cause; and that the facts fail to show a want of probable cause for the arrest of plaintiff, and, rationally considered, they point to no circumstances showing the existence of malice. The testimony is conflicting as to whether there was that want of probable cause which has been long recognized as an essential element in this action; and, the jury having found that there was no probable cause for the prosecution of James, it is unnecessary to determine whether a reasonable consideration of the facts point to the existence of malice, because the jury could infer malice if the evidence authorized them to believe that there was an absence of probable cause. That it was believed, prior to the deposition of James and his prosecution, that a loose wheel was the cause of the wreck of appellant's passenger coach at Kinney, in April, 1884, was a fact known to Snyder, appellant's general manager. There was evidence that a few days after the accident (which gave rise to the Fly suit and the others pending at the time of the prosecution) a telegram was shown Snyder by Crowley, the road-master, from Newton, the train-master, containing the words, "loose wheel;" that Snyder complimented Newton's brevity, and remarked, "Of course, we understand it, but the world does not." It was in evidence, also, that reports had been made of the accident, which were filed in the proper offices of the company, and which were under Snyder's control in May, 1884. When the plaintiff interviewed him, he knew about the loose wheel. Crowley had testified in some case then pending to the effect that the wreck was caused by a loose wheel, and Snyder had heard of this testimony, but had not seen the deposition of Crowley. From these and a number of facts testified to, the jury believed that there was no probable cause, as defined by law, for the prosecution of James for perjury by reason of the deposition taken in the case of Fly against the appellant. There being evidence from which the jury found there was no probable cause for the prosecution; they may have inferred malice from that fact. We do not think that because the jury have

found both a want of probable cause and malice, and might therefore have assessed exemplary damages, but found only actual damages, this would afford a reason for setting aside the verdict on the ground that such a finding indicated that there was no malice. If the proof would have supported a verdict for \$15,000 actual damages, it would furnish no ground for setting aside the verdict that it found only \$3,000 actual damages.

The proposition under the eighteenth assignment is that "where there is a substantial dispute about the facts upon the issue of probable cause, the court should state the evidence, if any, which, if true, would establish a want of probable cause, and instruct the jury, if they believe such evidence, then there is not probable cause, and should state that which, if true, would establish probable cause, and instruct the jury, if they believed that, there is probable cause." We think if this instruction had been given it would have been error. The definition contained in the charge of the court of "probable cause" is in accord with the authorities, and is uniformly accepted as correct. When the facts are in controversy, the question of probable cause must necessarily go to the jury, and the court should give such instructions as will enable them to draw correct conclusions from the facts as they find them. *Landa v. Obert*, 45 Tex. 589. This rule, stated in the case cited, is followed by the definition of probable cause which it was said should have been given in that case, and which in this was given.

It is earnestly insisted that the court should have instructed the jury that as a matter of law Snyder was not authorized, by reason of the fact that he was general manager of appellant, to institute, or authorize the institution of, the prosecution against James for the company, because as a matter of law it was not within the scope of a general manager's business of a railroad company to institute such proceedings, and that unless there was other evidence than the fact that he was such general manager, from which the jury believed he had such authority, they should find for the defendants. We do not think the jury should have been charged to the effect that, as a matter of law, Snyder was not authorized by reason of the fact that he had the entire control and management of the business interests of appellant to institute or authorize the institution of the prosecution against James. Whether this was within the legitimate scope of his powers as such general manager acting for and on behalf of the company was a question of fact to be determined by the jury. Whether the servant did the act with a view to his master's service, or to serve a purpose of his own, is a question for the jury. *Pierce, R. R.* 279. Nor is it any defense that the particular act by which the injury was inflicted was not authorized by the charter. *Id.* 280. The general authority to do the act may be inferred from the nature of the employment, and the usual course of business. In the case cited by appellant, (*Pressley v. Railroad Co.*, 11 Amer. & Eng. R. R. Cas. 229,) the rule is there laid down "that if the agent, while acting within the range of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of the authority conferred upon him or implied in his appointment, the master or employer is responsible," etc. This is said to be a modification of the former less satisfactory rule, which required "the willful act to have been previously ordered or subsequently ratified." In the case cited it was held that "an agent of a railroad company, having authority as the land agent of the company to make leases, collect rents, stumpage, etc., did not have authority to institute a criminal prosecution for offenses committed with reference to the property in his custody, and bind his principal in damages for a malicious prosecution." In that case the evidence limited the authority of the land agent to the matters of supervising or looking after the particular lands of the company, collecting the rents, etc. In the present case, the evidence indicates that the entire business affairs and interests of the company were under the control and direction of Snyder. His testimony

before the recorder's court, reproduced on this trial, was that he had authority to conduct the prosecution. As the manager of appellant, its property, road, and facilities for transportation were used under his authority for that purpose. It was shown to be within the line of his duty to look after and protect the business interests of the company; to prepare the papers and facts in the litigations affecting its rights. Suits were then pending in different portions of the state for damages arising from the wreck of the train at Kinney, caused by a loose wheel, and it was within the scope of his powers if he had probable cause to believe that false testimony was being given in those cases, to take the proper steps to disclose that fact, and protect the company. Had the evidence shown to the jury's satisfaction that such probable cause did exist, it would have been beneficial to appellant's interests in its effect upon the suits then pending. Out of this right which the general manager has to protect the interests of appellant grows a corresponding liability for damages in the event of its exercise, as in this case, without probable cause, and in such a manner as to bring it within the definition of a malicious prosecution.

In an action for malicious prosecution against a railroad company, where it was contended that the power of instituting a criminal proceeding was not conferred upon it by law, it was said: "Conceding that a corporation cannot be bound unless for an act done in pursuance of some object embraced by its charter, or conferred by law, it is not always or necessarily outside of the objects and privileges of a railroad company to prosecute criminal offenders. It is the object of such companies to acquire and protect its property by every lawful means. It is a lawful and commendable means to protect it by the institution of criminal proceedings against those infringing such rights, etc. * * * No law or public policy restrains them in this respect, and to hold that they cannot be held to a proper accountability would endow them with an invidious privilege." *Ricord v. Railroad Co.*, 15 Nev. 176. Discussing in the same connection the character of proof requisite in such a case to show that a prosecution was instituted and conducted by its authority, it was further said: "We do not consider it necessary to produce a resolution of a board of directors." "In the absence of opposing proof," it was said that "its legal advisers, acting in conjunction with such of its agents and servants as have knowledge of the facts, will be authorized to institute the proper proceedings."

We do not think probable cause is conclusively established by proof that defendant acted under the advice of counsel. This may be considered as a circumstance showing both want of malice and supporting the defense that there was probable cause; but we do not understand that it conclusively establishes the existence of the latter, or the absence of the former. *Jacobs v. Crum*, 62 Tex. 411.

We have considered the assignments relied upon in the argument of appellant for a reversal, also several mentioned in the brief of appellant, and we are of opinion that the judgment should be affirmed.

STAYTON, C. J. Report of commission of appeals examined, their opinion adopted, judgment affirmed.

WILSON v. STATE.

(Court of Appeals of Texas. January 16, 1889.)

1. INDICTMENT AND INFORMATION—COMPLAINT—EVIDENCE.

Code Crim. Proc. Tex. art. 481, forbids that an information be presented till oath has been made, charging the offense. Article 36 requires that this oath, called a "complaint," be filed with the information. *Held*, that a trial under an information cannot be proved by introducing in evidence the information alone, but the complaint is also essential.

2. PERJURY—INSTRUCTIONS—SUFFICIENCY OF EVIDENCE.

Under Code Crim. Proc. Tex. art. 677, requiring the court to set forth distinctly the law applicable, whether asked or not, the provision of article 746, that no person shall be convicted of perjury, except on testimony of two credible witnesses, or of one strongly corroborated, must be stated in the instructions, on a trial for perjury.

3. SAME—"CREDIBLE WITNESS."

A "credible witness," within the meaning of the statute, is one who, being competent to give evidence, is worthy of belief.

Appeal from district court, Fayette county; H. TEICHMUELLER, Judge.

Albert Wilson, convicted of perjury committed on the trial of William Bean for carrying a pistol, appeals.

W. H. Ledbetter, for appellant. Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. In all cases of prosecution for perjury committed in a judicial proceeding it must be made to appear, by the allegations of the indictment, that the court had jurisdiction of the judicial proceedings, (Willson, Crim. St. § 307,) and it is equally as important and necessary that the evidence should sustain the allegation in order to warrant a conviction. It was alleged in the indictment in this case that the judicial proceeding was a trial in the county court, "wherein one Bean was duly and legally charged by information" with unlawfully carrying a pistol on or about his person, etc. To sustain this allegation, the prosecution simply introduced in evidence the information. This was not sufficient. An information cannot be presented until oath has been made by some credible person, charging the defendant with an offense. Code Crim. Proc. art. 431. This oath is called a "complaint." It is the basis and foundation upon which the information rests, and is a necessary part, and must be filed with the information. Id. art. 36. Without a complaint, an information would be wholly invalid, and would confer no jurisdiction upon the court, and would be worthless for any purpose. Willson, Crim. St. § 1999. It follows, then, that, in order to sustain an allegation of a judicial proceeding by information, not only must such information be introduced in evidence, but the complaint upon which it is based or founded must be also introduced.

Another fundamental error appears upon this record. It is a fatal omission in the charge of the court to the jury. An express provision of our statute, with regard to perjury and false swearing, is that, "in trials for perjury, no person shall be convicted except upon the testimony of two credible witnesses, or of one credible witness corroborated strongly by other evidence, as to the falsity of the defendant's statements under oath, or upon his own confession in open court." Code Crim. Proc. art. 746, *Hernandez v. State*, 18 Tex. App. 134; *Anderson's Case*, 24 Tex. App. 706, 7 S. W. Rep. 40; *Maine's Case*, 9 S. W. Rep. 51. Article 746, as thus quoted, is as much a part of the law of perjury as is any other found in our Penal Code relative to that offense, and, when the accused has not confessed his guilt in open court, that article, or the substance thereof, should be given in charge to the jury; it being imperative in felony cases that the court "shall distinctly set forth the law applicable to the case, whether asked or not." Code Crim. Proc. art. 677. It is fundamental error to fail to give such instruction. *Washington's Case*, 22 Tex. App. 26, 3 S. W. Rep. 228; *Gartman v. State*, 16 Tex. App. 215; Willson, Crim. St. § 312. A "credible witness," as used in that article, means "one who, being competent to give evidence, is worthy of belief." *Smith's Case*, 22 Tex. App. 197, 2 S. W. Rep. 542.

For the errors discussed, the judgment is reversed, and the cause remanded.

SMITH v. STATE.

(Court of Appeals of Texas. January 16, 1899.)

1. PERJURY—MATERIALITY OF STATEMENT—QUESTION FOR COURT.

The materiality of a false statement, charged as perjury, is a question for the court, and a special instruction submitting the question to the jury was properly refused.

2. CRIMINAL LAW—APPEAL—INSTRUCTIONS—PRESUMPTIONS.

When there is nothing to indicate on appeal that requested instructions were refused, it will be presumed they were given.

3. SAME—GENERAL INSTRUCTIONS.

Requested instructions which are already substantially given and covered by the general charge, are properly refused.

Appeal from district court, Fayette county; H. TEICHMUELLER, Judge.

William Smith, convicted of perjury, appeals.

Phelps & Lane, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. This is a companion case to that of *Wilson v. State*, ante, 749, (just decided,) and was a prosecution for perjury committed in the same judicial proceeding, and assigned upon the testimony of this defendant given as to the same subject-matter. But in this case the errors for which the *Wilson Case* has been reversed have not been committed. In this case the complaint upon which the information in *Bean's Case* was based, was introduced in evidence, and the charge of the court substantially complied with the provisions of article 746 of the Code of Criminal Procedure relative to the testimony essential to a conviction. Defendant's motion to quash the indictment was properly overruled; the indictment being in all essential particulars in substantial compliance with the law, and the approved forms and previous adjudications upon the validity of indictments in such cases. Penal Code, art. 188; Willson, Crim. Forms, No. 122, and notes 1, 2; Willson, Crim. St. § 908, and especially under the head "Materiality."

No exception appears to have been taken to the charge of the court as given, and it does not appear that defendant's specially requested instructions were either given or refused,—there being no indorsement by the judge upon them. Taken as a whole, the charge, in our opinion, sufficiently submitted the law of the case in regard to the matters complained of, especially in the absence of exception as to any particular portion; and, in fact, it could not be said to be defective, even had such exception been reserved, because, in its entirety, it presented the law fully, and in a manner so that the jury could not have been misled to the prejudice of defendant.

As to defendant's specially requested instructions, the rule is: If requested instructions are "given" or "refused," they must be authenticated by the judge's signature, and, when nothing indicates that they were refused, it will be presumed on appeal that they were given. Willson, Crim. St. §§ 2354-2356. It is true that one of the grounds of defendant's motion for new trial, and one of the assignments of error, is the refusal of the court to give these special instructions. Suppose this entitled them to consideration as refused instructions, then it appears from said instructions that those which were legal had already been substantially given in and covered by the general charge, and the others, to-wit, the third, fourth, and sixth, should not have been given, because the materiality of the false statement assigned as perjury is a question for the court, and not the jury. *Jackson v. State*, 15 Tex. App. 579; *Donohoe v. State*, 14 Tex. App. 638; *Davidson's Case*, 22 Tex. App. 372, 3 S. W. Rep. 662; *Washington's Case*, 23 Tex. App. 336, 5 S. W. Rep. 119.

The only remaining supposed error is presented in defendant's bill of exceptions No. 2, as to remarks made by the district attorney in his closing argument. These remarks were in reply to matters commented upon by de-

defendant's counsel; were perfectly legitimate under the circumstances; and, were it otherwise, no harm or prejudice to defendant's rights is made to appear on account of said remarks. *Bass v. State*, 16 Tex. App. 62; *Pierson v. State*, 18 Tex. 524; *House v. State*, 19 Tex. 227.

We have failed to find any reversible error in this record, and the judgment is therefore affirmed.

WESTERN UNION TEL. CO. v. SHEFFIELD *et al.*¹

(*Supreme Court of Texas*. October 26, 1888.)

1. TELEGRAPH COMPANIES—DELAY IN TRANSMITTING MESSAGE—KNOWLEDGE OF URGENCY.

Plaintiffs sued defendant telegraph company for delay in transmitting the message, "You had better come and attend to your claim at once," sent to them by a bank which was holding notes for collection for plaintiffs against a failing debtor. *Held*, that the language of the message was sufficient, of itself, to indicate to the operator the urgency of the message, so as to bring such matter into the contemplation of the parties in sending the message.

2. SAME—NOTICE.

The necessity of speed and carefulness was sufficiently shown by the message, without the addition of the names of the debtors, the claims against whom demanded attention.

3. DAMAGES—PROXIMATE AND REMOTE CAUSE.

Through failure to deliver the message promptly, other creditors attached the property of the debtors before plaintiffs received the message; and the property, when sold by the sheriff, brought less than the amount of their attachment liens. *Held*, that the fact that the estimated value of the real estate sold by the sheriff was greater than the amount realized at the sale, and sufficient to pay plaintiffs' claim, did not impose on the plaintiffs the duty of buying the same, and discharging the prior liens, in the absence of evidence that plaintiffs were able to do so, and that it was their duty as ordinarily prudent men to do so.

4. SAME—MEASURE—INTEREST.

In such case the measure of damages is the value of the notes held by plaintiffs against the debtor, the cost of the message, with 8 per cent. interest to day of trial.²

Appeal from district court, Marion county; W. P. McLEAN, Judge.

This suit was brought by the appellees, S. Sheffield & Son, in the district court of Marion county, to recover of appellant actual and exemplary damages for delay in transmitting the following telegram: "OCTOBER 27th, 1888. To S. Sheffield & Son, Lodi, Texas: You had better come and attend to your claim at once. [Signed] W. T. ATKINS." Appellees allege that the said message was delivered to appellant's agent at Jefferson, Tex., by W. T. Atkins, the cashier of the National Bank of Jefferson, Tex., at 3:30 P. M. of October 27, 1886, and was not delivered to appellees, Sheffield & Son, until 8 o'clock A. M. on October 28, 1886; that Lodi was only nine miles from Jefferson, Tex., and that appellees, the Sheffields, were in Lodi from the date of sending said message up to the time of its delivery to them; that they were merchants doing business in said town, and were well known there, and were well known to appellant's agent in said town; that the failure to transmit and deliver the said message was caused by the gross and wilful neglect of appellant and its said agent. Appellees' bases of damages, as claimed, are that they held three notes of Jones, Edgeworth & Sellers,—one for \$677.74, of date 29th of July, 1886, payable September 15, 1886, with interest at 1 per cent. per month from maturity; and one for \$523.85, dated August 31, 1886, payable 60 days after date, with interest at 1 per cent. per month from maturity; and

¹Publication delayed through inaccessibility of necessary matter.

²See, as to the measure of damages in actions against telegraph companies for negligence in the transmission of messages, *Telegraph Co. v. Way*, (Ala.) 4 South Rep. 844, and note.

one for \$472.41, dated September 3, 1886, due in 60 days from date, with interest from maturity at 1 per cent. per month; an open account, held and owned by appellees against Jones, Edgeworth & Sellers, for \$1,000; and that because of the gross negligence they ask judgment in exemplary damages in the sum of \$2,500, in addition to the actual damages claimed by them. Appellees allege that the three notes mentioned by them were deposited with the National Bank of Jefferson for collection as they matured, and with instructions to carefully guard the interests and rights of appellees, and that the bank became possessed of information of the failing condition of Jones, Edgeworth & Sellers on the day of the delivery of the message to appellant's agent at Jefferson, and its cashier, W. T. Atkins, sent said telegram to appellees to apprise them, so that they could take steps to secure their said debts; that Jones, Edgeworth & Sellers had, at the time of the delivery of the message to appellant's agent at Jefferson, property, real and personal, of the reasonable value of \$10,000 over and above all exemptions,—more than sufficient to pay appellees's debts. Appellees further allege that about 12 o'clock on the night of October 27, 1886, creditors of Jones, Edgeworth & Sellers, namely, J. H. Bemiss, W. J. Sedberry, and R. Ballauf & Co., and others, sued out writs of attachment against them, amounting, with probable costs, to the sum of \$10,000; which attachments were, at or about 7 o'clock in the morning of the 28th of October, 1886, levied by the sheriff of Marion county, Tex., on all the property of said firm, Jones, Edgeworth & Sellers, real and personal, in Marion county, Tex.; that the personal property has been sold under said attachments at public auction, and the amount realized therefrom is insufficient to pay off the balance due upon said attachments, and that the real estate of said Jones, Edgeworth & Sellers is insufficient to pay off the balance due upon said attachment suits, and that the said property levied on and sold was the only property owned by the said Jones, Edgeworth & Sellers, and that the seizure and sale thereof have exhausted their assets, and they are now insolvent; that, if said telegram had been promptly transmitted and delivered, appellees would have instituted suit, sued out an attachment prior to the other attaching creditors, and have made their said debts out of said Jones, Edgeworth & Sellers; that they made demand in writing of appellant for the damages sued for herein, within 60 days, and that no part thereof has been paid. Appellant, answering, pleads: (1) A general demurrer; (2) a special demurrer that the allegations in plaintiff's petition are insufficient in law to recover exemplary damages; (3) a general denial. The court overruled the general demurrer, to which action exceptions were taken by appellant. It sustained the special exception as to exemplary damages, and in open court all claim thereto was withdrawn by appellees. A trial of said cause was had on the 18th day of June, 1888, which resulted in a judgment against the appellant for the sum of \$1,684.40, with interest at 8 per cent. per annum from the 28th of October, 1886, and all costs of suit. Appellant's motion for new trial was overruled. Notice of appeal given in open court, and by this appeal appellant seeks to reverse the said judgment upon the errors assigned by it herein.

Stemmons & Field, for appellant. *Charles A. Culbertson*, for appellees.

WALKER, J., (*after stating the facts as above.*) The questions involved in this appeal have received much attention from the courts of this state, and the case may be determined by the application of principles which have been recognized from time to time, and so often that they may be followed without question. The first and second assignments of error put in issue the sufficiency of the message itself to give notice of its purpose and importance. The message, "You had better come and attend to your claim at once," addressed to the plaintiffs from Jefferson, indicated with reasonable certainty to the telegraph operator the facts (1) that plaintiff had a claim of some pecu-

lary nature; (2) that the claim should be attended to at Jefferson; (3) that the matter was urgent,—“at once;” and (4) loss would probably follow want of such attention, which might be prevented by obeying the call made in the dispatch. This was sufficient to disclose that the object was to enable plaintiffs to attend to a claim due them, and that loss might result from a failure to transmit the message with promptness.

The second assignment of error further complains of the refusal of the court to instruct the jury, at request of appellant, “that unless they find from the evidence that defendant knew from the message, or from the facts communicated to it at the time it accepted said message, that the object of said message was to enable plaintiff to collect his debt from Jones, Edgeworth & Sellers, the loss of said debt cannot be estimated by them in arriving at the damage done plaintiffs.” The rule in *Hadley v. Baxendale*, 9 Exch. 341, adopted in Texas, for the measure of damages, and applied to telegraph companies in their work, is: “Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.” The last clause in this citation is further explained and enlarged in *Baldwin v. Telegraph Co.*, 45 N. Y. 750, cited by the court in *Daniel v. Telegraph Co.*, 61 Tex. 457. “The damages given by way of indemnity have been the natural and necessary consequences of the breach of contract in the minds of the parties, interpreting the contract in the light of the circumstances under which it was made; and when a special purpose is intended by one party, but is not known to the other, such special purpose will not be taken into account in the assessment of damages for the breach.” In other words, when applied to this case, the telegraph company should not be chargeable with any intent or purpose of which it is not informed, either by the terms of the message or otherwise. The charge asked was intended to limit the “special purpose” to the collection of the claim against Jones, Edgeworth & Sellers, and appellant insists that any less information would not place such claim within the contemplation of the parties when the message was delivered to the operator. The terms “special purpose” and “notice,” used in the definitions above, should receive reasonable interpretation, with reference to the subject to which they are applied. So far as would be important to the telegraph company, it would be sufficient, to caution it against probable loss, that it be informed that the message related to a pecuniary claim which was in danger and needing attention. It is elementary that by notice is included knowledge of and means of knowing the fact. That the claim was against the particular firm was and could have been of no concern to the telegraph company. No greater or other care would have been anticipated to protect a claim against one firm than another, in absence of any other fact. That the message was for the special purpose of enabling the plaintiffs to attend to a money claim at Jefferson was a sufficiently specific designation of the importance and purpose of the message, and this was evident from its terms. The natural consequences of failure to give at once the attention to the claim can be considered as within the contemplation of the parties. The court probably would have been justified in charging the effect of the terms used in the dispatch. This was not done. The jury were instructed that, in order to recover, the plaintiffs must show “that defendant’s agent was apprised from the language of the message that its prompt transmission was of urgent pecuniary importance to plaintiffs.” Again, that the defendants “are not liable for damages (beyond the price paid for sending the message) for a failure to send and deliver in time, unless they are apprised and put upon notice, by the sender, of the urgency and neces-

sity of promptness in its transmission and delivery. They must be notified by the sender in some way of the fact that a want of promptness will result in injury to the party interested in the same." Again, the jury were further instructed that if, among other things, "you find that defendant's agents receiving and transmitting the same had notice that it was important to plaintiffs that said message be sent through and delivered without unnecessary delay," then plaintiffs would be entitled to recover. On the other hand, the jury were instructed "that if you find that said message was not sufficient on its face to give the agent who received it for transmission notice of its import, and that it involved probable injury, if not promptly sent and delivered, * * * you will find for defendant." From these extracts from the general charge of the court, it is manifest that the jury were clearly informed of the importance to be attached to the meaning of the message, and of the necessity of their finding in its evidence of its purpose. The instruction asked by the defendant was properly refused. It exacted a minuteness of detail unnecessary for the information of the company of the nature and extent of the interest involved in the transaction. *Daniel v. Telegraph Co.*, 61 Tex. 457; *Same v. Edsall*, 63 Tex. 677; *Stuart v. Telegraph Co.*, 66 Tex. 583; *Telegraph Co. v. Brown*, 58 Tex. 174; *Loper's Case*, 8 S. W. Rep. 600; *Telegraph Co. v. Wenger*, 55 Pa. St. 267; *Manville v. Telegraph Co.*, 37 Iowa, 220; *Telegraph Co. v. Gildersleve*, 29 Md. 251; *Turner v. Telegraph Co.*, 41 Iowa, 460; *Candee v. Telegraph Co.*, 34 Wis. 480; *Tyler v. Telegraph Co.*, 60 Ill. 439; *Beaupre v. Telegraph Co.*, 21 Minn. 158; *Squire v. Telegraph Co.*, 98 Mass. 237; *Parks v. Telegraph Co.*, 13 Cal. 422; *Telegraph Co. v. Reynolds*, 77 Va. 179; *Daugherty v. Telegraph Co.*, 75 Ala. 170-174; 1 Sedg. Dam. (7th Ed.) 231-239. These cases have been examined. There is much diversity as to the rule of consequential damages. As stated above, the decisions of our own state have been adhered to, and they follow the great weight of authority, in number at least, of the courts.

The third assignment is to the refusal of the court to give the special charge asked by defendant: "If the jury find and believe from the evidence that plaintiff had a levy of his attachment on the property of Jones, Edgeworth & Sellers, sufficient in value to satisfy the same, and the other attachments levied prior to plaintiff's attachment, and suffered the prior attaching creditors to purchase said property at public sale at less than the value of said property, they should then find for the defendant, except for the amount paid for transmission of said message, and interest thereon at the rate of eight per cent. per annum, from the date of payment." There is no evidence of any unreasonable sacrifice of the property at the sheriff's sale, nor is it shown that the appellees themselves could have bought the stock of goods. Indeed, there is only the isolated facts that the goods seized were estimated at \$12,000 in value, that there were prior attachments upon the goods to nearly \$8,000, and that the sheriff did not realize sufficient to pay the prior liens. The court had charged the jury that "if it appears that plaintiffs were in a position and condition to have made their debt out of said property, and failed to do so, then for so much as they could have saved out of said property they cannot recover." It is elementary that a party claiming damages must not be in fault in contributing to them by his own want of proper care; and such care must extend to the protection from further loss after the act complained of. But this rule must be rationally applied. It is not required that everything possible must be done to prevent or limit the extent of the loss. It is not shown that the plaintiffs had the means, or could have commanded them, to advance the prior claims; nor is it shown to have been the reasonable duty of the plaintiffs, from the condition of their business, to have done so, if they had had the means. There is nothing to show but the money realized upon the sheriff's sale was the reasonable cash price of the stock sold, notwithstanding the estimated large value. A party is not required to invest further, in order to se-

cure himself against the consequences of a breach of a contract by which he suffers injury. *Railroad Co. v. Cobb*, 64 Ill. 142.

The fourth assignment is not well taken, in view of the constructions already given, that, "before plaintiffs can recover for such damage, it must appear from the evidence that, had the message been promptly transmitted and delivered, plaintiffs could and would have secured and collected the debt they claim to have lost, or a part thereof." As to the sufficiency of the testimony, there is no issue made as to the existence of a cause for attachment against the debtors. This conceded, the issue was as to the effect of the delay upon the ability of the plaintiffs to avail themselves of the means present of making their debt. The testimony develops that in reasonable probability they could have made the debt in attachment proceedings, or by purchase of the stock of the debtors. The activity shown to have been exerted, the means of travel between the places, and the preference obtained by others through the delay, were passed upon by the jury, and they were required to find from all the testimony that but for the delay in transmission of the message the debt would not have been lost. It cannot be said that the jury found their verdict without evidence. The verdict was: "We, the jury, find for the plaintiff the sum of \$1,684.40, with interest at 8 per cent. per annum from October 28, 1886." This sum was evidently obtained by adding the interest, which was 12 per cent., upon one of the notes, which was overdue, to the aggregate of the notes and the cost of the message. The form of the verdict is of but little importance in finding 8 per cent. per annum interest from the date of the act for which recovery was had. The measure of damages in like cases is the amount of the loss, with such interest added. It will not vitiate the verdict that the interest was not computed, and the amount named as the damages. It is held: (1) The message, "You had better come and attend to your claim at once," imparted notice of its purpose, and the importance of its prompt delivery, so as to bring such matters into the contemplation of the parties in the contract for the transmission of the message. (2) That the duty of carefulness would not have been more fully indicated to the telegraph company by the insertion therein of the name of the debtors, in absence of testimony showing otherwise. (3) The law does not impose upon a creditor the duty of further investment of his money to secure himself against loss for the breach of a contract by which such loss is caused. It is not, therefore, an act of negligence that the appellees did not buy in at the sheriff's sale or discharge the prior liens, although the estimated or real value of the property was in excess of the prior liens, sufficient to have paid their notes, in the absence of testimony to their condition as to their means to do so, and testimony showing it their duty, under the circumstances, as ordinarily careful and prudent men, to do so. (4) The measure of damages, upon the facts found by the jury, is the value of the notes, to which is added the cost of the message, if such be the extent of the loss shown, with 8 per cent. interest to the day of the trial. Finding no error in the record, the judgment below is affirmed.

SANCHEZ v. STATE.

(Court of Appeals of Texas. January 12, 1889.)

1. ADULTERATION—OF MILK—INDICTMENT.

An information under Willson's Crim. St. Tex. § 856, charging that defendant "did unlawfully and knowingly offer for sale" adulterated milk, is not open to the objection that it does not charge that defendant knew that the milk was adulterated.

2. SAME—EVIDENCE.

But a conviction cannot be sustained where the record shows no proof that defendant knew the milk was adulterated, or that he offered it for sale, though impure milk was found in his possession at the usual time in the day for peddling milk.

Appeal from Webb county court; J. M. RODRIGUEZ, Judge.

The trial judge certifies that the accused, Ypolito Sanchez, a youth 13 years old, was arrested in Laredo on the morning charged in the information, at the usual time for peddling milk. When arrested he had a can of milk in his possession. The milk in the can was tested, and found to be impure.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for the offense denounced by the act of April 10, 1883, (Willson, Crim. St. § 656,) the information charging that the defendant "did unlawfully and knowingly offer for sale an adulterated article of food, to-wit, milk," etc. A jury was waived, and the cause was determined by the judge.

While the information does not follow the statute literally, and directly charge that the milk was known by the defendant to be adulterated, we think it is substantially sufficient, and that the court did not err in overruling the exceptions made thereto.

To warrant a conviction of defendant, however, it was essential for the prosecution to prove, not only that the milk was adulterated, but that defendant knew that fact. In the record before us we find no proof of such knowledge on the part of the defendant. Nor is there any evidence in the statement of facts before us that the defendant offered to sell the milk. As presented to us, the evidence is manifestly insufficient to warrant the conviction, and the judgment is therefore reversed, and the cause remanded for another trial.

CANTEE v. STATE.

(*Court of Appeals of Texas*. January 23, 1889.)

ADULTERATION—OFFERING ADULTERATED FOOD FOR SALE—EVIDENCE.

Conviction for knowingly offering for sale adulterated food will be reversed where there is no evidence either that defendant knew the food was adulterated, or that he offered it for sale.

Appeal from Webb county court; **J. M. RODRIGUEZ**, Judge.

Nicholas Cantee, convicted of knowingly selling adulterated food, appeals.

Asst. Atty. Gen. Davidson, for the State.

WHITE, P. J. This appeal is from a judgment of conviction under information charging that defendant did, in the county of Webb and state of Texas, "unlawfully and knowingly offer for sale an adulterated article of food, to-wit, milk."

In all essential features this case is similar to that of *Sanchez v. State*, ante, 756, (decided at a former day of this term,) in which the judgment was reversed because it was not proved that defendant knew that the milk was adulterated, nor that he ever offered to sell the milk. The evidence was held wholly insufficient to warrant the conviction.

In this case, and for the reason stated, the assistant attorney general confesses error in behalf of the state, and the judgment is reversed, and the cause remanded, for said reason.

KORITZ v. STATE.

(*Court of Appeals of Texas*. January 16, 1889.)

1. CRIMINAL LAW—APPEAL—AMENDMENT OF RECOGNIZANCE.

The trial court has no jurisdiction to amend a recognizance which has been given to perfect an appeal therefrom.

2. SAME—MALICIOUS MISCHIEF.

Malicious mischief is an offense unknown to Texas law, and a recognizance, on appeal, stating that defendant had been charged and convicted of such offense, will not support the appeal.

Appeal from Washington county court; L. KIRK, Judge.

E. Koritz was convicted of breaking and injuring the fence of another, and appeals from a refusal of the trial court to allow him to amend his recognizance given in perfecting his appeal.

Bassett, Muse & Muse, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WHITE, P. J. Appellant was convicted in the court below upon an information charging him with breaking, pulling down, and injuring the fence of another, in violation of article 684 of the Penal Code. Judgment was entered against him on November 21, and, his motion for new trial having been overruled, he gave notice of appeal, and on December 9th entered into recognizance in open court to perfect his appeal. In this recognizance it was recited that he was charged in the county court with, and had been convicted of, "malicious mischief." The county court adjourned its term on December 9th, the day on which the recognizance for appeal was entered into. On December 28th, after adjournment and during vacation, defendant filed an application in the nature of a petition with the county judge to have his recognizance amended or corrected so as to show that, instead of "malicious mischief," the offense charged against him, and of which he had been convicted, was "unlawfully breaking and pulling down and injuring the fence of another," etc. To this application the county attorney filed exceptions, which may be summed up to the effect, viz.: That the county court had no jurisdiction over the matter, for the reason that the cause had been appealed to the court of appeals and the appeal perfected, that to allow a correction or change of the recognizance in the manner sought would be tantamount to allowing a new recognizance to be given; and that a recognizance for appeal could only be entered into during the term at which the conviction was had; and that the court could not enter, *nunc pro tunc*, at a subsequent term, a sufficient recognizance to supply the place of a defective recognizance after appeal had been perfected. At a hearing of the application in chambers the county judge overruled the exceptions of the county attorney to defendant's application and motion, and then overruled said application and motion, and refused to amend and correct the recognizance; to all of which the defendant saved his bill of exceptions, and submits the same for error to this court.

As we understand it, the question presented has already been substantially decided by this court in *Grant's Case*, 8 Tex. App. 432, where it is said: "The practice of amending recognizances after the term would tend to beget laxity and confusion in the administration of the law, and might oftentimes frustrate justice in this class of cases." "The recognizance must be perfected during the term, and cannot be amended or entered *nunc pro tunc* at a subsequent term." Willson, Crim. St. §§ 2648-2650. And, after the appeal has been perfected to this court, we know of no authority giving the court below jurisdiction to amend the recognizance which has been given to perfect the appeal. The court below did not err in overruling defendant's application to amend and correct the recognizance.

A motion is here made by the assistant attorney general to dismiss this appeal because the recognizance states no specific offense against the law. The offense stated in the recognizance is "malicious mischief." There is no such offense *per se* known to our law, and the motion must be sustained, and the appeal dismissed. *McLaren v. State*, 8 Tex. App. 680; *Morris v. State*, 4 Tex. App. 554; *Killingsworth v. State*, 7 Tex. App. 28; *Waterman v. State*, 8 Tex. App. 671.

The motion is granted, and the appeal is dismissed.

REVEAL v. STATE.

(Court of Appeals of Texas. January 19, 1889.)

LARCENY—WEIGHT OF EVIDENCE.

A horse was shown to have been stolen, and to have been in possession of defendant, who proved by one witness, partly corroborated by another, that he obtained the horse from one M. by trading a brown horse. Several witnesses testified in rebuttal that defendant did not have a brown horse, and others testified that he had casually stated that he obtained the horse alleged to have been stolen "from a man over the river," and "from his uncle." The latter statement was proved untrue. Held, that a conviction should be set aside.

Appeal from district court, Milam county; J. N. HENDERSON, Judge.

Bud Reveal, convicted of larceny of a horse, appeals. The state proved the disappearance of the horse, and its subsequent discovery in the hands of a third person, and traced it back, through trades and exchanges, to defendant's possession.

E. L. Antony, for appellant. *Asst. Atty. Gen. Davidson*, for the State.

WILLSON, J. A witness on behalf of the defendant testified positively that the defendant acquired the alleged stolen horse from one May, by trading to said May therefor a brown horse; that this occurred prior to the time when the witnesses for the state saw defendant in possession of the stolen horse; that May brought said horse to a place where many people had assembled on the occasion of a horse-race, and endeavored to bet the same on the said race, and, failing in this endeavor, proposed to sell or trade said horse; and that defendant traded for the horse as aforesaid. There is no testimony directly assailing the credibility of said witness, or directly contradicting any of his testimony. It was corroborated to some extent by the testimony of another witness, who testified that he saw May at the race with a horse similar in description to the stolen horse, and heard May and defendant discussing a trade about said horse. To destroy the effect of this defensive testimony, the state proved negatively by several witnesses that they were acquainted with the property owned by defendant, and he did not own a brown horse at the time of the alleged trade, within their knowledge. It was also proved that on one occasion, while defendant had possession of the stolen horse, he stated that he had got him "from a man over the river," and on another occasion he stated that he got him "from his uncle." It is shown by the evidence that, if he got the horse from May, the first statement is true. As to the second statement the evidence shows it to be untrue. These statements were casually made by the defendant when he did not know that he was suspected of the theft of the horse, and without his right to said horse being called in question. Having been made under such circumstances, they cannot be regarded as entitled to much consideration. Their criminative force is weak,—too weak to overcome the presumption of innocence, when that presumption is supported by positive evidence. As to the negative testimony that defendant did not own a brown horse at the time of his alleged trade with May, it is entitled to but little, if any, weight. He may have owned such a horse without the knowledge of the witnesses. He may not have owned such a horse, and yet he may have traded such a horse to May. It was incumbent on the state, we think, to meet the defendant's proof of a lawful acquisition of the stolen horse by more satisfactory evidence than was adduced. If May did not, in fact, trade the horse to defendant, and did not have the said horse in his possession at the race, it was reasonable to suppose that these facts could be readily established, as the race and alleged trade took place in the county of the prosecution, and many persons were present at the race, and in the town where the trade is stated to have occurred.

After a careful consideration of the evidence before us, we conclude that it

does not sustain the conviction. It does not establish the guilt of defendant to the exclusion of a reasonable doubt, in our minds, and we are unwilling to sanction the conviction upon the evidence.

The judgment is reversed, and the cause remanded for a new trial.

RIGBY v. STATE.

(Court of Appeals of Texas. January 19, 1889.)

COUNTIES—OFFICERS—SALES TO COUNTY.

Pen. Code Tex. art. 250, imposing a penalty on any county officer who shall become interested "in the purchase or sale of anything made for or on account of such county," renders such officer liable for selling a mule to the county.

Appeal from district court, Goliad county; H. C. PLEASANTS, Judge.

J. O. Rigby was indicted for selling a mule to the county while he was county commissioner, and was convicted, and appeals.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. Article 250 of the Penal Code is as follows: "If any officer of any county in this state, or of any city or town therein, shall become in any manner pecuniarily interested in any contract made by such county, city, or town, through its agents or otherwise, for the construction or repair of any bridge, road, street, alley, or house, or any other work undertaken by such county, city, or town, or shall become interested in any bid or proposal for such work, or in the purchase or sale of anything made for or on account of such county, city, or town, or who shall contract for or receive any money or property, or the representative of either, or any emolument or advantage whatsoever, in consideration of such bid, proposal, contract, purchase, or sale, he shall be fined in a sum not less than fifty nor more than five hundred dollars."

This appeal is prosecuted from a conviction had under said article, the indictment charging, in substance, that the defendant, while a county commissioner of Goliad county, sold to said county two mules, and received therefor from said county \$200. Defendant excepted to the indictment upon the ground that it did not charge any offense against the law; which exception the court overruled. It is contended by the defendant that the article of the Penal Code above quoted does not inhibit a county officer from selling property to the county, unless such property was made for or on account of such county; that the word "made," in said article, refers to the word "anything," and not to the words "purchase or sale." We do not agree to such construction of the article. We admit that the language of that portion of the said article, when considered without reference to the context, or without inquiry as to the legislative intent, would warrant the interpretation contended for by defendant; but when viewed in connection with the context, and with reference to the purpose which the legislature intended to effect by the enactment of the statute, such an interpretation would, in our judgment, be too restricted, if not strained and unreasonable. Manifestly, the legislature, in enacting the statute, intended thereby to protect counties, cities, and towns from official speculation. Such speculation was the evil sought to be suppressed; and the statute strikes at the very root of the evil, by making it an offense for any officer of a county, city, or town to become interested pecuniarily in matters wherein such corporations are pecuniarily interested. The purpose of such statute is to prevent official "rings" from being formed and operated to prey upon the treasuries of counties, cities, and towns; to prevent the officers of such corporations from using their official knowledge and influence to their individual pecuniary advantage in the financial transactions of such. The objects of the statute would be but partially attained if such of-

officers are to be permitted to deal with their corporations in the sale and purchase of property. We can perceive no reason why a county officer should be permitted to sell a mule to his county, and yet be denied the privilege of making a wagon or other article of property for the county for a consideration. In the construction of a statute, the legislative intent, if that intent can be ascertained, must govern, even over the literal import of words, and without regard to grammatical rules. Willson, Crim. St. §§ 17-26. Our construction of the statute is that it inhibits every officer of a county, city, or town from selling to or purchasing from such corporation any property whatever. This construction does not, we think, do violence to the language of the statute, and is the only construction which will accord with what we believe to be the intent and purpose of the statute.

We therefore hold that the indictment charges an offense against the penal law of this state, and that the exception was properly overruled.

We find no error in the conviction, and the judgment is affirmed.

PEACE v. STATE.

(*Court of Appeals of Texas. January 19, 1890.*)

1. CRIMINAL LAW—CONTINUANCE—ABSENT WITNESSES.

On a murder trial, there being sufficient proof of motive, threats, preparation, and proximity to the scene of murder, and there being evidence that defendant had previously been one of a party to hunt for certain outlaws, a continuance to secure testimony was properly refused, where the testimony would simply show that the outlaws had been at the scene of the murder a few days before, suspiciously searching for defendant.

2. SAME—APPEAL—INDEFINITE EXCEPTIONS.

A bill of exceptions taken generally to the charge of the court, specifying no particular error, will not be considered; but the charge will be examined with reference only to fundamental errors.

Appeal from district court, De Witt county; H. C. PLEASANTS, Judge.

One Stonebraker, while standing in a shed-room of the house on the ranch of one Rutledge, in De Witt county, Tex., about eight miles from the town of Helena, on the night of Monday, August 15, 1887, was shot and killed from ambush. As against the accused the state proved repeated threats to kill the deceased on the first opportunity, some of them uttered recently before the killing. As motive, it proved that the defendant frequently and recently denounced the deceased as a thief, charging that he had stolen a buggy and piano from the estate of his (defendant's) deceased sister, and a feather-bed, but recently, from him, (defendant.) It was proved that defendant and one Odam lived at the ranch of Rutledge, being employes of Rutledge. According to Odam, he (Odam) left the ranch on Saturday evening, defendant having previously left. He saw defendant in Yorktown, 15 or 20 miles from the ranch, as late as noon on Monday,—the fatal day. He was then riding Rutledge's bay horse, and said that he was going to Allee's ranch, 18 miles from Yorktown, to take a note for Rutledge. Odam saw him no more until his arrest in Helena on the next day, when he was riding Rutledge's gray horse, which, when last seen by Odam, was on the ranch. Odam and John Rutledge left Yorktown together, in a buggy, to go to the ranch, on Monday afternoon. At a point about six miles from the ranch they passed Stonebraker, Polzchinski, and Schneider, driving a herd of cattle. From the ranch witness went back to help Stonebraker drive his cattle. They got back to the ranch just after dark, and while witness was standing on the gallery washing his face, and Stonebraker was in the shed-room, a shot was fired from a shotgun from the direction of the fence. Stonebraker was killed, and Odam wounded by one buckshot, in the hip. Witness then went to Helena, and notified Mr. Rutledge (who did not stop at the ranch) and the sheriff. There

was a double-barreled shotgun at the ranch when witness left on Saturday evening. He looked for it on Tuesday morning, but had never found it.

It was proved that defendant did not go to Allee's ranch on Monday, after seeing Odam. He reached Helena about midnight, and reported to Rutledge that, hearing Allee was not at home, he abandoned the trip. When told, on Tuesday morning, of the killing of Stonebraker, he said that it was the first news he had heard of it. Two or three parties testified that they saw defendant on the afternoon of the fatal Monday, traveling the main road from Yorktown to the neighborhood of Rutledge's ranch. One of those witnesses testified that shortly before sunset defendant left the main road at a point where the path to Rutledge's ranch leaves it, and rode towards the ranch. He was then riding a gray horse.

The proof showed that defendant had frequently been one of a party to search for, for the purpose of arresting, two noted outlaws, named, respectively, Schneider and Jacobs. The continuance was asked for to secure a witness who would testify that a few days before the killing two men came to Rutledge's ranch, and asked for defendant and Odam, and, on being told they were not there, looked carefully through the house, and otherwise excited the suspicion of the witness. By another absent witness the defendant expected to prove that he (the said witness) saw the said Jacobs and Schneider in the neighborhood of Rutledge's ranch a day or two before the killing.

Asst. Atty. Gen. Davidson and Fly & Davidson, for the State.

WHITE, P. J. Appellant was indicted and tried in the lower court for the murder of one Stonebraker. He was found guilty of murder in the first degree, with his punishment affixed by the verdict and judgment at imprisonment for life in the penitentiary. No appearance has been entered, nor briefs filed for him by counsel on this appeal, notwithstanding which we have most carefully considered the entire record to ascertain if any error had been committed in the conduct of the trial in the lower court.

Defendant made a motion for continuance, which was overruled, and an exception was duly reserved to the ruling. In the light of the other testimony which was adduced, we do not believe that the proposed absent testimony, even if we should concede that it was admissible, and probably true, would have been of any materiality in affecting the result of the trial.

The only other bill of exceptions was reserved to the charge of the court. It points out no particular error. A general rule, well established, is that "a bill of exceptions taken generally to the charge of the court, specifying no particular error or errors, has no standing, and will not be considered by this court. In the absence of a proper bill of exceptions, this court will examine the charge of the trial court only with regard to fundamental errors, or such as, under all the circumstances of the case, were calculated to injure the rights of the accused." *Smith v. State*, 22 Tex. App. 316, 3 S. W. Rep. 684; *Williams v. State*, 22 Tex. App. 497, 4 S. W. Rep. 64; *Cordway's Case*, 25 Tex. App. 405, 8 S. W. Rep. 670. We find no such error in the charge of the court as would authorize a reversal of the judgment.

It only remains to consider the sufficiency of the evidence to support the verdict and judgment. Without recapitulating the facts, which will be reported, suffice it to say that the testimony, though circumstantial, establishes sufficiently motive, threats, preparation, and proximity to the scene of the homicide on the part of this appellant, besides other circumstances of inculpatory character. The verdict and judgment are supported sufficiently by the evidence, and we would not be warranted in interfering with them.

The judgment is affirmed.

DUGGER v. STATE.

(Court of Appeals of Texas. January 23, 1889.)

1. HOMICIDE—ACCOMPLICE—SUFFICIENCY OF EVIDENCE.

Testimony of a single witness that defendant asked him if he would go with others to rob or kill deceased, and on witness refusing, and asking the names of the others, that defendant said he had told him too much already; also that defendant said his own part would be to find deceased and see that it was done complete; also that, after the deed was done, defendant told him that he would be killed if he told of the conversation,—is not sufficient to convict defendant as accomplice in the murder.

2. SAME—INSTRUCTIONS.

Where defendant is charged as accomplice in a murder, the court should distinctly instruct that, in order to convict, the jury must believe that defendant was not present at the commission of the murder, and that it was committed by a person or persons who had been advised, commanded, or encouraged by defendant to commit it.

3. INDICTMENT—DESCRIPTION OF THE PERSONS.

Code Crim. Proc. Tex. arts. 420-425, requiring the name of the accused to be alleged in the indictment, if known, or, if unknown, that a reasonably accurate description be given, do not require, where the accused is charged as accomplice, that the names or a description of the principals be set out.

Appeal from district court, Lampasas county; W. A. BLACKBURN, Judge. Jerry Dugger, convicted as accomplice in murder, appeals.

A. G. Walker and J. L. Lewis, for appellant. Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. There are two counts in the indictment. The first charges that the defendant, and a certain other person or persons to the grand jurors unknown, acting together, with malice aforethought, did kill and murder Ellick Brown, etc. The second charges that certain persons to the grand jurors unknown, and whom the grand jurors are unable to describe, did kill and murder said Ellick Brown; and that the defendant, prior to the commission of the said murder by said unknown persons, did unlawfully, willfully, and of his malice aforethought, advise, command, and encourage said unknown persons to commit said murder,—the said defendant not being present at the commission of said murder by said unknown persons. On the trial of the case, after the evidence had been introduced, the district attorney abandoned the first count, and dismissed the same, relying upon the second count only for a conviction, and a conviction was had upon said second count; the punishment assessed being confinement for life in the penitentiary.

Defendant excepted to the indictment, because it does not allege the names of the unknown person or persons who committed the murder, or give any description of them. We are of opinion that the court did not err in overruling the exception. Those provisions of our Code which require the name of the accused to be alleged in the indictment if known, or, if unknown, that a reasonably accurate description of him be given, (Code Crim. Proc. arts. 420-425,) are not applicable in this case, because said unknown person or persons are not the "accused." The defendant, Jerry Dugger, is the "accused" in this indictment, and is named as such in the indictment. The other person or persons, being unknown, could neither be named nor described, nor was it essential to this prosecution that they should be, nor was it essential to a conviction of the defendant that the evidence should disclose who they were.

In support of the second count in the indictment—the count upon which this conviction is based—there is no testimony, except that of the witness Bright. He testified, in substance, that a month, or perhaps two months, prior to the murder, the defendant said to him that Brown would some day be killed, and that his money would be the inducement. He then asked witness if he thought that Brown had any money around him. Witness replied that he did not know, but that sometimes he did have. He then said, that if

Brown had any money around him a person would have to hang him, bruise him up, and may be to burn him, before he would give it up, or tell where it was. He then asked witness if he (witness) would go in with some men to rob or kill Brown. Witness answered, "No;" and after the lapse of about an hour asked the defendant if he would tell him the names of the men, and defendant answered: "I have told you too much already." Witness then asked him what part he would perform. He said all he would have to do would be to find him, and see that it was done complete. Said witness testified, further, that about one week after the murder defendant called his attention to the conversation above related, and told him not to tell anything about it, and stated that, if he did tell about it, he would be killed.

Is this testimony sufficient to sustain this conviction? We are clearly of the opinion that it is not. It does not show that the unknown murderer or murderers were advised, commanded, or encouraged by the defendant in the commission of the crime. It does not show that the "men" to whom he alluded in the conversation with the witness Bright were the murderers of Brown. Brown may have been murdered by other men than those; by men whom the defendant did not know, or had never seen, and, if so, he certainly was not an accomplice in the murder. It is not pretended that the witness Bright was a principal in the murder, and Bright is the only known person who was advised, commanded, or encouraged by the defendant to commit the murder. It may be that the defendant was an accomplice in the atrocious crime shown by the evidence to have been perpetrated by some person or persons, but we cannot pronounce his guilt legally from the evidence before us. If the witness Bright is to be credited, there is strong ground for suspecting that the defendant was in some way criminally connected with the murder; but suspicion is not proof, and the law demands proof, and such proof as leaves no room for reasonable doubt of guilt.

With respect to the charge of the court, we do not think it subject to the objections made to it. It is, in our opinion, a clear and correct exposition of the law of the case, except, perhaps, that it should have more distinctly instructed the jury that to find the defendant guilty they must believe from the evidence that the defendant was not present at the commission of the murder, and that the murder was committed by a person or persons who had been advised, commanded, or encouraged by the defendant to commit it.

Because the evidence does not sustain the conviction the judgment is reversed, and the cause remanded.

ALEXANDER v. STATE.

(Court of Appeals of Texas. January 23, 1890.)

CHATTEL MORTGAGES—FRAUDULENT SALE OF MORTGAGED PROPERTY—INDICTMENT.

An indictment for fraudulent sale of mortgaged property must allege the name of the person to whom it was sold, or that such name is unknown to the grand jury.

Appeal from district court, Travis county; W. M. KEY, Judge.

James Alexander, convicted of the fraudulent sale or disposition of mortgaged property, appeals.

Asst. Atty. Gen. Davidson, for the State.

WILLSON, J. This conviction is for the fraudulent sale and disposition of mortgaged property. It is not alleged in the indictment to whom the defendant sold or disposed of the property, or that such person was unknown to the grand jury. It is essential that the name of the person to whom the property was sold or disposed of should be alleged, or that it be alleged that the name of such person was unknown to the grand jury; and the omission of such an

allegation is a substantial and fatal defect in the indictment. *Presley's Case*, 24 Tex. App. 494, 6 S. W. Rep. 540.

Because the indictment is insufficient, the judgment is reversed, and the prosecution dismissed.

SHEPHERD v. JERNIGAN.

(*Supreme Court of Arkansas. March 2, 1889.*)

1. TENANCY IN COMMON AND JOINT TENANCY—CONVEYANCE BY TENANT IN COMMON.

Where tenants in common of a tract of land have laid it off into town lots, one tenant may convey his interest in a single lot to a stranger.

2. EJECTMENT—IMPROVEMENTS—NOTICE OF ADVERSE TITLE.

Constructive notice of title, such as is implied from the registry of a deed, is not alone sufficient to preclude an occupant from the benefits of the betterment act.

Appeal from circuit court, Carroll county; J. M. PITTMAN, Judge.

Crump & Watkins, for appellant. *Appellee, pro se.*

COCKEILL, C. J. This is an action of ejectment. The plaintiff and defendant were in fact tenants in common, though the deed of each to the town lot in controversy purported to convey the entire interest. The lot was a part of an 80-acre tract which had been patented to one Evans, who sold an undivided interest in it to D. B. Jernigan. It was then laid off into town lots by them, and D. B. Jernigan conveyed his interest in the lot in suit by deed, as mentioned above, to the plaintiff. The Eureka Improvement Company afterwards obtained conveyance from D. B. Jernigan and the other grantees of Evans to the entire interest in the 80 acres. The defendant is the grantee of the Eureka Improvement Company. The plaintiff's deed was recorded when D. B. Jernigan made the second transfer. The cause was submitted to the court without a jury. The defendant asked the court to declare the deed of D. B. Jernigan to the plaintiff of no effect, upon the ground that it was an attempt by one tenant in common to convey a part of a larger tract owned in common by him and others, but the court refused the request, and ruled that, the common estate having been divided into lots by the consent of the owners, a conveyance by one tenant of any lot carried the title to his entire interest therein.

The evidence tended to show that the defendant had entered into possession and made valuable improvements upon the land under the belief that he was the sole owner, but the court refused to allow him the benefit of the betterment act, upon the ground that the plaintiff's deed was of record when the defendant's grantor obtained its title. These two propositions present the questions raised by the appeal. The judgment was for the plaintiff for an undivided one-fifth of the lot.

Whether one tenant in common can convey his share of a specific portion of a larger joint estate is a question upon which the authorities are not harmonious. See *Freem. Co-Tenancy*, § 199 *et seq.*; 3 Washb. Real Prop. * 565, § 25a; 1 Washb. Real Prop. * 417; *Tied. Real Prop.* § 258. But where several parcels of land are held in common by the same parties, the rule is that either may convey his interest in a separate parcel. This is true even in jurisdictions which deny the right of the tenant to make a valid conveyance to a several part of a larger joint estate; and where the subject of the tenancy is a single tract of land, the co-tenants may, by agreement, convert it into several smaller tracts, as by laying it off into town lots, and so become co-tenants of each lot, and each is thereafter capable of conveying his interest in any of these several parcels. *Freem. Co-Tenancy*, § 208. The authorities are reviewed, and the question ably presented, in the case of *Butler v. Roys*, 25 Mich. 54. See, also, *Primm v. Walker*, 38 Mo. 99; *Barnhart v. Campbell*, 50 Mo. 597; *Markoe v. Wakeman*, 107 Ill. 262; *Green v. Arnold*, 11 R. I. 364.

The objection urged to the legality of the conveyance in this class of cases is that it impairs the right of the other co-tenant in respect to partition; that instead of giving him his share in one parcel as he might have if there had been no conveyance by his co-tenant, it would require him to take it in many distinct parcels. No question of partition arises in this cause, and whether partition would be directed in favor of the tenant whose interest remains intact, without reference to his co-tenant's conveyances, or whether those conveyances are, in contemplation of the law, no prejudice to the co-tenant, are questions not germane to our inquiry. See authorities *supra*, and *Stark v. Barrett*, 15 Cal. 362; *Gates v. Salmon*, 35 Cal. 588; *Sutter v. San Francisco*, 36 Cal. 116; *Robnett v. Preston's Heirs*, 2 Rob. (Va.) 278.

If the plaintiff's grantor, who was co-tenant of the entire tract, had been excluded from the participation in the possession of the particular parcel in suit, he might have maintained his action of ejectment for that parcel alone; but, as to the possession of that parcel, the plaintiff's attitude is as good as his grantor's, and it is no prejudice to the defendant to permit the grantee of his co-tenant to enjoy the fruits of a parcel of the undivided property. If, however, the defendant has improved the land in good faith, under the belief that he was the sole owner, he is entitled to pay for his improvements by the terms of the betterment act. Constructive notice of title, such as is implied from the registry of a deed, is not in itself sufficient to preclude an occupant from its benefits. *Beard v. Dansby*, 48 Ark. 186, 2 S. W. Rep. 701. The plaintiff must, therefore, pay one-fifth of the value of the improvements before he can be let into possession.

The judgment refusing to allow the defendant for improvements is reversed, and the cause will be remanded for further proceedings in that regard. The judgment of recovery is affirmed, but shall not be executed until the further order of the Carroll circuit court.

KANSAS CITY, S. & M. R. Co. v. OYLER *et al.*

(*Supreme Court of Arkansas. March 2, 1899.*)

APPEAL—PRACTICE—RECORD—CERTIFICATE OF EVIDENCE.

A certificate reciting that the foregoing bill is presented on the first day of the term, pursuant to an order entered last term, by counsel for defendant, and that "no counsel appearing for the plaintiffs, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth," and therefore said bill is signed, will not admit of the consideration of questions arising on the evidence.

Appeal from circuit court, Sharp county; R. H. POWELL, Judge.

Action by Oylor, Partee & Co. against the Kansas City, Springfield & Memphis Railroad Company. Judgment for plaintiffs. Defendant appeals.

C. H. Trimble and Neuman Erb, for appellants. S. H. Davidson and J. B. McCaleb, for appellees.

COCKRILL, C. J. The question raised by the appellees on the threshold of this appeal goes to the validity of the bill of exceptions.

The certificate of the circuit judge, who tried the cause, to the bill of exceptions is as follows: "The foregoing bill of exceptions is presented to me this first day of the April term of the circuit court of Sharp county by counsel for defendant, as prepared by him, pursuant to an order of court entered of record herein at the last term of this court. No counsel appearing for the plaintiffs, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth in the foregoing bill of exceptions. Therefore, the said bill of exceptions is now by me signed and made part of the record in this cause, with this explanation."

The object of the statute in requiring the circuit judge to sign a bill of ex-

ceptions is to furnish a certain test of its accuracy. When he allows the bill, and affixes his signature to it as a witness of the fact, we take its contents as conclusive evidence of those proceedings which do not otherwise appear of record. If the bill of exceptions is not allowed by the judge, and not otherwise proved as the statute permits, the benefit of the exceptions that are required to be preserved in that way is lost. Now the only questions that can be seriously urged for a reversal of the judgment in this cause arise upon the evidence. But the circuit judge refuses to certify that the transcript contains all or indeed any of the evidence that was heard by the jury. The circumstance that he has no reason to doubt that the bill, as prepared by the attorney for the appellant, is correct, goes only to show his confidence in the attorney's probity; but as he was unwilling to accept the bill as a true narrative of the proceedings, and sign it for the purpose of evidencing that fact, it did not serve the office of bringing the exceptions upon the record.

The appellant's condition comes of the unfortunate practice of postponing the presentation of bills of exceptions to time remote from the trial. The statute permits it, to prevent delay, or a failure of justice, but it is intended to be applied only in cases of necessity. *Carroll v. Pryor*, 38 Ark. 283. It was to prevent such a contingency that the exceptions were formerly required to be reduced to writing, signed, and made a part of the record at the trial.

In *Wright v. Sharp*, 1 Salk. 288, HOLT, C. J., predicted just the result we have here. "If this practice should prevail," said he, "the judge would be in a strange condition. He forgets the exception, and refuses to sign the bill, so an action must be brought." But since the practice does prevail, "it is to be presumed," as was said by the supreme court of Kentucky, "that an application for an extension must be shown to be absolutely indispensable before the judge will grant it, and therefore that such a case will seldom occur." *Meaux v. Meaux*, 81 Ky. 477. But the appellant asked and obtained the extension, and, when the court refused to attest the accuracy of the bill, took no other steps to bring the matters now complained of upon the record.

The judgment is affirmed.

SPRINGFIELD & M. R. CO. v. STEWART.

(*Supreme Court of Arkansas. March 2, 1890.*)

VENDOR AND VENDEE—VENDOR'S LIEN—CONTRACT.

Plaintiff conveyed land to defendant company for right of way and depot purposes, and took the notes of citizens of the county through which the railroad ran for the purchase price, payable when the right of way and depot grounds should be laid off and established. The right of way and depot were established by defendant, but the purchase price was not paid by the citizens. *Held*, that plaintiff had no lien on the land for the purchase money, as it was intended that the defendant should take the land unincumbered by any lien, and that plaintiff would rely on the notes for the purchase money.

Appeal from circuit court, Crittenden county; J. E. RIDDICK, Judge.

Action by Stewart against the Springfield & Memphis Railroad Company to have a deed of land for defendant's right of way and depot set aside, as obtained by fraud and undue influence, and for damages sustained by reason of the building of defendant's road. The lower court refused to set aside the deed and assess damages, but held that the purchase money had not been made, and that plaintiff had a lien on the land for the unpaid purchase money, and ordered the land sold to pay the same. Defendant appealed.

C. H. Trimbis and *Newman Erb*, for appellant. *O. P. Lyles*, for appellee.

BATTLE, J. In the course of the construction of its road appellant proposed to certain citizens of Marion county, in this state, that it would build its road to Marion, and locate a depot there, on certain ground, if they would

procure, and cause to be conveyed to it, free of charge, certain land for right of way and station purposes, a part of which belonged to appellee. The citizens referred to accepted the proposition, and caused appellee to convey so much of the land as belonged to her to the appellant, and executed to her their obligation to pay her \$50 an acre for the land so conveyed, when the right of way and depot grounds of appellant should be laid off and established as proposed. The road and depot were established according to agreement. Afterwards, appellee brought this suit against appellant to have her deed set aside on the ground of fraud and undue influence practiced on her in its procurement, and for damages sustained by her by reason of the building of appellant's road. Appellee answered, denying that the deed was obtained through fraud and undue influence, and setting up the agreement with the citizens of Marion, and the purchase of the land, and the obligation to pay the purchase money, in defense. The court refused to set aside the deed and assess damages, but held that the obligation for the purchase money had not been paid, and that the appellee had a lien on the land conveyed by her for the unpaid purchase money, and ordered it to be sold to pay the same, and defendant appealed.

The evidence before the court was not sufficient to show that the deed executed by appellee was obtained through fraud and undue influence. The only question in the case is, has appellee a lien on the land conveyed by her for the unpaid purchase money? A vendor of real estate has an equitable lien thereon for the unpaid purchase money, although he conveyed it to the purchaser by an absolute deed. He may, however, waive the lien, expressly, or by any act which manifests an intention to do so. The acceptance of personal security for the purchase money other than the note of the vendee is *prima facie* evidence of such intention. *Latender v. Abbott*, 80 Ark. 172; *Mayer v. Hendry*, 38 Ark. 240; *Stroud v. Pace*, 35 Ark. 100; *Richardson v. Green*, 46 Ark. 270.

In this case the evidence shows that it was understood that the land was to be conveyed to appellant on the condition that the right of way and depot would be located as before stated. Appellant was to do or give nothing more in the purchase of the land. To relieve it of any further obligation, certain citizens undertook to pay the purchase money, and, to carry into effect this undertaking, executed their obligation, and appellee accepted it. A part of the purchase money was paid by one of the citizens. We think it is clear that the intention of all parties concerned was that the appellant should take the land unincumbered by any lien, and that appellee would rely solely on the obligation given to her for the collection of the purchase money.

The judgment of the circuit court is therefore reversed, and appellee's complaint is dismissed, without prejudice to her right to bring an action for damages suffered by reason of the unskillful construction of appellant's road, and the appropriation, or the partial or total destruction, of property by appellant which was not conveyed to it by appellee.

LIGON *et al.* v. EQUITABLE FIRE INS. CO.

(Supreme Court of Tennessee. February 23, 1889.)

INSURANCE—PROOFS OF LOSS—WAIVER.

An insurance company was promptly notified of the burning of an insured building, and sent its adjuster to visit plaintiffs, the policy-holders, and, at the adjuster's request, they furnished a contractor to estimate the cost of replacing the burned building, but he declined to make the estimates, and the adjuster then procured another contractor, who made the estimates, and the adjuster offered to settle on the basis of the estimates so made, but plaintiffs declined. Plaintiffs afterwards sent formal, verified "proofs of loss" to the company, according to their understanding of the policy, and in substantial compliance therewith, but the company returned these proofs, saying that they were incomplete, and not in accordance with the

policy, and also that they required full specifications and plans of the building, and an estimate of the cost of repairing the same, by a competent contractor, and that, if there was overinsurance on the building, the policy was void. The policy required preliminary proofs of loss to be furnished without request, but plans and specifications were to be furnished "if requested." In an action on the policy, held, that further proofs of loss and specifications had been waived.

Appeal from circuit court, Wilson county; ROBERT CANTRELL, Judge.

Action by Richard Ligon and another, administrators, against the Equitable Insurance Company. Judgment for defendant, and plaintiffs appeal.

J. C. Sanders and J. P. Eastman, for appellants. *Tarver & Sam Golladay*, for appellee.

FOLKES, J. This is an action upon a fire policy for \$1,000, issued by defendant upon a building the property of plaintiffs' intestate. It was tried by the circuit judge without the intervention of a jury, and judgment rendered in favor of the defendant. Plaintiffs have appealed, assigning errors.

The defendant interposed three defenses, which, briefly stated, are as follows: (1) Want of title in plaintiffs' intestate, to the property; (2) other insurance in excess of the amount permitted in the policy; (3) prematurity of suit, and non-liability by reason of the failure of plaintiffs to furnish proper preliminary proofs of loss, and plans and specifications of the building destroyed, as required by the ninth clause of the policy. The court found in favor of the plaintiffs upon the first and second pleas, and there is ample proof to sustain such finding. Upon the third plea the finding was in favor of defendant, the court being of opinion that the plaintiffs had failed to furnish the "proof of loss" and the plans and specifications required by the terms of the policy.

In this there was manifest error. It is unnecessary to quote the exact terms of the ninth clause of the policy, as the case does not turn upon any peculiarity of phraseology, the clause being the usual one in fire policies requiring such proof as a condition precedent to the bringing of suit on the policy. Such stipulations are eminently proper, and should be sustained, and are by the courts upheld; but, being a provision for the benefit of the insurance company, can be waived by the latter, and will be held by the courts as waived where the conduct of the company has misled, and was such as might well have misled, a reasonably prudent man; or where it is manifest that the company had already been put in possession of all the information that said clause was intended to furnish, and made no request for more specific details, until after the lapse of an unreasonable time, leaving the insured to suppose that no further demands would be made.

The facts necessary to be stated are as follows: The building was burned on the 15th of May, 1887. The company was promptly apprised of the fact, and in a few days thereafter the adjuster of the company visited the city of Lebanon, where the property had been located, and had repeated interviews with the plaintiffs; and, after having been requested by the adjuster to do so, the plaintiffs furnished a reliable carpenter and builder to make plans and specifications of the building destroyed, with an estimate of the cost of replacing same. This contractor, when called on by the agent and adjuster, declined for personal reasons to make such plans and estimates. The adjuster then came to Nashville, the home of the company, and procured the services of a contractor of his own selection, and returned with him to Lebanon. This contractor then made out specifications and an estimate showing minutely the amount and character of material destroyed, value, cost, and the like. The plaintiffs had proposed to the adjuster to select a contractor themselves, who should act in conjunction with the contractor brought there by the company. The adjuster declined this, saying that he preferred the contractor selected by him to make the specifications and estimates by himself. After these specifications had been thus made out by the adjuster selected by

the company, the latter proposed to settle the loss by paying its share thereof, being one-half, there being another policy upon the same property for the same amount. The parties were unable to agree; the principal difficulty being in the estimate made by the adjuster's contractor of the degree and extent of injury to the brick walls that were left standing. The adjuster thereupon returned to Nashville. On the 22d June, 1887, the plaintiffs being unable to obtain anything satisfactory from the company, made out and transmitted by mail formal "proofs of loss" in accordance with their understanding of the requirements of the ninth clause of the policy duly sworn to, and with the certificate of magistrate, etc., as designated in the policy. On the 29th of June the company, through its secretary, returned the following reply: "We are in receipt of what purports to be proofs of loss under our policy No. 52,940, issued to A. L. Ligon, deceased. We hereby return the said proofs as incomplete, unsatisfactory, and not in accordance with the printed conditions of the policy. We require, according to the ninth condition of our policy, full and detailed specifications and plans of the building we insure, and an estimate of the cost of repairing the same, by a competent and reliable builder and contractor, as well as an allowance for the difference between old and new. We most positively deny any claim against the company other than the damage and loss to the building we insured under said policy. If there was, as you claim, an insurance of \$2,500 on the building insured by said policy, then our policy is void by reason of overinsurance, our policy giving the privilege of only \$1,000 additional insurance." In relation to this letter it is sufficient to say that, so far as it concerns any supposed infirmities in the preliminary proofs of loss as made out and sent by plaintiffs, it is inoperative by reason of the fact that such proofs are a substantial compliance with the requirements of the policy, and, if defective, the company should have pointed out wherein they were insufficient. The objections thereto are too vague and general, even if the plaintiffs were under any obligation to furnish formal proofs of loss, after what had taken place between the parties. It must be borne in mind that, under the terms of the policy referred to, preliminary proofs of loss are to be furnished without request, while, as to plans and specifications of the building destroyed, they are to be furnished "if required so to do." That portion of the letter which relates to and "requires full and detailed specifications and plans of the building" cannot be now regarded as the "request so to do," contemplated by the policy, (the object of which was to furnish such information to the company,) for the reason that this condition is to be held as waived by the conduct of the company through its adjuster, as herein already fully narrated. To allow the company to make such demand, after having been, with the plaintiffs' knowledge and co-operation, already placed fully in possession of all that was needed for the end in view, would be to permit the plaintiffs to be misled and deceived by the defendant into fancied security and loss of time in the operation of their legal rights. Moreover, it is by no means clear that so much of the letter as denies liability on the policy by reason of assumed overinsurance would not, in and of itself, operate to dispense with all preliminary proof of loss and specifications, independent of the matters above referred to as constituting a waiver.

Under well-settled principles such certainly would be its effect if it were an unqualified denial of liability on the policy by reason of overinsurance, or other defenses going to the validity of the policy. It is probable, however, that the denial of liability is made conditional upon the assumed claim of plaintiffs of \$2,500 insurance on the building. Be this as it may, and without deciding the last point suggested, we are of opinion, and so adjudge, that the defendant company has by its conduct, as herein set out, waived the performance of the stipulation with reference to any further proofs and specifications. See *Roumage v. Insurance Co.*, 13 N. J. Law 110; *Badger v. Insurance Co.*, 49 Wis. 389, 5 N. W. Rep. 845; *Beatty v. Insurance Co.*, 66 Pa.

St. 9; *Insurance Co. v. Kinnier*, 28 Grat. 88; *Lewis v. Insurance Co.*, 52 Me. 492; *Blake v. Insurance Co.*, 12 Gray, 265; May, Ins. §§ 461, 468, 469, 473.

The case of *Insurance Co. v. Sorsby*, 60 Miss. 302, relied on by defendant, is not considered in the way of the conclusions we have reached. It resembles the case at bar in some respects, but it differs from it in this: that the additional proof demanded under the terms of the policy doubtless related to invoices, etc., concerning a stock of goods burned, informalities in relation to which had not necessarily been obtained by the company from the visit of its agent at the scene of the loss, and the examination there made of the assured touching the loss. Here the information concerned the building merely, and the specifications obtained shortly after the fire contained all available information in relation thereto. By contenting ourselves with pointing out the one difference between the case at bar and this Mississippi case, we do not wish to be understood as approving or criticising the decision in the latter case.

Reverse the action of the circuit court, and enter judgment here for the full amount of the policy, with interest.

WEEKS v. MAYS.

(*Supreme Court of Tennessee. February 28, 1889.*)

ABATEMENT AND REVIVAL—DEATH OF DEFENDANT—ACTION FOR BREACH OF MARRIAGE CONTRACT.

An action for breach of contract of marriage is an action "affecting the character of the plaintiff," within the meaning of Code Mill. & V. Tenn. § 3560, providing that no civil action commenced, except actions for wrongs affecting the character of plaintiff, shall abate by the death of either party; and such action does not survive against the administrator of the promisor.

Appeal from circuit court, Wayne county; E. D. PATTERSON, Judge.

Action by Dollie I. Weeks against Stewart Mays, for breach of contract of marriage. Defendant died before trial, the suit was abated, and plaintiff appeals.

R. A. Haggard and Pitts, Hays & Meeks, for appellant. *Bateman & Broyles*, for respondent.

TURNER, C. J. On 12th of November, 1886, the plaintiff sued Stewart Mays for "a breach of contract of marriage, and seduction." After service of process, and before the appearance term, the defendant died. *Sci. fa.* was issued against his administrator and heirs, who appeared, and moved to abate. Plaintiff, after dismissing as to the seduction, moved to revive. The suit was abated, and plaintiff appealed.

It is insisted the suit should have been revived under section 3560, Code Mill. & V., providing: "No civil action commenced, whether founded on wrongs or contracts, except actions for wrongs affecting the character of the plaintiff, shall abate by the death of either party, but may be revived."

"The defenses which may be urged against an action to enforce a promise to marry are very numerous, among them the bad character of the plaintiff, or her lascivious conduct. The cases generally exhibit this defense where the woman is plaintiff. * * * If the defense be general bad character, evidence of reputation is receivable; for, says Lord KENYON, 'character is the only point in issue; public opinion, founded on the conduct of the party, is a fair subject of inquiry.'" 2 Pars. Cont. (5th Ed.) 65.

The plaintiff, by her suit, necessarily tenders an issue as to her character. By her action she declares herself suitable for a wife, and the mother of a family, and invites the defendant to controvert her assumption. Upon her character and conduct depend her chances of recovery. After the proof of the contract, the first step of the plaintiff is, ordinarily, to undertake to es-

establish a good name for virtue. The first inquiry of the attorney, on application to him to institute suit, is, can her character or conduct be sustained? Can they be assailed? The suit, then, must be one "affecting the character of the plaintiff," and is within the exception of the statute. Aside from the statute, the rule is: "The promise is so far of a personal character that the breach of it gives no action to the personal representative of the party injured, unless, perhaps, special damage to the estate of the decedent is alleged and proved; nor does it survive against the administrator of the promisor." 2 Pars. Cont. 70; *Stebbins v. Palmer*, 1 Pick. 71; *Smith v. Sherman*, 4 Cush. 408.

Affirm the judgment.

LOUISVILLE & N. R. Co. v. MARTIN.

(*Supreme Court of Tennessee*. February 26, 1889.)

1. MASTER AND SERVANT—WHAT CONSTITUTES A FELLOW-SERVANT.

Where the regulations of a railroad company provide that, in case a train becomes divided, the front brakeman shall go to the rear of the front portion, and signal the engineer which way to move, etc., and that the engineer shall obey the signals, and also that, in case the conductor is cut off from the train, the right to command shall devolve on the engineer, the engineer and brakeman are only fellow-servants, in case of the breaking of a train, when the engineer does not assume the command, and both are acting in the line of their separate duties.

2. SAME.

An instruction, in such case, that being subject to the orders of the engineer is the same, in effect, as acting under his orders, so as to render the company liable for an injury to the brakeman from the engineer's negligence, is erroneous.

Appeal from circuit court, Robertson county; A. H. MUMFORD, Judge.

Action by Q. M. Martin against the Louisville & Nashville Railroad Company for personal injuries. Judgment for plaintiff, and defendant appeals. *J. T. Cobbs*, for appellant. *H. C. Crunk* and *J. L. Watts*, for respondent.

FOLKES, J. Defendant in error was a brakeman in the employ of the railroad, and while so engaged was injured to the extent of having his foot crushed by being thrown violently to the ground from the top of a car, by the negligence of the engineer, who, as it is alleged in the declaration, was at the time of the injury in charge of the train, in consequence of the absence of the conductor, so that the defendant in error was under the control and subject to the orders of the engineer. There was verdict and judgment for defendant in error in the sum of \$4,500. New trial being refused, the railroad company has brought the case here by an appeal in error. Several errors are assigned, but, under the view we have taken of the case, it will be necessary to dispose of only one of them.

After the court had given his charge to the jury, and had given several special requests of the defendant, the plaintiff asked this charge, which was by the court given, viz: "The court instructs you that being subject to the orders of the engineer is the same, in effect, as acting under the orders of the engineer, as you have been instructed; but in either case it must be by the rules and orders of the defendant, to be lawful." This is manifestly erroneous. The court had, in its main charge, laid down the general doctrine with reference to fellow-servants and to superior. The jury had been made to understand that, if the injury was inflicted by a fellow-servant, the plaintiff could not recover, because he is held to have entered into the service, and been compensated therefor, with reference to the risk assumed by him of injury from the carelessness of those who occupy towards him the position of fellow-servants. They had also been told that while the engineer was, ordinarily, a fellow-servant with the brakeman, the former might, under the rules or orders of the common master, become the superior of the latter, with

right and duty to control and direct him; and that, when the engineer did so assume and exercise towards the brakeman the authority so conferred upon him, he became for the time being the representative of the master, and the master would be liable to the brakeman for the negligence of the superior. Now, to follow these general statements of the charge, with the special one given at the request of the plaintiff, was to neutralize and destroy what had theretofore been said. It virtually and substantially told the jury that if, at the time of the injury, the engineer was in the position where, under the lawful rules and orders of the company, he might have taken charge of the train, and directed the movements of the brakeman, the company would be liable for the engineer's negligence, as much so, and to the same extent, as if he had in fact taken charge and given orders, and been at the time engaged in the exercise of his superior authority,—the error of which is made the more apparent when applied to the facts of this case.

The record shows that the train, being a freight, had, while *en route* between Evansville and Nashville, become uncoupled or broken in two. On the front there were the engineer, the fireman, and the defendant in error, who was the front brakeman; leaving the other two brakemen and the conductor on the rear fragment of the disconnected train. That under the rules of the company, in such a contingency, it was the duty of the front brakeman to hasten to the rear end of his fragment of the train, for the purpose of ascertaining whether, in the act of separating, any timbers had been detached, which were dragging on the track, and which might injure or derail the front section, should it undertake to back, or hurt the rear section, should its own impetus bring it in contact with such wreckage. It was his duty, also, to look out for the rear section, and by signals direct and regulate the movements of the engineer, so that he might move forward more rapidly, if in danger of being run into by the rear section, or stop, and move back to recapture the detached portion of the train. The same rules made it imperatively the duty of the engineer to observe and obey the signals of the brakeman so on the lookout. The engineer had no right to stop, retreat, increase, or slacken his speed, unless and except in response to the signals of the brakeman, if the latter was at his post, engaged in the discharge of his duties. These rules were known to both engineer and brakeman, and each was in the discharge of his respective duties when the injury to the brakeman was inflicted. The engineer had given no orders or instructions to the brakeman; had done and said nothing indicative of a purpose to assume the functions of the conductor, nor to take charge of the train in any manner. The brakeman says himself that the engineer did not direct him to go to the position from which he was injured, nor direct nor assume to control his movements in any way; that he went back because it was his duty to go, for the purpose already stated; that while so engaged, and within about three feet of the rear end of the rear car on the front section of the broken train, the engineer, having shut off steam, which slackened the speed of the train, then "suddenly jerked the train forward, and I was thrown off behind on the road-bed. I had given the engineer no signal to go forward." It is true that the engineer denies that he gave any sudden jerk, and says that, when he found the brakeman was no longer at his post, he went back, and picked him up, and, when asked how he happened to fall, the brakeman said that he had accidentally walked off, but this is the only difference between them; for, as to the action of the brakeman in going back, they agree that the engineer gave no orders, and did nothing indicating a purpose to take charge of the train. It was also in proof that when the conductor is cut off from his train, by the parting of his train or otherwise, the right to command devolves upon the engineer; and, if he has no brakeman on his part of the train when such accident happens, it is his duty to send his fireman to the rear of his train to discharge the duties of lookout, as already detailed, as pertaining to the brakeman in such an emergency.

We have a case, therefore, where the brakeman is injured by the negligence of the engineer of the same train, while each is in the discharge of his respective duties. A contingency has happened which, under the rules of the company, authorizes the engineer to take charge, and direct the movements of the brakeman; but inasmuch as the brakeman is doing, under general orders of the company, what he is required to do, and what is the best thing to be done for the safety of the lives of the employees, and the preservation of the property of the company, the engineer has no occasion to take charge, and does not take charge, as conductor, nor give any directions, nor do any act which, as conductor, he might be allowed to do, but confines his conduct entirely to his duties and functions as engineer. In such a case the negligence is the negligence of a fellow-servant of the brakeman, and the company is not responsible. This is clear, upon well-considered adjudications of this court which have settled principles that control the disposition of this cause. See *Railroad Co. v. Wheless*, 10 Lea, 741, where it is held that the engineer is a fellow-servant of a brakeman on the same train. This was a case where the conductor had ordered certain cars to be coupled, and had then left the engineer and brakeman to execute the order. Judge MCFARLAND, in his elaborate and learned discussion of the case, says, among other things: "In many movements the engineer and brakemen act in accordance with general regulations, and a general knowledge of their duties, and without any special orders." Such is the case at bar. Again: "They were engaged in a common service; each performing his particular part. * * * But the engineer did not assume any supervision of the work, or give any orders in regard to it, and the plaintiff cannot, in any fair sense, be said to have been acting in this particular matter under the orders, either express or implied, of the engineer." So it is here. This distinction is recognized in *Railroad Co. v. Handman*, 13 Lea, 423; *Railroad Co. v. Collins*, 1 Pickle, 227, 1 S. W. Rep. 883; *Railroad Co. v. Lahr*, 2 Pickle, 335, 6 S. W. Rep. 663,—the latter case making the distinction between personal and official negligence of one confessedly, at the time, the superior, so far as it affects the servant's right to hold the master liable; while the case of *Fox v. Sandford*, 4 Sneed, 36, clearly points out the line which encircles "a foreman," and makes of him a fellow-servant so far as the master's liability is concerned, where, in the particular matter in which he is engaged at the time of the injury, he is acting as a fellow-servant, and not in his capacity of foreman. As is well said in the *Wheless Case*, this state has gone as far as it is deemed prudent or wise to go in recognizing exceptions or modifications to the doctrine of fellow-servants, and we have no desire to extend them one step beyond the point already reached.

The circuit judge should have charged the jury that, the engineer and brakeman being, ordinarily, fellow-servants, the company would not be liable, under the facts proven in this case, unless the engineer had availed himself of his rights to take charge of the train, and had taken charge, and assumed to direct and control the movements of the brakeman; and that, if both were acting under orders or rules of the company at the time,—the brakeman as such, and the engineer as such,—the negligence was the negligence of a fellow-servant, for which the master would not be liable. Reverse the judgment, and remand the cause for a new trial.

GRISSOM v. COMMERCIAL NAT. BANK.

(Supreme Court of Tennessee. February 23, 1899.)

1. BANKS AND BANKING—APPLICATION OF DEPOSITS—PAYMENT OF NOTE.

A note executed by the depositor of a bank, and payable at the bank, is not equivalent to a check, and the bank has no authority to pay such note to a third party in the absence of a usage or of instructions from the maker to that effect.

2. SAME—CUSTOM OF BANKS.

There was evidence that a certain bank was in the habit of paying such notes upon presentment, without asking instructions from the maker. But among other banks in the neighborhood the custom was not uniform; some of them so paying only when given for personal property, and others, only when the depositor executing the note was engaged in mercantile business. *Held*, that a depositor of the first-named bank, who had no knowledge of any such custom, was not bound by it.

3. SAME—SET-OFF AGAINST DEPOSIT.

And where it appeared that such a note, executed by such depositor, and paid by his bank without asking for instructions, was an accommodation note, and that the maker had no notice of such payment until after the insolvency of the party primarily liable, and after a settlement had been had between him and such party, in which such note was credited to the latter, the bank had no right to set off the amount of such note in an action against it by the maker to recover a deposit.

LURTON, J., dissenting.

Appeal from chancery court, Davidson county; ANDREW ALLISON, Chancellor.

Stokes, Parks & Stokes, for appellant. *Champton & Head*, for respondent.

FOLKES, J. This is a bill brought by complainant to recover of the defendant the sum of \$1,000 claimed as a balance due after crediting the bank with all checks drawn against sundry deposits made therein by complainant as a customer of the bank.

The defendant interposes two defenses: It admits that between May 1, 1886, and July 27, 1887, the complainant made deposits with it in sundry sums aggregating \$5,134.05; but says that it has paid out the same for and on account of complainant, upon sundry checks, except as to \$1,000, which it says was paid upon and in discharge of a note of complainant's for that amount, made and dated at Nashville, March 26, 1887, and payable 60 days after date to the order of J. D. Carter & Co., at the Commercial National Bank, Nashville, indorsed by J. D. Carter & Co., and by John F. Wheelis; the latter of whom, as the owner and holder thereof, placed the same in the Fourth National Bank of Nashville for collection. That on May 28th, the last day of grace, the note was by the Fourth National Bank presented for payment at the defendant's banking-house, where it was marked "good," by defendant, and was, on May 30th, paid by defendant to the Fourth National Bank, and the amount thereof charged up to complainant in the same manner as though it had been a check drawn by complainant. It claims that it was and is the custom of the banks in Nashville, where notes are made payable at a particular bank, to pay such notes, when the maker has sufficient funds to his credit for that purpose, without instructions, and to charge the same to the general account of the maker. It also insists that, independent of custom, it has the right to treat a note so made as the equivalent of a check, and as a direction, therefore, on the part of the maker, to pay same on his general account as a depositor. The chancellor found both defenses in favor of the bank, and dismissed the bill. Complainant has appealed, assigning errors.

We will consider, first, the matter of custom. The defendant introduces the testimony of the officers of four banks in the city of Nashville, who say that such a custom, with certain modifications and variations, prevails at their respective banks, and, so far as they know, at the banks in the city generally. But these witnesses are not agreed as to the manner of exercising the usage. Mr. Porterfield, of the defendant bank, says it is the custom with his bank to pay such notes, unless on their face they appear to have been given for land, in which event they are not paid. Mr. Williams, of the First National Bank, says that while the habit of his bank was to pay such notes, they did not pay land-notes, nor where there was some complication about them. Mr. Keith, of the Fourth National Bank, proves that it was the custom of his bank to pay such notes, and that he knows of no exception to the rule, although his bank may have made some. Mr. Jones, of the American National Bank, says that it is the custom with his bank to pay such notes, if given by mercantile

men; but when given by men not so engaged, they ask for instructions, before paying; and that, immediately upon paying a note under the usage referred to, his bank always gave written notice to the depositor that such payment had been made. If the custom of this last bank as to giving notice had been followed by the defendant bank, it is probable that this suit would never have been brought, as the complainant would have had opportunity of protecting himself by recourse over on the parties for whom he was accommodation maker, as will appear later on. It is clearly proven that such a custom was not known to this complainant, who was a lumber-man, living in a small town in the state of Kentucky, 200 or 300 miles from Nashville. From what has already been stated as to the proof on this subject, it is clear that the defendant cannot justify its payment of the note in question upon the ground of custom. It is well settled that, to be binding, a custom must be general as to place, and not confined to any particular bank or banks. It must be certain, and uniform, and there must be a reasonable ground to suppose that the custom was known to both parties to the contract, as it is upon this supposition that the parties are presumed to have contracted with reference to it. *Dabney v. Campbell*, 9 Humph. 686; *Saint v. Smith*, 1 Cold. 52; *Adams v. Otterback*, 15 How. 545; 1 Morse, Banks, (Ed. 1888,) § 9.

Having failed, then, to show a right to pay the note upon the ground of a usage or custom binding upon this complainant, we are confronted with the proposition that, independent of usage, the bank at whose place of business a note is upon its face made payable, has the right to treat the note as a check, and pay same, and charge it up to the account of the maker, where such maker is a depositor of the bank. The question is presented for the first time in this state, although it has received the attention of text writers, and been passed upon by the courts of other states, where we find a conflict of opinion. Under such circumstances it is our duty to determine the question for ourselves, upon reason and principle, and with a due regard for considerations of public policy and convenience, provided that, in doing so, we do not place our state in antagonism to the current of authority in this country. We recognize the fact that it is of prime importance that the several states in this Union should, as far as may be, without doing violence to well-settled principles of state jurisprudence, endeavor to bring about and maintain as much certainty and uniformity of decision on questions of commercial law as can be accomplished. In response to this idea, we would, upon the question now before us, yield much of the strong conviction we entertain thereon in the endeavor to place ourselves in line with the current of authority, if a strong and steady current could be found, which would not threaten to engulf and destroy distinctions which have been long and well settled in this state.

While we must concede that the weight of text-book authority is in support of defendant's contention, we are unable to discover that the weight of judicial decision is in the same direction. Moreover, we are constrained to believe that the contrary view is more in harmony with well-settled adjudications in this state upon principles presenting analogous questions, and that the current of adjudged cases is certainly as strong in the same direction. Let us see, in the first place, what is the relation between depositor and banker. It is merely that of debtor and creditor, where the deposit is not a special one. The money deposited in the ordinary course of business is at once blended with the general funds of, and becomes the property of, the bank. The depositor has only a debt against the bank, payable on demand, upon the presentation and surrender of the draft or order addressed to and directing the bank in unequivocal terms to pay the amount of such draft to the person therein named, or to bearer. This order is commonly known in commercial and banking parlance as a "check."

Reduced to its last analysis, then, the question at issue here may be said to be: If a creditor makes a note payable to a third party at his debtor's place

-of business, does it operate as an order on the debtor to pay the note, in the absence of any instructions, and in the absence of any understanding or agreement growing out of the previous course of dealing between the parties? In the absence of authority, the question would seem to carry its own answer in the negative. In *McGill v. Ott*, 10 Lea, 147, this court has said: "A man who receives the money as agent of another, cannot simply, in that capacity, make an application of such money to the payment of his principal's debt without the assent, expressed or implied, of the principal. The fact that the debt is due to him cannot change the principle. He was bound to account for the money to his principal, it is true, but this simply made him his debtor to that amount. If sued for it, he might, under our law, set off his debt under a plea, and then hold the money subject to such an adjustment of their rights. But this goes on the idea that each is a debtor to the other, and not that one debt has paid the other." The fact that the note was payable "at" the bank, could not change the principle aimed at in the decision just quoted, unless we are to read the words "payable 'at' the bank" as synonymous with the words "payable 'by' or 'through' the bank." It will be admitted that there is nothing in the primary meaning nor general signification of the terms to warrant the use of the words in the sense in which they are to be understood, if the contention of respondent is to prevail. It is equally plain that there is nothing in the origin and purpose of the words "payable at the bank," as used in notes, to justify the meaning sought to be given them. The language is no necessary part of the instrument. It is as valid when made payable generally as when made payable at any particular place. Its purpose, as generally understood, is to designate a place where the holder may find the maker, and ascertain whether the latter is ready, able, and willing to pay the same; if not, then, having made demand at the place designated, there remains nothing for the holder to do but give notice to the indorser that such demand has been made and refused, as required by the law-merchant as a condition precedent to recourse on such indorsers.

For a while, in England, it was held that a failure to present at the place named on the note discharged the maker, and the conflict of decisions between the court of king's bench and the court of common pleas, before the decision of the house of lords in 1820, in *Rowe v. Young*, 2 Brod. & B. 165, in accordance with the decision of the common pleas, reversing the judgment of the king's bench, was finally settled in 1 & 2 Geo. IV. c. 78, which enacted that an acceptance "payable at the house of a banker, or other place," should be deemed a general acceptance, unless the words "and not otherwise, or elsewhere," were added. *Bank v. Smith*, 1 Amer. Lead. Cas. 456, (364.) But the almost unbroken current of authority in this country is that, so far as the maker of a note or the acceptor of a bill is concerned, the designation of a place of payment does not make a conditional liability dependent on presentment and demand at such place, but is an absolute liability to pay generally; so that practically the insertion of the place of payment is without utility, so far as the maker is concerned. And its principal, if not its sole, office, practically, in this country, now is to dispense with the inconvenience and uncertainty attending the presentment and demand upon the maker at the proper place to fix the conditional liability of indorsers.

With the place of payment designated on the face of the note, no question can arise as to due diligence, etc., on the part of the holder in his efforts to make demand on the maker. He has only to present it at the place named, without regard to the residence or place of business of the maker, and, if dishonored, give notice to the indorsers, and the latter become liable. That such is the view taken by our courts of the purpose and effect of such a clause in a note, see *Bynum v. Apperson*, 9 Heisk. 688, where it is said: "By making the note payable at the bank, it was fairly contemplated by the parties that the payment should be made at the bank." And in *Lane v. Bank*, Id. 436,

it is said: "And if the note be payable at a particular bank, and before the day of payment arrives that bank has no place of business, and ceases to exist, and another does business in the same room, it is sufficient to present the note for payment at their room." While the question now under consideration was not presented nor discussed in the two cases just cited, they serve to illustrate the argument that the use of said terms in no sense converts the note into a check. If such a clause in a note converts it into a check, or, in the language of the text-books cited by defendant, is tantamount to an order to pay same out of the funds of the maker on deposit with the bank at which the note is made payable, it would seem to follow that the failure of the holder to present same, and the subsequent insolvency of the bank, with funds of the maker on hand sufficient to pay same, would discharge the latter, and cast the loss on the holder, whose negligence was the occasion of the loss; and such is the holding of some of the cases which constitute in part the authority upon which the text writers lay down the principle contended for here by the defendant bank. See *Lazier v. Horan*, 55 Iowa, 75, 7 N. W. Rep. 457, referred to by Mr. Daniel in note 3 to section 326a, (3d Ed.) of his valuable work on Negotiable Instruments, as justifying the text, in this language: "And other well-considered cases sustain this view." The "well-considered cases" are *Lazier v. Horan*, *supra*, and *Thatcher v. Bank*, 5 Sandf. 130; *Bank v. Bank*, 46 N. Y. 88; *Bank v. Newton*, decided by the First district appellate court, Chicago, and reported in the Bankers' Magazine for July, 1881, 8 Bradw. 563, which we will presently examine. The unsoundness of *Lazier v. Horan* is demonstrated in *Adams v. Improvement Commission*, 44 N. J. Law, 638, where, after an able discussion of the authorities, it is said: "The naming of a bank in a promissory note as the place of payment does not make the banking association an agent for the collection of the note or the receipt of the money. No power, authority, or duty is thereby conferred upon the banker in reference to the note, and the debtor cannot make the banker the agent of the holder by simply depositing with him the funds to pay it with." It shows that *Lazier v. Horan* was decided entirely on the authority of section 229, Story, Prom. Notes. No cases were cited in support of the proposition, and it overlooked the holdings to the contrary in the English cases of *Sebag v. Abitbol*, 4 Maule & S. 462; *Turner v. Hayden*, 4 Barn. & C. 1. It is also at variance with *Ward v. Smith*, 7 Wall. 447; *Gas Co. v. Pinkerton*, 95 Pa. St. 62. The point decided in the cases last cited, while of course not conclusive of the question before us, is instructive by analogy, and establishes the unsoundness of the adjudications invoked to sustain the contrary view.

Equally unsound is the case of *Bank v. Newton*, from the district appellate court of Chicago. At least it would so appear from the statement of what it holds, as found in the note to Daniel, Neg. Inst., above referred to, which is all the information we have on the subject, as we have not had access to the case. The quotation made therefrom by Mr. Daniel (volume 1, § 326a, note 3, p. 302) is as follows:

(1) "As it is the duty of the bank to pay its customers' checks, when in funds, so at least it has authority, if it is not under actual obligation, to pay his notes and acceptances made payable at the bank.

(2) "It is a presumption of law that if a customer does so make payable or negotiable at a bank any of his paper, it is his intent to have the same discharged from his deposit.

(3) "*The neglect of the bank to make such appropriation would discharge the indorsers and sureties.*

(4) "The act of thus making his paper payable at a bank is considered as much his order to pay as would be his check, and, if the bank pay, without express orders to the contrary, it is a defense to a suit by the depositor for money so paid.

(5) "And the rule seems to be settled that if a bank *advances* the money to pay a bill or note of its customer, made payable at the bank, it may recover from the depositor as for *money loaned*; the paper so made payable being equivalent to a request to pay.

(6) "He makes the bank his agent, with implied authority to protect his credit by appropriating his deposits to the payment of his maturing obligations made payable at the bank."

The italics, and the numbering of the paragraphs, are ours, made for the purpose of emphasis and reference.

Now, are we willing to go this far? Must we establish as the law of this state the several propositions above announced, each of kin, and logically dependent one upon the other? Surely not, unless compelled by the overwhelming weight of authority. Does it not open a very Pandora's box of evil rife with litigation, and most hurtful in their character? Does it not alike astonish the professional and lay mind? Does it not introduce, by arbitrary presumptions of law, liabilities not so "nominated in the bond," and impose upon parties to commercial paper responsibilities not contemplated by them, and hitherto unknown? Does it not inject into the every-day transactions of business men, where uniformity and certainty should be the corner-stone, elements of uncertainty and risk too grievous to be borne? Is the liability of indorsers and sureties to depend upon the pleasure of the bank whether or not it will appropriate the deposits of the maker to the payment of his notes, under the first and third propositions above? If the banks should pay checks drawn on the day of the maturity of a note of the maker in favor of itself or of a third party, to the exhaustion of the drawer's deposits, is it to be liable to the holder of the note for not having withheld sufficient funds to pay the latter? And is a twin suit to be born out of the same transaction between the holder and the sureties or indorsers as to whether or not they have been thereby discharged; they, perhaps, having given notice to the bank that unless deposits sufficient are held they will claim their discharge? If the bank should, under such notice, deem it safe to withhold deposits sufficient for the note, is it to then encounter a suit with the holder of a check unpaid? Is the maker of a note, where there has been a total failure of consideration, giving him a good defense to the note as against the payee or purchaser, not in due course of trade, to be held liable to the bank, which, in the absence of deposits, has gone forward and paid the note for the maker, advancing the money therefor under the fifth proposition, authorizing the bank to treat the note made payable months before at its house as equivalent to a check, or request to pay? On the other hand, if the bank should fail to pay a note so made payable where there were deposits sufficient, whereby the note is protested, is the bank to become a defendant to a suit for damages for injury to the credit and business of the maker, upon the authority of the sixth proposition, to the effect that the note so made constituted the bank the maker's agent to protect his credit out of the latter's deposits?

Illustrations of the inconvenience and hardships of the rule which we are urged to establish could be multiplied almost indefinitely, and are such as to readily suggest themselves to thoughtful men, acquainted with the practical affairs of commercial life. To hold a note payable at a particular bank as tantamount to a check on the bank, is to confound distinctions heretofore established and well settled in the adjudications of this state between notes and checks. A "check" is defined to be a "written order on a bank directing it to pay a certain sum of money." A "note" is the "written promise to pay another a certain sum of money at a certain time." One is payable on presentation, the other is payable on a day certain. One is entitled to days of grace, the other is not. One is an order on a third party, the other is the undertaking of the party himself. One is an appropriation of so much money in the banker's hands, the other is a *promise* to pay. On the check, ordi-

narly, no right of action accrues until after presentment for payment; on the note, a right of action against the maker exists without such presentment. *Blair v. Bank*, 11 Humph. 88; *Mulherrin v. Hannum*, 2 Yerg. 81; *Springfield v. Green*, 7 Baxt. 801; *Bank v. Merritt*, 7 Heisk. 190; *Brown v. Lusk*, 4 Yerg. 216. For these and other considerations we cannot yield our assent to the doctrine urged by the defendant, and upon which the case was decided in the court below. We hold, therefore, that there is no implied authority for a bank to pay to a third party a note made payable at its place of business simply because of the fact that the maker has funds sufficient for that purpose, in the absence of any course of dealing or previous instructions to so apply the deposits.

Nor are we without express authority to sustain this conclusion. The supreme court of Illinois, in the case of *Wood v. Savings Co.*, 41 Ill. 267, has reached the same result in principle. The action was on a note payable at the banking-house of Conrad. The holder presented the note, had it marked "good," but it was not paid. The bank failed, and the maker was sued on the note. The defense was that the maker had funds sufficient on deposit with the bank to pay the note; that it was the duty of the bank to have paid it when presented. The court say: "Had Conrad any authority, whatever, to pay the note out of the funds on deposit in his bank to the credit of the maker? The custom sought to be established among bankers has nothing, in our judgment, to do with the question, what is the effect of making a note payable at a particular place? Was it ever before heard that the effect was to transfer, *ipso facto*, the money at the place, belonging to the makers, absolutely to the holder, on his presenting the note at the place of payment? There is no such rule in any commercial country, of which we have any knowledge. * * * We do not understand that the fact of making a note payable at a particular place amounts to an agreement that the maker may make a deposit at the bank of the amount of the note, and thus discharge his obligation, and that the money so deposited is at the risk of the holder of the note. It is a mere designation of the place where the note is to be paid, not of the person to whom the money is to be paid. By the terms of the note the money was to be paid by the maker to the payee, not 'to' (and it might have added 'by') Conrad, but 'at' Conrad's banking-house. * * * If this be so,—if the holders of this note were under no obligation to present this note at Conrad's counter,—does the fact that it was presented change the liability of the party in any way? * * * Conrad had no right to pay it, nor could the money be taken to pay it, except by means of the verbal order, check, or draft of the maker and depositor." The principle of that case is reaffirmed in *Bank v. Patton*, 109 Ill. 479.

In *Scott v. Shirk*, 60 Ind. 160, the court say: "A bank of deposit has no power to apply a money deposit in its possession belonging to the maker of a promissory note payable at such bank to the satisfaction of such note without his consent." To the same effect is *Bank v. Bank*, 132 Mass. 151, where the court say: "The case expressly finds that Carrick, Calvert & Co. never had given any authority to the plaintiff to pay their notes out of their funds on deposit. Such authority cannot be implied merely from the fact that they made their notes payable there;" citing, in support of this proposition, *Wood v. Savings Co.*, 41 Ill. 267, above. This was as late as 1882, from a state of the highest authority on questions of commercial law.

The case of *Gordon v. Muchler*, 34 La. Ann. 604, is said to have settled, for the state of Louisiana, this question in the same manner; but we have been unable to examine this volume, it being misplaced from our state library. The supreme court of Missouri, as reported in the text-books, seems strongly to intimate a similar holding. In *Bank v. Carson*, 32 Mo. 191, the court is quoted as saying: "The bank is not bound to apply the deposits, if it has even the authority to do so."

The text-books generally, which are cited as sustaining the defendant's contention, agree that it is not the duty, but merely a privilege, that may or may not be exercised by the bank, to so apply deposits of the maker. Surely, this will not do, to leave the action of the bank, upon which so many important, not to say, intricate, rights of other parties depend, open to the uncertainty that must follow its optional exercise by the bank. We quite agree with Mr. Daniel, in his work on Negotiable Instruments, (volume 1, § 326,) that the question should be settled definitely, and not left to the option of the bank. But we think it much sounder and safer to hold that, in the absence of instruction, either expressed or to be implied from previous course of dealings between the maker and his banker, the bank has no authority to apply the funds of its depositor to the payment to third parties of notes payable at its bank. We limit this decision to a payment made to a third party because we are not called upon to decide any but the case before us, which, as we have seen, is one of a payment to a third party.

The right of the bank to retain out of deposits sufficient to pay itself, where the bank is the holder and owner of the note, is quite a different question, involving an application of the law of set-off, and is not intended to be affected by anything said in this opinion. We close the citation of authority which is in accord with our conclusion by a reference to 1 Edw. Bills, (8d Ed. 1882,) p. *166, § 195, where the learned author says: "The better opinion undoubtedly is that the bank has no right to pay out the money of a depositor except upon his order, or with his assent;" citing approvingly the 41 Ill. and 60 Ind. cases, above referred to. See, also, Newm. Bank Dep. (1888,) § 119, p. 120, where, in the text, it is said: "A banker has no right to apply money on deposit in his bank to the payment of a note of the depositor, payable at the bank, without the order of the depositor;" citing the case already referred to by us, of *Bank v. Patton*, 109 Ill. 479.

If we consulted our own convenience and the necessities of the case, we would end this opinion here. But it has been so strenuously urged at the bar that the great weight of authority is the other way, that it becomes proper, if not necessary, to refer to the authorities upon which such claim is predicated. We have laboriously and at length examined everything that has been available to us that presents the other side, but, owing to the length to which a review of cases ordinarily leads, we will try to be brief in what we have to say in relation thereto.

It is true that Bolles on Banks and Their Depositors, § 403, and Morse in his work on Banks and Banking, vol. 2, § 557, and Pratt in his Manual of Banking Law, c. 9, p. 44, after stating that there are authorities both ways, say the weight of authority is that it is the privilege of the bank (to be exercised or not, as it may see proper) to apply deposits to the payment of a note of the depositor, payable at its bank. The American cases cited by these text writers are the same, and consist, in the main, of the following: *Mandeville v. Bank*, 9 Cranch, 9; *Bank v. Bank*, 46 N. Y. 82; *Indig v. Bank*, 80 N. Y. 106; *Bank v. Henninger*, 105 Pa. St. 496; and a very few other cases where the bank was itself the holder of the note. The states represented are not so numerous, as appears from their citations, as those who hold as we do, while the cases themselves will not stand close scrutiny.

Great prominence is given the case of *Mandeville v. Bank*, from the supreme court of the United States, reported in 9 Cranch, 9. All the text-books quote the following language from the opinion in this case pronounced by Chief Justice MARSHALL: "By making a note negotiable in bank, the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face;" and announce the doctrine as contended for. The few cases in the same direction build with equal confidence upon this decision. It must be admitted that, when taken by itself, the language quoted does seem to sustain them. But, when we examine the facts in that case, it becomes

manifest at a glance that the point really decided, and to which the language was intended to apply, is as foreign to the question we are considering as it could well be, and relate at all to commercial paper. The facts of the case were, briefly, these: Mandeville, a citizen of Virginia, executed his note to one Nourse, for \$410.50, 60 days after date, negotiable at the Union Bank of Georgetown, payable at the Bank of Potomac in Alexandria. On the day of its execution, the note was negotiated and discounted by the Union Bank of Georgetown, and the proceeds thereof paid over to Nourse. After this, Nourse, becoming indebted to Mandeville, executed to him his note, due in 60 days, negotiable at the Bank of Alexandria, payable at the Bank of Columbia. When the note given by Mandeville, and discounted by the Union Bank, fell due, it was not paid, and the Union Bank sued Mandeville thereon. He defended, trying to set off against the note the debt he held against Nourse. It was insisted for Mandeville that his rights must be determined according to the laws of Virginia, the *lex loci contractus*; and that under the laws of that state a defendant is allowed to set off against the assignee of a promissory note any just claims which he had against the original payee before notice of the assignment of the note. For the bank it was said that it was immaterial by which law the note was to be governed; for it was made with a view, expressed on its face, to be discounted by the Union Bank, whereby the defendant had waived any offset to which he might otherwise have been entitled. The court, in deciding the question, said, (and we give the opinion entire, *in hac verba*;) "It is entirely immaterial whether this question be governed by the laws of Virginia or of Maryland. By neither of them can the discounts claimed by the plaintiff in error be allowed. By making a note *negotiable* in bank, [the italics are ours,] the maker authorizes the bank to advance on his credit to the owner of the note the sum expressed on its face. It would be a fraud on the bank to set up offsets against this note in consequence of any transactions between the parties. These offsets are waived, and cannot, after the note has been discounted, be again set up. The judgment is to be affirmed, with damages at the rate of 6 per cent. per annum." Thus we see that no possible question arose upon the part of the note making it "payable at" the Bank of Potomac, nor "with" that bank, but upon that part of the note making it "negotiable" at the Union Bank, and with the latter bank; and no question of the application of bank deposits in any shape is presented. The only matter considered, or that could possibly have been considered, by the court, was whether a party having authorized a bank to discount his note could thereafter set off debts he held against the payee of the note. The facts of this case were not published in the earlier Cranch Reports, which doubtless accounts for the misconception of the opinion by the usually accurate and always learned text writers who have made it the groundwork of the effort to establish the rule as contended for by defendants in the case at bar. The facts will be found in "The Lawyers' Co-Operative Pub. Co.'s Edition of the United States Supreme Court Reports."

The case of *Bank v. Henninger*, 105 Pa. St. 496, is greatly relied on by the text-books above referred to. There the bank was the holder and owner of the note, and the maker was B. F. Young, its cashier. At the close of business on the day of the maturity of the note there were funds of the cashier on deposit sufficient to pay it. The cashier, instead of charging up said note against his deposit, handed it to a notary for protest; the object being to hold the indorser, and compel him to proceed against the maker in order to let in a defense which the maker could not set up against the bank. The suit was by the bank against the indorser, who claimed to be discharged by the facts stated. The court, among other things, say: "When the depositor becomes indebted to the bank on one or more accounts, and such debts are due and payable, the bank has the right to apply any deposit he may have to their payment; this, by virtue of the right of set-off. Where a general deposit is made

by one already indebted to the bank, the latter may appropriate such deposit to the payment of such indebtedness." And, while admitting that the bank might waive this right of set-off, so far as it was concerned, yet, where the rights of other parties were concerned, the waiver might result in releasing sureties, and the court held the indorsers discharged; the court illustrating the ground of the decision in the following language: "If I am the holder of A.'s note, indorsed by C., and when the note matures I am indebted to A. in an amount equal to or exceeding the note, can I have the note protested, and hold C. as indorser? It is true, A.'s note is not technically paid, but the right to set-off exists, and surely C. may show, in relief of his obligation as surety, that I am really the debtor, instead of the creditor, of A. If this be so between individuals, why is it not so between a bank and individual?" How far removed this case is from supporting the doctrine as contended for here, is too manifest to justify elaboration, yet it is cited in the text-books as sustaining the assertion that the weight of authority is in favor of the right of a bank, without regard to whether it is or not the holder of the note, to appropriate deposits of the maker to its payment, upon the idea that a note made payable at the bank is tantamount to a check on the bank.

Let us see next what is in the case of *Indig v. Bank*, 80 N. Y. 100. Plaintiff held a note payable at the bank at Lowville. He deposited it with the defendant bank for collection, who sent it by mail to the bank of Lowville. On maturity, the bank of Lowville charged the note up to the maker,—he having funds there on deposit,—and forwarded its draft to defendant. The bank of Lowville failed before the draft was cashed. The plaintiff sued the defendant for the amount of the note, which amount he alleged was lost through defendant's negligence. It was insisted for the plaintiff that defendant, by sending the note to the bank of Lowville, constituted that bank its agent for the collection of it, and was "therefore liable for the proceeds as having been received by the bank of Lowville; the last-named bank being deemed to have received the proceeds by charging the amount of the note against its customer,—the maker." The court, in response, say: "We do not think that any such agency was created. The note, *in so far as relates to its presentment at the bank*, and the duties of the bank in respect to it, was equivalent to a check drawn by the maker upon the bank where the note was made payable;" citing *Bank v. Bank*, 46 N. Y. 88. We will first observe that the portion of the opinion which we have taken the liberty of italicizing is directly in conflict with the decisions in our own state with reference to the duties of the holder of a note so payable as to the non-necessity of presentment, and overlooks and confesses the distinctions we have already pointed out between a check and a note as to presentment. The right of the bank of Lowville to pay the note because made payable at its place of business was not the issue in that cause, but in the argument upon the non-liability of the defendant the court merely assumed, upon the authority of the *Bank Case*, in 46 N. Y. 82, that such was the law; so that for the soundness of the doctrine we must turn to that case. When we read the syllabus, we are told that it simply decides that a direction of a bank depositor to his bank to pay out his funds on his notes due and to become due, in a certain order, creates no trust in favor of the holders of such notes, and that they have no right of action against the bank for its failure to comply with the depositor's instructions. The facts were that the Florence Mills, a Connecticut corporation, had made two notes, payable at the counter of the defendant. One fell due April the 2d, and the other, April 4th. The note falling due on the 2d April was presented for payment, and protested for non-payment. On 3d April the mills company sent a letter to the bank, containing a draft, (which, with a small balance to the credit of the mills, was sufficient to pay either note, both being for the same amount,) with directions to credit their account with the draft, and then to pay their note falling due on the 4th. The draft was col-

lected on the 3d,—the day it was received,—and on the same day the bank paid the note that had been protested on the 2d. The note due on the 4th not being paid, the holder sued the defendant, insisting that the letter directing how the proceeds of the draft should be applied, operated as an equitable assignment or appropriation of the proceeds to the payment of its note falling due on the 4th. This alone was the issue, and such was the reporter's understanding of it, as shown by the syllabus. The opinion takes a much wider range, and does announce the doctrine as broadly as here contended for,—that a note payable at a particular bank is in substance a check. But that part of the opinion making the announcement is without any citation of authority or process of reasoning to sustain it, and it is difficult to understand exactly upon what the court predicated its opinion that the note was the equivalent of a check. In two paragraphs it seems to be placed upon the agreement or understanding of the parties, and in another upon commercial usage, while in another it seems to be predicated upon the legal effect of the note so written. Nor does it appear that the defendant bank was not itself the owner of the past-due note to which the deposit was applied in violation of the instructions of the depositor. Moreover, the opinion was by a divided court, Chief Justice CHURCH, dissenting; so that our answer to this case, which is much relied on by the defense here, is that what is said concerning the question now before us was incidental merely, unsupported by reason or authority, and with an ambiguity of statement of facts, so far as this question is concerned; and we may be permitted to add that on the very point decided it is of most questionable soundness. It virtually holds that a customer of a bank cannot make a deposit, with instructions accompanying the same to apply proceeds to a note of the depositor maturing on the succeeding day, that would prevent the bank from applying the proceeds to a note past due before the deposit was made. It seems not only to create a new law for banks, but it strikes down the well-established right of a debtor, unable to pay two debts, to direct and control the application of his payments to the one he may prefer. The authority of such a decision, viewed from any stand-point, is not sufficient to overturn our convictions, nor break the force of the well-considered cases holding to the contrary.

In *Pease v. Warren*, 29 Mich. 9, Judge COOLEY says: "It cannot be pretended that the making a note payable at a particular bank can make the bank the agent of the payee to receive payment." And, we ask, would not this be just as fair and reasonable reading of the terms as it is to construe them to make the bank the agent of the payor to make payment. They would serve the one purpose as well as the other, and there is as much authority for the one holding as the other; and several of the cases cited as sustaining the defendant's contention here do go to the very point of deciding what Judge COOLEY says is not law. Such is the decision in *Lazier v. Horan*, 55 Iowa, 75, 7 N. W. Rep. 457, already herein referred to.

It is true that Mr. Daniel, in the third edition (volume 1, § 926a) of his valuable work on Negotiable Instruments, says that in his previous editions he had taken a different view, but that he is now of opinion that he was wrong, and that "upon principle and authority we should say that a bank or banker at whose place of business negotiable paper is made payable may apply to its payment funds of the maker or acceptor held on deposit, at its maturity; the relations of banker and customer, and the tenor of the instrument, justifying the inference that the customer intended this to be done;" citing, in note, the case of *Indty v. Bank*, 80 N. Y. 106; and adds in the text: "And other well-considered cases sustain this view,"—referring to *Lazier v. Horan*, *Thatcher v. Bank*, *Bank v. Bank*, and the case of *Bank v. Newton*, already so freely quoted from by us. While we entertain for this distinguished author the highest respect for his learning and accuracy, (and the writer especially esteeming him no less highly personally than professionally,) we are constrained to believe

that the view expressed in the previous editions of his work is sounder, and more in keeping with authority and reason, and the necessities of the large interests concerned, than is found in the last. There is no new light shed on this subject that, in our opinion, justifies the change of view. This author seems to consider separately the rule as applied to acceptances and to notes; and as to acceptances, he says: "It may be regarded as well-settled law in England that an acceptance payable at a particular banker's is tantamount to an order on the banker to pay same to the person who, according to the law-merchant, is capable of giving a good discharge to the bill." In support of this he cites, in note 3, § 326a: *Robarts v. Tucker*, 16 Adol. & E. (N. S.) 578; *Kymer v. Laurie*, 18 Law J. Q. B. 218; *Forster v. Clements*, 2 Campbell, 17; and, in addition thereto, Thompson, Chitty, Parsons, Byles, and Edwards, on Bills. Of the text-books cited, Edwards, as we have already seen, takes a different view, while the others refer to the same cases that Mr. Daniel does, as far as they were extant at time of publication; their text adding nothing thereto germane to the point under discussion.

Having already extended this opinion beyond what is deemed necessary by the writer, we will undertake to go into but one of the English cases referred to, although they have all been considered. *Robarts v. Tucker*, 16 Adol. & E. (N. S.) 578, was where the banker paid an acceptance of the Pelican Life Insurance Company, payable at such banker's, upon a forged indorsement. This payment was debited to the company on its pass-book, and returned to it by the banker, and the company credited its banker on its books. Subsequently the company was compelled to pay the amount thereof to the true owner of the acceptance, and thereupon brought this suit against the banker. The first count in plaintiff's declaration alleges that, in consideration of certain money loaned by it to the defendant banker, and of the agreement to retain and employ the defendant as the banker of plaintiff, the defendant undertook and promised the company, to the extent of money so lent, to pay to the lawful holder thereof all such bills of exchange as should be accepted by the company, payable at the banker's house; and that not regarding, etc., the defendant had charged plaintiff with an acceptance that had been paid to persons not legally authorized to receive payment and give an acquittance, etc. The second count was for money loaned, account stated, etc. The contest was whether the course of dealing between the bank and its customer creating the obligation of the banker to pay his customer's acceptance made payable at the place of business of the banker rendered the latter liable if he paid same upon a forged indorsement, it being conceded that the act of acceptance was a guaranty of the genuineness of the drawer's signature. The court decided that the banker's authority to pay was limited to the payment of genuine indorsements; the court adding that, "if bankers wish to avoid the responsibility of deciding on the genuineness of indorsements, they may require their customers to domicile their bills at their own offices, and to honor them by giving a check upon the banker." And it was in this connection that PARKER, B., used the language that has been made the basis of the announcement by the text writers of the doctrine contended for; the latter losing sight of, as we think, the custom and course of dealing, if not an express agreement, that by reason of the deposit or lending of the funds to the banker the latter undertook to protect the credit of the customer, under which, if he failed to do so, the banker became liable to an action by his customer for permitting him to be dishonored. See *Marzetti v. Williams*, 1 Barn. & Adol. 415; *Whitaker v. Bank*, 1 Comp., M. & R. 744. Recognizing the mutability of the obligation, it was said by MAULE, J., in *Robarts v. Tucker*, *supra*, that "it is a hardship on a banker if he must either pay the bill at once at the peril of an indorsement proving a forgery, or dishonor the bill at the risk of an action against him by his customer." *Forster v. Clements*, 2 Camp. 17, cited by Mr. Daniels, and other text writers, was a case presenting for adjudication the same question pre-

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sented in *Roberts v. Tucker*, differing from it only in the fact that in *Forster v. Clements* the banker had paid the acceptance without funds, and then sued the acceptor,—its customer. The acceptor defended upon the ground that the bank had not proven the genuineness of the first indorser's signature. The custom to pay was assumed. If we are to ingraft upon the law of this state what is said to be the English rule, authorizing the bank to treat the paper made payable at its place of business as tantamount to a check, we should do so, not in part, as the few American cases relied on do, but as a whole, and carry with it an obligation and duty upon the bank to pay, so that, upon failure to do so, it must be liable to an action for damages for injury to the credit of its customer. Well might the banks pray to be delivered from their friends if the rule contended for is to be established in this state, with all of its attendant uncertainties and dangerous liabilities.

Without referring further to the cases cited in the text-books, they may be classed as resting either on custom well established, or course of dealing between the parties thereto, or to paper owned and held by the bank at maturity, where the principle of set-off has been applied. Without further discussion, we hold, on this branch of the case, the decree of the chancellor was erroneous, and should be reversed. Of course it is needless to add that there is nothing to prevent any depositor from making such agreement with his bank as to the protection of his paper. We merely hold that, in the absence of an understanding, the bank pays at its peril.

One other question remains to be disposed of: For the defendant it is urged that if it be held that the bank had no authority to pay the note, then they ask to be permitted to rely upon such payment as a set-off against complainant's demand; and the note is filed with the answer, showing the indorsements as given in the opening statement of this opinion. The answer is asked to be taken as a cross-bill, but no process is issued. Without determining whether this matter could or could not be made in answer merely, without cross-bill, it is sufficient to say that in whatever form presented it would be unavailing to the defendant under the proof in this case, which shows that by reason of such an authorized payment, and the failure of the bank to notify the complainant thereof, the latter had a settlement with J. D. Carter & Co., the parties primarily liable, as between themselves and complainant, subsequent to such payment, and in ignorance thereof, wherein complainant allowed Carter & Co. credit for the amount of said note upon the assumption that they had, in accordance with their contract, paid the same; the consequence of all of which, together with the subsequent insolvency, and removal from the state, of Carter & Co., before any knowledge that his deposits had been applied, the complainant has lost recourse over on the parties primarily liable thereon. So that to allow the set-off would be to cast upon complainant the loss resulting from the unauthorized act of the defendant.

Under the facts of this case the complainant's equity is superior to any right of set-off which the defendant might otherwise have had.

Let the decree be reversed, and judgment here for the complainant, with interest and costs.

LURTON, J., dissents from the foregoing.

HENDERSON BLDG. & LOAN ASS'N v. JOHNSON *et ux.*

(Court of Appeals of Kentucky. February 2, 1889.)

BUILDING AND LOAN ASSOCIATIONS—USURY—CHARTER.

A subscriber to nine shares of stock of \$100 each of a building association discounted them to the association for \$675, securing the loan by mortgage on realty, agreeing to pay as interest installments 50 cents per month on each share. The debt, interest, premiums, and fines, calculated according to the charter for a period of three years, four months, and six days, amounted to \$1,138.52, subject to a credit of \$459.25, leaving the mortgagor still in debt \$679.27. *Held* that, as the transaction was in fact usurious, the association could not protect itself by a provision in its charter that "no dues, premiums, interest, or fines that may accrue to the association in accordance with its charter shall be deemed usurious."

Appeal from circuit court, Henderson county; M. C. GIVENS, Judge.

Action by the Henderson Building & Loan Association against Thomas S. Johnson and wife to recover a debt, and to foreclose a mortgage to satisfy same. Defendant interposed a plea of usury as to a part of said debt, and judgment was rendered for plaintiff for its claim, deducting therefrom the usury alleged by defendant, and a sale of the property was ordered. Plaintiff appeals.

Montgomery Merritt, for appellant. *John Young Brown*, for appellees.

PRYOR, J. The question involved in this case involves the validity of section 8 of the appellant's charter in so far as it provides that "no dues, premiums, interest, or fines that may accrue to the association in accordance with its charter shall be deemed usurious, and the same may be collected as other debts," etc.

The appellee Thomas S. Johnson subscribed for nine shares of stock in the Henderson Building Association of \$100 each, to be paid for in weekly installments of 25 cents on each share. He discounted the shares to the association at and for the sum of \$675. He was also to pay 50 cents per month on each share, as interest installments, and, in case he failed to pay his periodical dues for the period of three months, the association had the right to forfeit his shares of stock, and collect at once the amount of money obtained from the association. The appellee executed, on the 25th of August, 1884, a mortgage on his house and lot in Henderson to secure the payment of \$675, (the money then obtained,) and, failing to pay his dues for three months, this action was instituted to foreclose the mortgage.

It is alleged in the petition, and the account made out in accordance with the charter and by-laws of the association shows, that of date September 16, 1887, he owed the association the sum of \$679.97 on this loan of money, or, as appellant alleges, by reason of this partnership of which the appellee was a member. The appellee only received \$607.40 in money, as by the rules of the association he was entitled to the benefit of the earnings from the ——— day of March, 1884, although he did not become a member until August, 1884. The attorney's fee for examining title and clerk's fees had to be, and were, deducted from the amount of money received by him.

The appellee, in defense to the action, alleged that this was a simple loaning and borrowing of money at a usurious rate of interest, and that, although sanctioned by the legislature, it was such partial and favored legislation as violated the fundamental law of the state; and the chancellor below so holding gave the appellant its debt, with legal interest only, of which it now complains.

It is insisted that the object of such associations is to enable the mechanic and laborer for wages to acquire a home, or secure one, for the benefit of his family, by the payment in weekly and monthly installments of 25 and 50 cents; and that no other corporation or individual would likely hold out such

inducements to those who are unable to furnish personal security for the performance of their obligations. Counsel for the appellant has produced many authorities from courts of last resort, and such as are entitled to great weight, sustaining the powers conferred by appellant's charter in like corporations, basing their conclusions, some of them, at least, on the fact that the actual transaction between the member and the association is not made upon any usurious consideration. *Patterson v. Association*, 14 Lea, 677; *Merrill v. McIntire*, 13 Gray, 157.

Experience may demonstrate the necessity for such organizations, and the peculiar benefits to be derived by the laboring classes from the liberal provisions contained in their charters; but the facts of this case are by no means convincing that either benevolence or charity constitutes the basis of this association. The members who abstain from bidding the enormous premiums for the loan of money must necessarily profit by the investment; but those who are so unfortunate as to become borrowers, and required to pay the interest exacted in this case, must ordinarily forfeit their stock, with the homes they have mortgaged and sold, and the proceeds applied to the benefit of those who act from motives of gain and not from the love of mankind.

The appellee in this case owned no real estate but that embraced by the mortgage. He obtained this loan of \$675 on the 25th of August, 1884, to enable him to pay a debt of \$600 to a creditor, who was pressing him for payment. From the time of the loan, in August, 1884, up to the 1st of January, 1886, he had paid the association at various times, in the way of dues and interest, the sum of \$297.85, and on the 14th of July, 1888, when the report of the commissioner was made by which the appellant was only allowed the legal rate of interest on the loan, and the appellee credited by what he had paid, the latter owed the association \$482.46, to satisfy which the chancellor ordered the property mortgaged to be sold.

The appellant complains and says that, following the articles of association, the appellee would be indebted by way of discount, dues, interest, and fines unpaid in the sum of \$1,138.52, subject to a credit of \$459.25, the amount of dues, etc., that should have been paid by the appellee, with which he stands charged, leaving a balance still due the association of \$679.27, as of the date of the commissioner's report. This result is reached by charging the appellee with the premium agreed to be paid on the money loaned for the time the loan had been made, which was \$122.72. This sum, added to the dues, fines, and interest, which amounted to \$416.25, makes \$538.97 that defendant had paid or was bound to pay by the laws of the appellant and the regulations of its order, leaving the appellee still in debt in the sum of \$679.27. Calculating this debt and its interest, and the claim of the association against the appellee in the way of premiums, fines, etc., as authorized and required by the charter, and the appellee would be compelled to pay for the loan of \$675 from the 25th of August, 1884, until the 1st of January, 1888, a period of three years, four months, and six days, 538.93, leaving him still in debt \$679.27.

The debt borrowed was secured by a mortgage on real estate, and we are inclined to adjudge that the appellee could have had no difficulty in obtaining such a loan from either a natural or artificial person with money to loan, especially upon a mortgage lien, with a law protecting the lender against any reclamation of usury by the debtor; nor will it be pretended that such special privileges could be conferred on an individual or corporation, and at the same time deny to others a like privilege.

The legislature has suspended the general law in regard to usury for the benefit of the appellant, seemingly to promote the benevolent objects in view. The profit made does not ultimately benefit all the stockholders. Those who can live without borrowing from the association, and whose stock is not liable to be forfeited for the non-payment of dues, will ultimately realize the large profits resulting from such usurious loans at the expense of those who have

paid from 20 to 50 per cent. for the use of the money. The fact that the money is loaned by the corporation to one of its members can make no difference. The entire transaction is against the letter and the spirit of the statute against usury.

The charter of appellant is delusive. It proposes to practice benevolence, and, at the same time, exacts the most exorbitant rate of interest. The borrower is made the victim of the delusion, and, instead of being protected by the corporation, is made penniless by reason of these usurious exactions. It is certain that those who fail to borrow, prosper under the workings of this association; but they do so on the needs and misfortunes of their fellow members.

A loan to members at the legal rate of interest, with reasonable dues for the maintenance of the organization, could not be held usurious, but such power as is conferred on the corporation in this case, or upon its managers, in the loan of its money, evidenced by the transaction in question, divests the appellant of its benevolent character, and converts it into an organization under the form of law for the purpose of filling its treasury by imposing oppressive burdens on its members, who have been solicited to become the objects of its benevolence.

This court, in the case of *Herbert v. Association*, 11 Bush, 296, adjudged such a transaction to be usurious. See also, *Association v. Hetder*, 55 Iowa, 424, 5 N. W. Rep. 578, and 7 N. W. Rep. 686; *Association v. Wilcox*, 24 Conn. 147; *Williar v. Association*, 45 Md. 546; *Association v. Gallagher*, 25 Ohio St. 208; *Association v. Blackburn*, 48 Iowa, 385. In addition to these authorities, in the case of *Gordon v. Association*, reported 12 Bush, 110, it was held that the section of appellee's charter in that case, investing it with the power to charge a greater rate of interest than was allowed by the general law of the state, was unconstitutional, and, whether regarded as an exclusive privilege or partial legislation, it was in violation of the fundamental law. In that case, it is true, the borrower was not a member of the association; but the power was given by the fifth section of the charter to loan money at such rates of interest as might be agreed on by the parties; preference being given in all cases to the members of the association. The object of that organization was to enable its members to acquire homes and other property, and, if the benevolent object in view justified the legislature in permitting its members to borrow money of the corporation at a usurious rate of interest, there is no reason why, in order to accomplish such a purpose, it should not be authorized to make the same character of loans to those not members.

The power given a natural person to offer his money at auction, for loan to the highest bidder, making valid by legislative enactment the agreement to pay any amount of interest agreed on, would be deemed usury under the general law; and the repeal of the usury law as to him, however laudable the motive, would be open to constitutional objection. There is no difference in the exercise of such powers by a corporation and an individual. If invalid as to the one, it is equally so as to the other; and no such special privileges can be conferred upon either under our constitution.

The supreme court of Illinois in a well-considered case held that when a sum of money, in addition to the interest allowed by law, is bid for a loan by one of its members from the corporation, and included in the note, the transaction is usurious, and a provision in the charter exempting the same from the operation of the usury law of that state was held to be unconstitutional. *Association v. Smythe*, 9 Reporter, 714.

We concur in the judgment below holding that all the appellant was entitled to recover was the money loaned, with the legal rate of interest.

Judgment affirmed.

CITY OF COVINGTON *v.* WORTHINGTON *et al.*

(Court of Appeals of Kentucky. February 7, 1889.)

1. CONSTITUTIONAL LAW—TAXATION—PUBLIC IMPROVEMENTS—ABUTTING OWNERS.

Act Ky. March 8, 1876, authorizing the city of Covington to assess a special tax upon lots abutting on property purchased or condemned for opening, extending, or widening a street, "said tax to be used to pay the cost and expense of such purchase or condemnation," is not unconstitutional, as applied to cases where the owners of the abutting lots upon which the special tax is assessed also owned the lots taken for the street. The owners of the lots so taken being entitled to full compensation therefor without deduction on account of supposed benefits to their adjoining lots, the subsequent assessment on the latter is their share of the public burden for improvement; and it is immaterial that such assessment may exceed the value of the lots taken.

2. EMINENT DOMAIN—COMPENSATION—PAYMENT.

But the compensation for the lots taken, *i. e.*, their full value, must be paid in money before the improvement is made, notwithstanding the assessment may equal such value.

Appeal from chancery court, Kenton county; J. W. MENZIES, Judge.
W. A. Byrne, for appellant. William Goebel, for appellees.

PRYOR, J. This case is brought here to determine the constitutional validity of an act of the legislature amending the charter of the city of Covington, approved March 6, 1876, and also the validity of an ordinance passed in pursuance of its provisions. The city council, by a regular proceeding in the mayor's court, condemned certain lots, or parcels of lots, in the city, for the purpose of extending Stewart street from its present western terminus to Russell street. The regularity of the condemnation proceedings is not involved, and we must infer they were such as the law authorized, and, if not, the parties whose property has been condemned may appeal to the circuit court, and from there to this court, as in other cases.

The appellees were the owners of the ground, or a part of it, taken by the city for the purpose contemplated, and owned land bordering on the improvement; in fact, the appropriation of a part of these lots left the balance bordering on the street. The appellees instituted this action, enjoining the city and the tax collector from collecting any tax from them to pay for this improvement; and the chancellor, upon the facts alleged in the petition, perpetuated the injunction as to the tax, but held the proceedings valid in so far as the city sought to extend the street. The city appeals from the judgment perpetuating the injunction as to the collection of the tax, and the appellees, by cross-appeal, from that part of the judgment holding that the street was properly taken for the public use. The ground upon which the chancellor sustained the injunction was that the land of the appellees had been taken for public use without constitutional compensation.

It was alleged in the petition by the appellees that the special tax levied on the realty belonging to them, and bordering on the street, was equal or amounted to more than the value of their realty taken for the street, and therefore their property had been taken without any compensation whatever. That the tax imposed is equal to, and as to one or two of the appellees exceeds the value of, the property taken, is conceded.

The act of March 6, 1876, is as follows: "Whenever the said city shall have acquired by purchase or condemnation any land or material for the opening, extending, or widening of any streets or parts thereof within said city, its city council shall have the power to assess a special tax upon the lot or lots or parcels of land fronting or abutting on the said street," etc., "according to the front feet, for such distance along the same, not less than a square's length, if the square is laid out, or not less than four hundred feet, if there is no square, as they shall provide in their resolutions directing the purchase or

condemnation, or they may assess according to valuation as the same appears in the city assessor's last book of assessments, or they may assess any property benefitted according to benefits,—said tax to be used to pay the cost and expense of such purchase or condemnation, or to reimburse the city treasury if said cost and expenses shall have been previously paid thereupon," etc.; "and the proceedings of condemnation shall be regulated by the provisions of section 4 of article 6 of the act of March 2, 1850."

Counsel for the appellees in this case insists that the exaction of this tax on the value of the property abutting on the street, as provided by the enactment of March, 1876, is substituting for compensation, to the owners of the property taken, the benefits derived, instead of a money equivalent, as required by the constitution. This view of the question presented arises from the fact that all taxation imposed in cases like this is based upon an actual or supposed local benefit; and therefore, as a part of appellees' lots have been taken, the remaining really out of which the street has been carved is taxed on account of the local benefits derived, and that when they pay this tax there is nothing left in the way of compensation but the enhanced value of their adjoining property, or the peculiar benefits resulting from the improvement.

It is manifest that nothing can be deducted from the value of the property taken by way of condemnation. Neither the state, county, nor municipality can assert benefits or advantages to the citizen as a recompense for the appropriation of his property to the use of the public. He is entitled to its value in money to be paid before entry. Recognizing this principle as the settled doctrine of this state, it is proper to inquire whether or not the appellees in this case have been required to contribute more to the opening or extension of the street in question than their share of the public burden in the construction of such improvements.

If those owning real estate in the city of Covington are liable to similar taxation for the purpose of opening, extending, or improving streets, the taxation, then, being equal, is not open to constitutional objection. The fact that the appellees owned the land condemned, and are left with lots bordering on the extension, is no argument against the imposition of the burden. If the land had belonged to a stranger to this controversy, and purchased or condemned by the city for the street extension, the lots bordering upon it belonging to the appellees would be liable to taxation for its improvement. The law applicable to the entire municipality provides that such improvements shall be made by a special tax upon the lots bordering on the improvement, according to the number of front feet, etc. It is universal in its application, and produces that equality recognized and settled as constitutional in the case of *City of Lexington v. McQuillan's Heirs*, reported in 9 Dana, 513.

The section of the charter of the city of Lexington was similar in almost every respect to the section we are considering, and the court there held the taxation constitutional. Nearly all the legislation in this state with reference to such improvements has been based on that decision, and the courts of this and other states have recognized it as the leading case on the subject. There is one feature of the section in appellant's charter that was disapproved in the case cited: "The city council is authorized to assess any property benefitted according to benefits;" and therefore could impose a much greater burden upon the one lot-owner than the other, and, as in the *Case of McQuillan's Heirs*, make one lot-owner pay more than another, because of the great expense incurred in improving the street in front of the particular lot. This was condemned in the *McQuillan Case*, and each lot-owner required to contribute his due proportion of the cost according to the extent of his ground on the street.

The special tax in this case makes each lot-owner pay in proportion to the number of feet fronting the street, and this was proper. The tax imposed is neither arbitrary nor unreasonable. If appellees had not owned the ground

taken, their part of the cost would have been the same. They are not taxed to pay for the ground appropriated, but to pay the cost of extension. It inevitably follows that, in this distribution of the burden, the tax collected from the appellees aids in paying for the property condemned, and so of any street or public highway that has been condemned as such for public use. If a county road is established, and the land of A. is condemned for that purpose, A. is compelled in discharging his part of the county levy to answer and pay his proportion of the value of his own land. The expense is charged to the entire county, and in this way all contribute, including the citizen whose land has been condemned. As to cities, as is usual in this state, each square improves its streets by taxing the property by the front foot to pay for the improvement. This is held to produce equality, and the fact that the party sought to be taxed was the owner of the land condemned can make no difference. If no tax can be imposed in such a case, then you extend the improvement, and release him from all cost, when charging others for like improvements who happen to own the land adjoining, but not the land condemned.

In the case of *Sutton's Heirs v. City of Louisville*, reported in 5 Dana, 28, the jury, in determining the value of the land for the street, was authorized to set off the advantages and benefits to the owner by reason of the improvement against the value of the land, and it was held unconstitutional. In this case the appellees have been given the value of their land without reference to the advantages to be derived from the street extension, and have been taxed as all other owners of real estate situate in the city are taxed. The tax may exceed the value of the land taken, and is imposed because of local benefits derived, but, producing that equality in the common burden for like improvements, it is constitutional taxation. In the *Case of McQuillan's Heirs*, it is said "that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will from such constituent members of the same community generally as own the same kind of property." Where the same kind of property is subjected alike to the same common burden, the taxation, if otherwise unobjectionable, has always been sustained.

We are unable to determine from the pleadings in this case (there being nothing but the petition) whether the moneyed value of the land condemned has been paid to the appellees or not, or whether the city has entered upon the premises condemned for the purpose of making the improvement. We infer from the petition that the appellees are assailing both the ordinance and charter of the appellants, and that no entry has been made or money paid, but an injunction obtained with a view of delaying all proceedings until the constitutional question raised is determined.

It is plain that the city should pay, or offer to pay, the appellees the money value of their land, as fixed by the verdict and judgment, before entering on the premises. This is a condition precedent to the right of entry, and when paid the assessment may be made as provided by the charter. While the assessment may equal the value of the property taken, it affords no reason for applying the doctrine of set-off in a case like this. The owner must be paid his money, and then required to pay his part of the common burden.

The judgment below is reversed on the original, and affirmed on the cross, appeal, and remanded for proceedings consistent with this opinion.

SINGLETON *et al.* v. SCHOOL-DIST. NO. 34.

(Court of Appeals of Kentucky. February 9, 1889.)

1. EJECTMENT—TITLE TO SUPPORT—DEDICATION—ADVERSE POSSESSION.

Trustees of a school-district, in an action in the nature of ejectment, in which they allege that they are the owners of the land and entitled to possession, may prove either a dedication or adverse possession, or both.

2. SAME—EFFECT OF DEDICATION.

A parol dedication of land to the use of a school-district by survey, and describing the boundaries by marked corners, and acceptance by building a school-house thereon, and using it for school purposes, are effectual to vest the title in the trustees as against subsequent grantees.

3. ADVERSE POSSESSION—OCCUPATION FOR SCHOOL PURPOSES.

Possession of land for school purposes for such length of time each year as school is taught may be regarded as actual, continuous, and adverse, so as to give title, if continued for the statutory period.

4. DEED—EFFECT OF RESERVATION.

An express reservation in the *habendum* of a deed of a portion of the land included within the description will prevail over the granting clause, containing no such reservation.

5. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

The admission of illegal evidence, not objected to at the trial, is not sufficient cause for reversal, though it may have had some influence with the jury on the question of damages.

Appeal from circuit court, Crittenden county; S. HODGE, Judge.

Action in the nature of ejectment by the trustees of school-district No. 34 in Crittenden county against Thomas Singleton and another. Defendants appeal.

Blue & Blue, for appellants. *Nunn & Cruce*, for appellees.

LEWIS, C. J. In 1869, Dempsey, the owner, conveyed to Newcomb, remote vendor of appellants, a tract of land, reserving in the *habendum* clause of the deed one and one-half acres thereof, described by metes and bounds, for "a school-house seat in 34 school-district, for the only use of same." It appears the small parcel of the land described and reserved in the deed had been, in 1866, dedicated by Dempsey for the use of the common school-district, by being surveyed, and the boundary thereof described by marked corners, and that the trustees of the district signified their acceptance of it by immediately erecting a log school-house thereon, which has been occupied and used for school purposes a portion of each year ever since. But in the deed from Newcomb to Beck, and that from Beck to appellants, no mention or reservation of the parcel so dedicated was mentioned. Nevertheless, as the dedication, though made by parol, was valid and complete, and the parcel of land was in the actual possession of the trustees of the school-district when the deed was made to Newcomb, and has so continued ever since, they had, when this action was commenced, a complete title, both in virtue of the dedication and by adverse holding; while, on the other hand, as Newcomb never had any title to the parcel whatever, his vendees could not acquire any from him.

The trustees having alleged they were the owners of the small parcel of land, and entitled to the possession, of which appellants had, without right, deprived them, they had the right, this being in the nature of an action in ejectment, to prove, as evidence of their superior title and right to recover the possession, either or both the dedication made by Dempsey and adverse possession and claim for 15 years; and consequently the court did not err in overruling the motion to require the plaintiffs to elect for which cause of action they would prosecute, there being but one.

The lower court permitted witnesses to testify to the fact that the trustees of the school were deterred by the claim of appellants to be the owner of the land from going to the expense of building a new school-house, or repairing

the present one so as to enable a school to be taught in the winter-time, whereby some of the children were deprived of the privilege of attending the school. That consideration may possibly have had some influence on the jury in fixing the amount of damages found for the plaintiffs, which was \$50; but as the evidence, even if illegal, was not objected to by appellants during the trial, and may not really have been considered by the jury, we do not feel authorized to reverse the judgment on account of the amount of damages found.

We do not think the common-law rule, rejecting the *habendum* clause of a deed where it is totally repugnant to the granting clause, ever applied to the mere description of the quantity or kind of property conveyed, but simply to the character and kind of estate or interest conveyed; but the rule has not been so rigidly applied by this court as to defeat the intention of the parties, when ascertained by looking to every part of the instrument. The parcel of land in contest in this case never was intended to be conveyed by Dempsey to Newcomb, but was intended to be, and was expressly, reserved, and therefore no title to it passed.

It has been repeatedly held by this court that a possession, such as the nature of the real estate will admit of, and is necessary for the use it is applied to, may be regarded as actual, continuous, and adverse, though not in the actual use or occupancy of the owner all the time; and, accordingly, possession of a parcel of land for school purposes for such length of time each year as a school is taught is to be regarded such, in the meaning of the law, as will, if continued for 15 years, give a perfect title. Judgment affirmed.

PORTLAND & G. TURNPIKE CO. v. BOBB.

(Court of Appeals of Kentucky. February 12, 1889.)

1. EMINENT DOMAIN—CONDEMNATION FOR TURNPIKE—PETITION.

Under act Ky. April 11, 1883, §§ 1, 10, providing that when a turnpike company shall be unable to contract with the owner for the purchase of land necessary for its use it shall file a particular description thereof, and may apply for the appointment of commissioners, the statement filed at the commencement of the proceeding must not only contain a description of the land, but must aver that the land is necessary for the company's use, and that it has been unable to contract with the owner for it, and such averments are jurisdictional.

2. SAME—AMENDMENT ON APPEAL.

Such averments not being contained in the statement presented to the county court, which is vested with original jurisdiction thereof, the proceeding cannot be aided by amendment in the circuit court on appeal, though it is there tried *de novo*.

3. SAME—FORMAL PETITION.

But it is not necessary to file a formal petition according to the Code of Practice.

4. CORPORATIONS—FRANCHISE—FAILURE TO FILE CHARTER.

An association which has filed articles of incorporation for record in the office of the clerk of the county court, as required by Gen. St. Ky. c. 56, may begin business, and its acts are valid, though it has failed to comply with the further requirement to file a copy of its articles with the secretary of state within three months. Such failure is available only in a direct proceeding to annul the franchise.

Appeal from circuit court, Pendleton county; W. E. ARTHUR, Judge.

Leslie P. Applegate, for appellant. W. M. & C. A. Rardin, for appellee.

HOLT, J. The appellant, the Portland & Greenwood Turnpike Road Company, instituted a proceeding in the Pendleton county court to condemn a right of way for its road through the land of the appellee, Joseph Bobb, under the act of the legislature of April 11, 1882, and which by its tenth section is made applicable to the condemnation of lands for turnpike road purposes. The first section thereof provides: "When any railroad company authorized to construct and operate a railroad in this state shall be unable to contract with the owner of any land or material necessary for its use for the purchase

thereof, it shall file in the office of the clerk of the county court a particular description of the land and material sought to be condemned, and may apply to the county court to appoint commissioners to assess the damages the owner or owners thereof may be entitled to receive; and thereupon the said court shall appoint three impartial housekeepers of the county, who shall be sworn to faithfully and impartially discharge their duties under this act." Gen. St. c. 18, § 1.

The appellant, as the foundation of the proceeding, filed what is styled in the caption, "Description of Land to be Condemned," and which merely gives such description, and asks the appointment of commissioners to assess the damages. It is questionable, perhaps, whether the description given comes up to the "particular description" required by the act; but we will so regard it. There was no statement in any form filed stating that the company had been unable to contract with the appellee for the right of way, or that it was necessary for such purpose. The commissioners reported, and the appellee, having been summoned, appeared, and presented both a general and special demurrer. Both were overruled. The ground of the latter was that the appellant had attempted to incorporate itself by articles of incorporation, filed for record in the office of the clerk of the county court under chapter 56 of the General Statutes, and had failed to file a copy of the articles with the secretary of state within three months after the filing in the clerk's office, as directed by the statute, and therefore had no legal existence as a corporation. This same question was made by the exceptions filed by the appellee to the commissioners' report, and it is unnecessary to notice it further than to refer to the case of *Walton v. Riley*, 85 Ky. —, 3 S. W. Rep. 605, in which it was held that a corporation thus created may begin business upon the filing of the articles in the county court clerk's office, and that it is not essential to the validity of its acts that the articles of incorporation should be filed with the secretary of state. In other words, that this failure to comply with this statutory requirement can be taken advantage of only in a direct proceeding to annul the franchise.

The exceptions filed by the appellee made no issue as to the need of the land for the right of way, or whether the company had made any effort to obtain it by contract. A jury assessed the damages, and thereupon the county court rendered a judgment of condemnation. The appellee appealed to the circuit court, and there, upon his motion, the action was dismissed. This was done without any hearing upon the merits, and, if properly ordered, it therefore can present no bar to another proceeding for the same purpose. The judgment does not give the reason for the dismissal. Counsel agree, however, in argument, that it was because of a failure at the institution of the proceeding to file a petition setting forth the facts necessary to authorize the condemnation. It was not necessary, however, to file a petition *in forma* according to the Code of Practice. It is a proceeding under a statute to enforce a statutory right, and the statute prescribes how it shall be done. While, however, the statute says the company "shall file in the office of the clerk of the county court a particular description of the land and material sought to be condemned," and then apply for the appointment of commissioners, yet the same section provides that it can only do so when the land is necessary for its use, and it has been unable to contract with the owner for it. If the land be not necessary for its use it cannot, under the statute, condemn it; nor can it do so unless it has first in good faith made an effort to obtain it by contract. They are conditions precedent to the exercise of the right of condemnation. The power conferred upon the company is an extraordinary one. The sovereign power vests it for certain purposes, and with a view to a public service, with the power of eminent domain; but it does so upon certain conditions, and with these it should strictly comply, in view of the extraordinary power given to it over the property of the citizen. It can institute proceedings for

its condemnation only when it is necessary for its use, and after an effort to obtain it from the owner by contract. The legislature intended to restrict the exercise of the power conferred to cases of necessity, and to afford the owner an opportunity to contract his land, or the use of it, away; thus avoiding the expense and trouble of a court proceeding. If the conditions do not exist upon which the company has been authorized to condemn the land, then, clearly, it cannot be done. It must show their existence. If an issue be made as to the necessity for the condemnation, or whether an effort has been made prior to the institution of the proceeding to obtain the land by purchase, and both do not appear affirmatively, there can be no condemnation. This being so, a proper and reasonable construction of the statute in question requires that the company should at the outset, and as showing its right to institute such a proceeding, not only incorporate in its statement filed as the basis of the proceeding a particular description of the land sought to be condemned, but an averment that it is necessary for its use, and that it has been unable to contract with the owner for it. It has no right to appear in court, or bring the owner there, unless this be so. They are jurisdictional facts, and should therefore be stated by the applicant at the outset. They lie at the foundation of the proceeding. Their existence should at least be *prima facie* shown, to authorize the court to proceed. Moreover, since a failure to show them upon an investigation would result in a dismissal, common sense dictates that the party should at the start aver their existence, because, if he cannot do so, the owner should not be forced into court. The statute not only admits of this,—to our minds a reasonable construction,—but the spirit, if not the letter, of the section in question requires it.

It is true, the proceeding upon the appeal must be tried *de novo*. The statute so declares. But the same cause of action must be tried. The original jurisdiction is vested in the county court; and, there having been a failure to present one there, it could not be created in the circuit court upon appeal by amendment. There was nothing to amend.

Judgment affirmed.

MORTON v. CLACK.

(Court of Appeals of Kentucky. February 14, 1890.)

EQUITY—RESCISSON OF CONTRACT—MISREPRESENTATIONS.

A. executed a deed to B., providing that, if at any time the premises conveyed should cease to be used for milling purposes, they should revert to A. B. conveyed to C., and the latter to the defendant; C. assigning to defendant a title-bond which he had received from B., and by which B. covenanted to execute a general warranty deed according to the deed given by A. C. represented to the defendant that the title was perfect in B. Held that, though the deed from A. was of record, the defendant had a right to rely on the representations of C., and that, as the land was liable to revert to A., the defendant was entitled to have the contract between him and C. rescinded.

Appeal from circuit court, Barren county; W. H. BOYTS, Special Judge.

John B. Clack, by this suit against J. F. Morton *et al.*, sought to recover judgment on a purchase-money note executed by Morton, and to enforce an alleged vendor's lien on Morton's undivided half interest in the purchased land. Judgment for plaintiff, from which Morton appeals.

W. L. Porter and Lewis McQuown, for appellant. Boles & Duff, for appellee.

HOLT, J. December 16, 1882, Edwin Vincent conveyed a small lot of land to Thomas Walton, Ivy Prescott, and Mary Poynter. The deed does not expressly define the interest of each of them, but, being jointly to them, must upon its face be regarded as a conveyance to each of a third interest. The deed contained this provision: "It is further expressly agreed and understood

that if, at any time in the future, the premises above described shall cease to be used for milling purposes, or the milling machinery be removed, then from then, and in that case, the above-described lot of land or premises shall revert to the said Edwin Vincent, his heirs and assigns. So long as the above conditions, as above described, are strictly complied with, the said Edwin Vincent will always warrant and defend the right and title to said lot of land during the exact observance of the afore-named conditions by the party of the second part with covenant of special warranty."

June 5, 1883, Mary Poynter and her husband, Edmund Poynter, sold to the appellee, John P. Clack, an undivided half interest in the property. Mrs. Poynter claimed to own this much interest under the purchase from Edwin Vincent. They at the time of the sale executed to the appellee a bond for title, which provides, *inter alia*: "The parties of the first part bind themselves to make to said Clack, according to deed made to them by Ed. Vincent, a general warranty deed to said property, on or before the day of possession."

The writing was, of course, not binding on Mrs. Poynter, by reason of her coverture; but any question as to it is obviated by the fact that since the bringing of this suit on March 9, 1885, and on May 22, 1885, she and her husband executed a deed with covenant of general warranty to the appellee for the half interest. September 15, 1883, the appellee sold it to the appellant, J. F. Morton, for \$790,—all of which the latter paid by conveying to the appellee's wife another tract of land, save \$360, for which sum he executed his note to the appellee, who brought this action upon it, and sought, not only a personal judgment against the appellant, but one enforcing a lien upon the half interest in the property.

When the appellee made the sale to the appellant he assigned him the title-bond held by him (Clack) upon the Poynters. Mrs. Poynter was also made a defendant to the action, as well as one Isham Vincent, to whom Walton and Prescott had conveyed their half interest in the property.

The appellant defended upon the ground that Mrs. Poynter had title to but a one-third interest in the property, instead of a half; and that even it was subject to reversion to her grantor by virtue of the clause above copied from the deed from him. His answer avers that, when he purchased, the appellee, Clack, represented to him that he was the owner of a half interest in the property, and that when he purchased of the Poynters they had a good and perfect title to it.

The appellee, in his reply to it, admits that the deed from Edwin Vincent invested Mrs. Poynter with but a third interest in the property; but he avers that she in fact purchased one-half of it, and that the deed by omission and mistake failed to state that such was her interest; and, to the end that this might be corrected, he made his reply a cross-petition against Edmund Poynter, Ivy Prescott, and Thomas Walton. The record fails to show that the latter was brought before the court, but his deposition was taken, and he testified that he was a defendant to the suit. Prescott, being a non-resident, was only constructively served.

It is true Walton and Prescott had conveyed all the interest they appear to have claimed to Isham Vincent, and that he had been made a defendant to the original petition; but no pleading was filed, directed against him, seeking a correction of the alleged mistake in the deed. It is clear that Edwin Vincent was not a necessary party to an action to reform it in the respect sought, because it was only a question of the extent of interest among the grantees. The testimony plainly shows that the claim of a mistake in its execution was well founded, and that Mrs. Poynter was in fact the purchaser of an undivided half interest in the property. It is unnecessary to decide, however, whether upon the record as presented, and considering who were before the court, and the manner of bringing them, the lower court had the right and should have reformed the deed for this reason.

The appellee tenders a deed of special warranty only to the appellant, which by its terms is expressly subject to all the conditions contained in the one from Edwin Vincent to Walton, etc. The appellant never accepted it. He had a right to believe at the time of his purchase, from the terms of the Poynter bond assigned by the appellee to him, that the appellee and his vendor, Mrs. Poynter, had a perfect title to the land, and that he was acquiring it by his purchase.

The reply of the appellee admits that when he traded with the appellant he represented to him he was the owner of one-half of the lot, and that "Poynter and wife had a good and perfect title" thereto when he purchased of them. It is true it also denies that he "studiously concealed" from the appellant the conditions of the Vincent deed, and denies that he made any representations to him as to its conditions, except those named in it; but when the entire pleading is considered, and it must be construed most strongly against the pleader, it must be regarded as admitting the averments of the appellant's answer as to the representations made to him by the appellee as to his title at the time of the purchase.

The appellant had a right to rely upon them. It is true the Vincent deed was of record, but he had no actual knowledge or notice of its provisions, and he was not required to take notice of them, in the face of the appellee's representations as to his title. It is evident the appellant, when he purchased, believed he was thereby acquiring a good and perfect title to the mill property. The appellee professed to sell him such a right to it. This he did not and cannot do; because, granting that the interest of Mrs. Poynter in the purchase from Vincent was, as is no doubt true, an undivided one-half, and that the record as made up authorized the lower court to reform the deed from him, yet the property is still subject to reversion by the terms of the conveyance; it is an uncertain tenure; and such a title has not been made or tendered to appellant as he is entitled to under the terms of his executory contract of purchase, and it is evident the appellee cannot comply with it.

The judgment is reversed, with directions to render a judgment rescinding, upon equitable principles, the contract between the appellant and appellee, and any conveyances made thereunder, and for further proceedings in conformity to this opinion.

TEN BROECK v. FIDELITY TRUST & SAFETY VAULT CO.

(Court of Appeals of Kentucky. February 14, 1889.)

TRUSTS—COMPENSATION OF TRUSTEE.

S. was trustee of a fund of which his daughter and her children were to receive the income, and served from 1874 until 1887, when he died. In 1893 he made his first settlement, and was allowed commissions for investments. From that time he paid the income quarterly, charging his grandchildren for his services, but making no charge against his daughter. He repeatedly stated that he would charge her at some future time, but not while her necessities required the whole income. In 1886 he talked of making a settlement, including such charges, but the absence of her attorney prevented it, and he continued until his death to pay her the income without deductions. The fund, though large, did not require much time or expense. Held, that it was the intention of S. to donate his services, and that his administrator could not recover for them.

Appeal from Louisville chancery court; I. W. EDWARDS, Chancellor.

John B. Smith and George W. Morris, trustees under the will of H. D. Newcomb, sued, in 1882, for a construction of the will, and a settlement of their accounts. A settlement was had, and after the death of Smith, in 1887, the suit was revived for a final settlement of his accounts. His administrator, the Fidelity Trust & Safety Vault Company, presented a claim for commissions alleged to be due Smith as trustee, which was allowed. Exceptions

thereto were filed by Mrs. M. C. Ten Broeck, a beneficiary of the trust, which were overruled, and she appeals.

Brown, Humphrey & Davie, for appellant. *J. K. Goodloe, Dodd & Grubbs*, and *J. C. Dodd*, for appellee.

PEYOR, J. H. D. Newcomb, by his last will, devised to John B. Smith and Thomas L. Barrett \$200,000, to be held in trust, and invested in safe securities "so as to yield an income which, after paying all taxes and charges thereon, shall be applied by said trustees to the continual support and maintenance of my wife, Mary Camella Newcomb, and her children, free from the control, use, or enjoyment of any husband she may have; but neither the said trustees, nor Mrs. Newcomb, nor any future husband, nor her child or children, shall at any time have the power, right, or authority, in any way, manner, or for any purpose, to incur or anticipate the said fund or the said income, or any part thereof, for any purpose whatever; and, in case these instructions are violated, this bequest at once shall be void, and the fund become a part of my residuary estate; and in case of her death without child or children, issue of any marriage with her living, or leaving descendants, the said fund shall be a part of my residuary estate." The deviser also bequeathed to the trustees for his two infant children the sum of \$100,000 each, and provided that, if one of the trustees should die or decline to act, the remaining trustee was invested with the power to appoint another with like powers, etc. Barrett refused to act as trustee, and John B. Smith selected George W. Morris in his stead. Smith was the father of Mrs. Newcomb, the widow of the deviser, and was the active manager of the trust-estate, both for his daughter and her children. Newcomb died in the year 1874, and no settlement was had by Smith as trustee until July, 1882. Up to that settlement no charge had been made by the trustee for his services, either against his daughter or her children. It seems that the trustee had given his notes, payable on demand, for what he had used of the trust money, amounting to \$4,000, and the chancellor allowed him as commission at that time 5 per cent. on income, and 1½ per cent. on investments. After that date, in July, 1882, he continued to charge his grandchildren his commission regularly up to his death, but made no charge against his daughter for managing the trust from which her income was derived. Smith died in April, 1887, leaving his wife his executrix. The office of trustee becoming vacant by reason of his death, the present appellee, the Fidelity Trust & Safety Vault Company, was appointed trustee in his place, and, Mrs. Smith resigning as executrix, the Fidelity Trust & Safety Vault Company was appointed and qualified as administrator with the will annexed of her husband. This controversy is therefore with this corporation as the trustee of Mrs. Ten Broeck, (Mrs. Newcomb having married Ten Broeck,) on the one hand, and as administrator of Smith, on the other.

The question arises from the claim made by the appellee, as administrator of John B. Smith, against Mrs. Ten Broeck, for commission or compensation to him for managing the trust fund in which she was interested from the year 1882 until his death, in 1887. Smith died insolvent, and this is in fact a claim asserted by the administrator for the benefit of creditors. After the death of her father, Mrs. Ten Broeck demanded her income, and was told that his commissions would have to be deducted; and she, claiming that the services rendered were gratuitous, and such as her father had the right to donate to her, by reason of the relation between them,—that of parent and child,—declined to pay the commissions, and hence this appeal.

The claim of the appellee is, and upon that the chancellor based his judgment, that the father paid to his daughter the whole of each quarterly income from the year 1882 until the year 1887, without making any deduction for compensation, because her necessities demanded it. After the settlement in 1882, he continued to deduct his commissions from the income and invest-

ments made or paid to his grandchildren, and kept a separate account as to the income of the appellant. He had made judicious investments of the principal so as to enable him to pay his daughter a quarterly income, that was paid regularly by check without any deduction whatever. He had a large fund to invest and control for his grandchildren, and may have supposed that his compensation arising from that fund was ample to pay him for controlling the whole; or that, looking to the wants and necessities of his daughter, he ought not, in justice to her, demand pay for his services. The latter reason no doubt prompted him to make no charge, and, while her income was large, it is apparent from the facts of the record that his daughter needed the entire amount. The attention of her father, who was then at the head of one of the leading banking institutions in the city of Louisville, was called time and again to the fact of his failure to make any deductions for services on this income paid to his daughter, and his reply was, in substance, that the condition of his daughter required it, and that the charge could be made at some future time. There is proof tending to show that in the year 1886 he talked of making a settlement, including these charges, but was prevented by the absence of his daughter's attorney from making it; and yet he continued up to his death to make the quarterly checks without any deduction; and it is plain that, when the opportunity was presented, he declined to do so because such was not his purpose. His trust had been faithfully executed; the income, to a cent, paid over, and no charge made. Besides, such a fund, with the facilities afforded him in his bank for managing it, could not have been attended with much expense or trouble, and under the circumstances we perceive no reason why he should have claimed compensation. He may have intended at some future time, and doubtless did, when the necessities of his daughter for money should become less urgent, to exact from her compensation for his services; but it is manifest from the record that such a time had not arrived at the date of his death, and that he was forwarding the money, and the daughter receiving it, with no intention on his part to make any charge, or his daughter of paying, until circumstances had changed with reference to her pecuniary condition.

It is true, the daughter had no legal or equitable right to exact from her father the discharge of these duties as a mere gratuity; but the father had both the legal and natural right to aid his daughter in the transactions connected with this trust free of charge on his part; and we think that such was his purpose, as is evidenced from his conversations with Burford, and the manner in which he disposed of this income from 1882 until his death. He made regular charge against his grandchildren, and it is not unnatural or unreasonable that he should decline to make any other charge for his services, at the expense of the welfare and happiness of his child. He never changed his intention or purpose with reference to this compensation. The same circumstances appealing to his affections for his daughter, and inducing this generosity on his part, existed at his death, that influenced his whole action from the year 1882. His personal representative will not be allowed to change that intention, or to show that the surrounding circumstances demanded an exaction of compensation during the entire period, instead of a gratuitous discharge of services, prompted by parental affection. It is no fraud on the rights of creditors, or depriving them of any legal or equitable right, as against the father or his estate, to refuse, at their instance, to compel payment by the child in a case like this. He had the right to make his services gratuitous; and the intention to charge at some future day, if conceded, creates no obligation on the part of Mrs. Ten Broeck to pay for such services. In *Abbey v. Deyo*, 44 N. Y. 343, it was held that such gratuitous services did not prejudice the rights of creditors; and in *James v. O'Driscoll*, 2 Bay, 101, the court, in speaking of a purpose to charge for a benevolent or friendly act at a future day, said "that it will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand. It

would be doing violence to some of the kindest and best effusions of the heart, to suffer them afterwards to be perverted by sordid avarice."

The testimony of the book-keeper explains this whole transaction. The bad health and pecuniary condition of Mrs. Ten Broeck was always referred to as a reason for not making any charge, but coupled with the intention to do so when her condition was improved. The appellant had the right to presume that the father did not contemplate such a charge; and from the proof in the record, if the father had been alive and the demand made for the income on 1887, there would have been no refusal to pay. He had no intention of misleading his daughter by inviting her, in effect, to live up to her income, and, after the lapse of years, violate the express provisions of the trust, by imposing a burden upon it in the way of commissions that would or might for the time being have deprived her of any income whatever. The income was in no manner to be anticipated, but paid over to the beneficiary after deducting all charges. This fact is another strong circumstance showing a purpose to make no charge. The declarations of his intention are inconsistent with his whole conduct in the control of the trust-estate, and yet only such declarations as any father would likely have made with his surroundings, and still have no purpose of carrying them into effect. If the purpose, however, was to charge the daughter when her condition improved, this does not authorize his personal representative to create this burden, and exact a compensation that the father had by every act induced the daughter to believe had been waived.

The judgment below is reversed, with directions to sustain the exceptions to the commissioner's report awarding this compensation, to be paid out of either the principal or the income of the fund from which the appellant derives the benefit. Remanded, with directions to reject the claim.

APPERSON'S EX'X v. EXCHANGE BANK OF KENTUCKY.

(Court of Appeals of Kentucky. December 15, 1888.)

1. PAYMENT—APPLICATION—CONSTRUCTION OF CONTRACT.

The president and cashier borrowed of their bank a sum which they loaned to a falling debtor of the bank and of the president. The debtor gave a mortgage on goods and land, and delivered the property to the mortgagees, with authority to sell and appropriate the proceeds to the mortgage debt, after applying enough of the goods to pay for another tract of land, which was accordingly paid for, and conveyed by the debtor's vendor to the mortgagees. It did not appear that anything more was realized from the goods. The president promised that the debt to the bank would thus be paid, and, relying thereon, the directors made no effort to collect it otherwise. *Held*, that the president, who controlled the property and received the proceeds, was entitled to have the proceeds of both parcels of land applied, first, to the payment of the loan to him and the cashier, and that the balance should be applied to the debts due to the bank and the president.

2. WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

Civil Code Ky § 606, subsec. 2, providing that no person shall testify for himself concerning any verbal statement, etc., of a decedent, does not prohibit the cashier, in an action between the bank and the president's executor, from testifying to an agreement by the president to pay the balance due by the debtor to the bank, where no action has been brought on the cashier's bond for any misconduct in the matter, and he is not shown to be liable to the bank.

3. BANKS AND BANKING—STATUTE OF FRAUDS—PROMISE TO PAY ANOTHER'S DEBT.

The right of the bank to recover of the president rests on his express or implied promise as its officer to secure the debt to the bank, and to obtain its payment out of the property acquired by him, and not on his promise to answer for the debt of another, and the statute of frauds is unavailing.

4. SAME—DUTY OF BANK PRESIDENT.

The directors having relied on the president's promise that the debt would be paid by means of such dealings, and having made no other attempt to collect it, but having permitted the president to acquire the mortgage lien on property which otherwise might have been subjected to the debt to the bank, it was not necessary that they should formally authorize or ratify his proceedings.

5. SAME.—POWER OF BANK TO HOLD REALTY.

The question whether the bank had power to acquire and own realty is immaterial.

Appeal from circuit court, Montgomery county; R. RIDDELL, Judge.

Action by Exchange Bank of Kentucky against E. S. Apperson, executrix of R. A. Apperson, and others. Defendant Apperson filed a cross-bill against one Anderson, to foreclose a mortgage. Judgment for plaintiff, cross-petition dismissed, and defendant Apperson appeals.

H. L. Stone, for appellant. *W. H. Hoit*, *B. J. Peters*, and *O. S. Tenney*, for appellees.

LEWIS, J. Appellee, the Exchange Bank of Kentucky, brought this action, November, 1878, against appellant E. S. Apperson, executrix of R. A. Apperson, who died in January of that year, to recover \$2,674.58; being the principal sum of \$1,736.78, and interest from July 9, 1869; William Hoffman being also a defendant, though only nominally so.

It is stated in the petition, as the cause of action, that at the date last named one J. W. Clay owed the bank the sum named, being what he had overdrawn, and at the same time owed R. A. Apperson about \$1,000; and by an agreement between Hoffman, who was cashier of the bank, Apperson, the president of it, and Clay, a tract of about 47 acres of land, belonging to the latter, was publicly sold and bought in by Apperson for the benefit of the bank and himself, the proceeds or profits which might arise from any future sale to be divided in proportion to the respective amounts of the two debts. It is further stated that, prior to that purchase, Clay had mortgaged to Apperson and Hoffman, acting for the benefit of the bank, to secure a debt, a lot of whisky, and by agreement between the three parties 2,500 gallons thereof were applied to pay one Roberts, vendor of the land, the purchase price, no part of which had been paid; and thereupon the latter made a deed to Apperson and Hoffman for the purpose mentioned. It is alleged Apperson had the use of the land from March 1869, the date of the deed, to January, 1875, when he sold it for \$3,087,—Hoffman, in furtherance of the agreement previously made, uniting with him in a deed to the purchaser; that it was held, used, and sold for the joint benefit of the bank and Apperson, and that he continued president up to a short time before his death, and promised to pay the claim. The relief prayed for was judgment subjecting the proceeds of sale, rents, and profits of the land received by Apperson, now in the hands of his executrix, to pay the amount sued for.

Appellant denied the material allegations of the petition, presented various defenses, and made her answer a cross-petition against appellee Anderson.

But we will first endeavor to ascertain the actual character and purposes of the different transactions relating to this controversy, incidentally considering the questions upon the competency of evidence raised by appellant.

There was in February, 1869, a public sale of the land, before (not, as stated in the petition, after) the execution of the mortgage mentioned. But it does not appear what Apperson bid for it, or that either he or Clay treated it as valid and binding for any purpose. March 1, 1869, Apperson and Hoffman borrowed from the bank \$4,500, for which they gave their joint note, a bill, and that money they loaned to Clay, taking his note of that date, payable July, 1869, for \$4,650; and to secure the payment of it Clay executed to them, on the same day, a mortgage upon 35 barrels of wine, about 100 barrels of whisky, and a tract of 106 acres of land, now claimed by appellee Anderson. By the terms of the mortgage the property was delivered to the mortgagees, with authority to sell the same, or any part of it, and appropriate the proceeds to the payment of the mortgage debt, and they had the privilege to apply enough of the whisky to pay Roberts the purchase price of the 47 acres of

land. And in pursuance of that agreement 2,500 gallons were delivered to him for that purpose, and he thereupon, with the consent of Clay, conveyed the land to Apperson and Hoffman. In this connection it is proper to say that the estate of Apperson, if liable to the bank at all, cannot, according to the evidence before us, be made accountable for any of the mortgaged property, except the two tracts of land; for the wine proved worthless, and nothing was realized from it, and it does not appear the residue of the whisky was used otherwise than in paying the taxes due to the United States government, and a part of the mortgage debt.

The agreement alleged to have been made between Hoffman, representing the bank, and R. A. Apperson, and the promise by the latter to pay the balance due to it by Clay on February, not July 9, 1869, were testified to substantially by Hoffman, and some of the directors of the bank, and to some extent they were sustained by Clay. But it is contended the evidence of Hoffman is incompetent, because, being liable on his bond as cashier for the loss caused by permitting Clay to overdraw his account without the sanction of the directors, he is interested in proving the agreement by Apperson to pay it. But subsection 2, § 606, Civil Code, provides that no person shall testify for himself concerning any verbal statement of, or transaction with, or any act done or omitted to be done by, one who is dead when the testimony is offered. While we do not think it was intended to limit the operation of that section to the testimony of a person a party to and directly interested in the result of a suit with the representative of one who is dead, yet, to render such testimony incompetent, it must appear that it will have the effect to directly or indirectly benefit the person giving it pecuniarily. No action has been brought on the bond of Hoffman, nor is there enough before us to fix any liability by him to the bank, if there had been.

It seems to us there is no room to doubt the existence of an agreement in February, 1869, between Apperson and Hoffman to act together in the effort to save the two debts mentioned, in which Clay was willing to aid them; for, though the public sale to Apperson of the 47 acres of land proved abortive, because no part of the purchase money had then been paid, the subsequent arrangement to loan Clay the money borrowed from the bank was evidently made for the purpose of enabling him to free the whisky from bond, and use it to pay for the land, which, together with the other mortgaged property, was to be applied, after first satisfying the mortgage debt, to what he owed Apperson and the bank. The transaction can be accounted for in no other way, for neither Apperson nor Hoffman had any other apparent motive for incurring the debt they did to the bank, and risking a loan of the money to Clay, who was then in a failing condition financially.

We will now consider the various grounds of defense made for appellant, none of which, in our opinion, can be considered valid, when the nature and object of the agreement upon which the right to recover is based, and the attitude and relation of the parties to the bank are correctly understood.

The amount overdrawn by Clay in February, 1869, was a subsisting debt due to the bank, which it was the duty of Apperson, the president, not less than of Hoffman, the cashier, to use reasonable diligence and skill to secure. As was actually the case, it was not then practicable to collect in the usual mode; and the agreement between Apperson and Hoffman was simply a plan or scheme resorted to by them, as officers and agents of the bank, to accomplish that object, and at the same time make safe and collectible the debt of \$1,000 which Clay owed Apperson; and the evidence in this case shows that the directors of the bank, relying upon the assurance and promise repeatedly given by Apperson that its debt would be thus ultimately satisfied and paid, not only made no attempt to collect it in any other mode, but permitted Apperson to acquire the mortgage lien on Clay's property, which before that might have been made subject to its debt. It was therefore not necessary for the board

of directors by a formal resolution to either authorize the agreement to be carried out or sanction it after it was done.

Nor do we perceive what pertinency there is in the question raised whether the bank had or not the right under its charter to acquire and own real estate; for the mortgage and deed were executed to Apperson and Hoffman in their own right and name, but upon the promise and trust by them, as officers and agents, that they would out of the proceeds of the property collect and pay the debt due by Clay to the bank.

We think, for the same reason, the plea of the statute of frauds is equally unavailing; for the right to recover in this case is not founded upon the promise of Apperson to answer for the debt, default, or misdoing of Clay, but upon his undertaking, and implied, if not express, promise, as an officer and agent of the bank, to secure, and, out of the proceeds of property acquired by him for the purpose, to cause to be collected and paid on the debt which Clay owed.

It is satisfactorily shown that, within five years before the commencement of this action, Apperson promised to collect and pay to the bank the Clay debt; and the other officers of the bank, relying upon the promise, left the entire matter in an unsettled condition to the time of his death, not even requiring him to pay the money borrowed by him and Hoffman in 1869, to loan to Clay for the purpose before mentioned. Though Hoffman was a party to the entire transaction, Apperson seems to have controlled and managed the property, and received the proceeds of what has been sold.

It is true, as stated by counsel, Clay continued to do business with the bank up to July, 1869, but the deposits made by him seem to have been principally of the money borrowed from Apperson and Hoffman, and made in the course of paying the government tax on the whisky, and, obviously, whatever credit he got was upon the faith, if not in furtherance, of the arrangement between him and Apperson and Hoffman.

But we think the lower court erred in giving a preference to the bank debt, and applying the proceeds of the 47 acres to the payment of it, while the note given by Clay to Apperson and Hoffman, or any part of it, remains unsatisfied; for it was with the money loaned by them to him that the taxes were paid on the whisky, and enough of it rendered available to pay for the 47 acres of land, and manifestly neither of them loaned, or could have been expected to loan, the money to Clay without being assured the property mortgaged would be first applied to reimburse them. Moreover, the title of the 47 acres of land being acquired by them under an agreement contained in the mortgage, we know of no principle of equity requiring the debt of the bank to be paid before they are reimbursed for the money advanced by them, without which the land could not have been available to pay either. It seems to us appellant has the right to have the proceeds of the property which Clay mortgaged, as well as that he conveyed, first applied to pay whatever of the mortgage debt remains unpaid, and that what may remain of the proceeds of the 47 acres, together with the proceeds of the tract of 106 acres, should be applied to pay the debt of the bank, and the one of \$1,000 due appellant; for we perceive no reason whatever for the judgment of the lower court dismissing the cross-petition against Anderson, who never paid anything for the 106 acres of land, and has no title or claim to it. The evidence, which at best is vague and unsatisfactory, shows no more than authority to him at one time to sell it, not for his own benefit, but as agent. We think the mortgage lien of appellant and Hoffman exists beyond question, and should be enforced on that tract.

Wherefore, for the errors mentioned, the judgment is reversed, and cause remanded for further proceedings consistent with this opinion.

MARSHALL v. APPELGATE *et al.**(Court of Appeals of Kentucky. February 14, 1889.)***HOMESTEAD—ABANDONMENT.**

A debtor made an assignment, and afterwards filed a petition to be allowed to share in the proceeds of a house and lot sold under a judgment, claiming to have a homestead right, which he had never conveyed or relinquished, though he admitted that at the date of the assignment he was temporarily absent from such property. The answer alleged that the debtor had before the assignment permanently abandoned the property, and purchased other property to which he had removed as his home. In his reply the debtor denied that he had purchased other property as a residence, but did not deny that he resided permanently elsewhere. *Held* that, on the pleadings, the debtor's right to a homestead must be regarded as having been abandoned.

Appeal from chancery court, Pendleton county; J. W. MENZIES, Chancellor.

Applegate and others were plaintiffs in certain consolidated cases against J. J. Marshall for a settlement of his insolvent estate. Judgment was rendered against Marshall, and certain real estate belonging to him was sold. After the sale Marshall filed his petition against Applegate, etc., asking that \$1,000 be paid to him out of the proceeds of said sale, claiming that he was entitled to this in lieu of his homestead. Judgment was given rejecting Marshall's claim, and he appeals.

C. H. Lee, for appellant. *L. T. Applegate*, for appellees.

LEWIS, C. J. In 1884 appellant made a deed of assignment for the benefit of his creditors, which contained a reservation of the estate in these words: "Save and except such as the law will allow me to hold." It appears that at the date of the deed he owned a lot of land, whereon was a house, the lower story of which had been used by him for the sale of merchandise, and the upper story had been occupied by him and family as a dwelling-place. In October, 1886, after a sale of the house and lot under judgment rendered in various consolidated actions by his creditors, involving a settlement and distribution of the estate so conveyed by him, he filed in court a petition claiming and asking that there be paid to him \$1,000 out of the proceeds of the sale of the lot; his homestead right in which he alleged had never been conveyed or relinquished by him. He stated in his petition he was at the date of the deed of assignment only temporarily absent therefrom, and that he did not then, nor had since the deed, any home of his own. One of the creditors filed an answer to the petition, in which he denied that appellant and his family were only temporarily absent from the house and lot at the date of the deed; and alleged that appellant had, prior to the assignment, permanently abandoned the property, and purchased and removed to other property as his home. In his reply appellant denied he had purchased and removed to other property before the assignment. No proof was taken upon the issue thus formed, and the validity of the claim set up by appellant must be determined by the pleadings.

It is admitted by appellant he was absent from the place at the date of the deed, and, although he alleges in his petition he was only temporarily absent, he does not in his reply deny the statement in the answer he had then and has ever since had a permanent residence elsewhere; the denial he does make going no further than to put in issue the statement in the answer he had purchased other property for a residence.

Although it may be considered that he reserved in the deed his homestead interest in the house and lot, and might have resisted the claim of the creditors to subject it to the payment of their debts, still he may have lost the right by abandonment of the place as his residence. And as he admits he was, with his family, absent from it at the date of the deed, and does not al-

lege he ever subsequently resided there, though two years had elapsed when he filed his petition, we think he has not merely failed to show he was absent only temporarily, as it was incumbent on him to do, but, by his residence for such length of time elsewhere, made it reasonably certain he permanently abandoned it as a residence; and his homestead right must therefore be regarded as also abandoned and lost. Judgment affirmed.

CRITTENDEN v. BECK.

(Court of Appeals of Kentucky. February 16, 1889.)

EXECUTION—SALE—INSUFFICIENT RETURNS—EQUITY OF REDEMPTION.

Where the proceeds of land sold under order of court to satisfy a vendor's lien, and which brings less than two-thirds of its appraised value, are insufficient to satisfy such lien, the vendor may have a decree for the sale of the equity of redemption of the vendee, the rights of third parties not having intervened, under Gen. St. Ky. p. 973, § 4, providing that if a judgment, in pursuance of which a sale is made, is not satisfied by such sale, the right of redemption given in such cases may be sold in satisfaction of the residue of such judgment.

Appeal from circuit court, Owen county; WARREN MONTFORT, Judge.

Action by J. N. Beck against Jeff Crittenden to recover on a promissory note, and to enforce his alleged vendor's lien on a lot of ground to satisfy same. Defendant denied plaintiff's ability to make a good title to the lien property. Judgment for plaintiff was rendered, and the property was ordered sold. It having sold for less than two-thirds of its appraised value, and for not enough to satisfy plaintiff's claim, on plaintiff's motion the defendant's equity of redemption was sold. Defendant appeals.

J. H. Dorman and J. J. Orr, for appellant. *J. A. Duncan*, for appellee.

PRYOR, J. We perceive no error in this case to the prejudice of appellant. The title he should be compelled to accept; and it was proper, as the judgment was not satisfied, to sell the equity of redemption. The appellee had a lien on the land for the purchase money. It was sold under a judgment of the court to satisfy the lien, and brought less than two-thirds of its appraised value. The appellee then asked that the equity of redemption be sold to satisfy the balance due on the judgment, to which appellant objected. The equity was sold, after crediting the judgment by the amount realized on the first sale. This was proper. The statute provides, (Gen. St. Ky. p. 973, § 4:) "If the judgment, in pursuance of which such sale is made, be not satisfied by such sale, the right of redemption herein provided for may be sold in satisfaction of the residue of such judgment, and the said right of redemption shall also be liable to sale under execution," etc.

The rights of third parties had not intervened in any manner before the sale was ordered, and, as between the parties to the judgment, the sale was properly ordered. Judgment affirmed.

FRAZER v. CLARK et al.

(Court of Appeals of Kentucky. February 16, 1889.)

CONTRACTS—ACTION FOR BREACH—NOMINAL DAMAGES.

Where plaintiff, having made a contract to saw a lot of timber for defendant, purchased a saw-mill for that purpose, and defendant subsequently refused to let plaintiff perform the contract, but it appeared that, during all the time that the mill was owned by the latter, it was employed in sawing for others at prices equal to what plaintiff would have received under his contract with defendant, the plaintiff was entitled to only nominal damages.

Appeal from circuit court, Logan county; W. L. DULONEY, Judge.

Action by J. N. & R. Clark against T. N. Frazer to recover damages for breach of contract. Judgment for plaintiffs, and defendant appeals.

W. W. Lyles, R. S. Bevier, and M. B. Bowden, for appellant. W. F. Broder, for appellee.

PRYOR, J. It is alleged in the petition of the appellees that they entered into a contract with the appellant, Frazer, to saw for the latter all the timber on a certain tract of land into merchantable lumber, for which they were to be paid at the rate of 33½ cents for every hundred feet. They were to begin sawing on a certain day, and continue until they had completed their contract, and also were to saw exclusively for Frazer until the timber was exhausted. They allege they purchased the saw-mill, and offered to perform their contract, but Frazer refused to permit them to go upon his land, or comply with their agreement; that they could have sawed not less than 2,000,000 feet of lumber, and claim that by reason of the breach on the part of the appellant they were damaged in the sum of \$2,000.

There is much conflicting testimony on the issue as to whether any such contract was made as is alleged; but the testimony for the appellees conducing to establish such a contract, and the jury so finding, the principal question arising in this case is as to the measure of damages. The details of the contract are not all given, but only so much as is necessary to determine the legal question involved. The action was instituted within three weeks from the date at which the execution of the contract was to begin. The court below, in instructing the jury, said that, as the appellant had admitted that the timber would have produced 2,000,000 feet, that quantity, at 33½ cents per hundred feet, is the basis of recovery, and, after deducting from it the cost of sawing and stacking the lumber as provided by the contract, the remaining sum is the amount the appellees should recover.

It is made to appear from the testimony that the appellees were running their mill for others prior to and at the time at which the contract with the appellant was to begin; and, further, that their mill was provided with all the timber it could saw from the time the appellees bought it until sold by them, paying as much as Frazer's contract would have paid them. The mill was idle about three weeks, and no longer, and continued sawing after it was sold.

No loss of work or sawing has been alleged or proven, but, on the contrary, the testimony tends to show that the appellees have sustained only nominal damages. The case is thus presented by the proof: The appellant employs appellees with their mill to go upon his land, and saw 2,000,000 feet of lumber, and not to saw for others until the contract is completed. The appellant refuses to permit appellees to enter and perform their contract. The services of the appellees and their mill were, in violation of the contract, dispensed with, and the appellees, as their own engineer and witness testifies, operated the mill from May preceding the 1st of June, when the work for appellant was to begin, until Christmas of the same year, and the sawing was as profitable as it would have been if running under the contract with appellant.

If, therefore, the appellees are permitted to recover the entire profit that could have been realized on the contract with the appellant, and have run their mill continuously with the same profit for others, they are permitted to recover or make double profits. The amount of recovery in a case like this is the actual damage sustained.

Suppose the appellees had brought their action after the time for the performance of the contract on their part, and it had been made to appear from the testimony that they had by the use of their mill, and their own services in running it, made more profit than they could have realized from the contract with appellant, will it be insisted that the appellees could recover more than nominal damages? If charged with the profit that could have been made

during the period, it would be just and equitable that appellant should be credited by the value of the use of the mill by the appellees for the same time, and, if in summing up the profits the appellees have lost nothing, there has been no injury.

The instruction given in this case makes the offer to perform equivalent to actual performance, when the appellees were only entitled to the actual damage. They had equally as profitable employment in the same country and neighborhood, and therefore lost nothing, looking to their own testimony. The criterion of recovery for the sale and delivery of personal property, where there is a breach, is the difference between the price to be given and the value of the property at the time and place of delivery; but the case presented here is not within that class, and in ascertaining the actual loss sustained, if the appellees with their personal services, counted with the operation of their mill, have sustained no damage, there is no reason for making the appellant pay the profit they have already received, for all the complaining party is entitled to is a just recompense for the actual injury sustained.

The principle governing this case is similar to that in regard to contracts for personal services, as in the case of *Whitaker v. Sandifer*, 1 Duv. 261. Whitaker was to serve Sandifer for one year as an overseer on his farm for a fixed sum. Sandifer discharged him after Whitaker had been in his service for some months, and the result was an action to recover the price agreed to be paid for the year's labor, in which it was held by this court that he was entitled only to the actual damage sustained, and determining, in effect, that, if he had equally profitable employment after his discharge, the damage would be nominal.

In the case of *Petrie v. Lane*, 35 N. W. Rep. 70, (decided by the supreme court of Michigan,) the plaintiffs owned a saw-mill, and agreed to saw 4,000,000 feet of logs, to be delivered by the defendant in a certain year, the plaintiffs to be paid a fixed price for sawing. The logs were not delivered, and the plaintiffs sued for the loss of profits, and insisted that, as a matter of law, they were entitled to all the profits they could have made on the contract, regardless of the actual damage they had sustained. Their mill was not closed, but working all the time, sawing other lumber to its fullest capacity, upon which they made like profits, and, by giving them the same profits against the defendant, they were doubling the capacity of their mill as well as their profits. As the right of recovering actual damages in that case was disclaimed, the judgment for the defendant was affirmed.

This is a much stronger case against the recovery than the case cited. Here the appellant had contracted for the service of the appellees, in connection with the operation of their mill, for such a time as would enable them to saw the timber on his farm; the use of the mill to be applied to the sole purpose, and no other, without the consent of the appellant. There was a breach of the contract by the defendant, and the appellees, with their mill, proceeded at once to saw for others, running continuously for the period of seven months, and until sold by the appellees, making as much or more profit than would have been made if the contract had not been violated by the defendant. There was no sale of timber to the appellees, or such stipulations in the contract as would bring the case within the rule as to the measure of damages, when applied to a breach for the failure to deliver personal property, or, in the case of ordinary contracts, for the refusal to permit the execution of specific work. The machinery must be used, and not allowed to remain idle that the owner might speculate on the probable profits to be derived from the particular undertaking.

If A., with his machine, undertakes to thresh the grain of B. on a named day, at a fixed price per bushel, and B. declines to permit the work to be done, it does not follow, as a matter of law, that A. can recover the contract price, less the cost of his hands, as his damages. If he should employ his machine

in threshing a like quantity of grain for others on the same day, with no loss of time or inconvenience by reason of B.'s conduct, the injury is nominal only. In this case there was no allegation of any extra expense, loss of time, or any special injury alleged or proven by the appellees, nor their failure to obtain like employment with like profits, or, if obtained, for less profit than that to be realized from the contract with appellant, but a general averment that actual damages had been sustained to the amount of \$2,000. When the proof shows that no actual injury had been sustained, nominal damages should have been awarded.

The judgment is reversed, and cause remanded, with directions to set aside the verdict, grant the appellant a new trial, and for proceedings consistent with this opinion. Under this view of the case, we have not considered the other questions raised. If the appellees can amend their petition, the answer can then controvert the amount of lumber that is alleged could have been made from the timber, etc.

WOLF *et al.* v. McHARGUE, Sheriff.

(Court of Appeals of Kentucky. February 16, 1889.)

MUNICIPAL CORPORATIONS—IMPROVEMENT OF STREETS—TAXATION—CONSTITUTIONAL LAW.

Property owners in an incorporated municipality may constitutionally be required to pay taxes for the improvement of streets in the municipality; and also to pay the general county road tax. The former are for special privileges, not equally enjoyed by other residents of the county.

Appeal from circuit court, Pulaski county; Z. T. MORROW, Judge.

This was an agreed case, wherein A. Wolf and others were plaintiffs, and J. H. McHargue, sheriff of Pulaski county, was defendant. The agreed facts are these: Plaintiffs are residents of the incorporated town of Somerset, in the county of Pulaski, and all their taxable property is located within the corporation. They paid, in 1886, their *pro rata* of the municipal taxes for the repairing of the streets of the municipality. The legislature of Kentucky, by an act approved March 10, 1886, authorized the levying of an annual tax on all property within Pulaski county for the purpose of repairing and keeping in repair the public roads in said county. Said tax for 1886 has been assessed against the citizens of the county, and against the plaintiffs, and is in the hands of the sheriff for collection. Plaintiffs claimed that said taxation was as to them unconstitutional, and that the sheriff should be restrained from collecting it. Judgment was rendered holding the tax valid, and plaintiffs appeal.

W. A. Morrow, for appellants. J. L. Colyer, for appellee.

HOLT, J. The legislature, by an act approved March 10, 1886, authorized the levy of an annual tax of 10 cents on each \$100 in value of the real and personal property in the county of Pulaski, for the purpose of repairing and keeping in repair its public roads. 1 Acts 1885-86, p. 581. The appellants reside, and their property is situated, within the corporate limits of the town of Somerset, in said county.

The municipality levied a tax of 40 cents on each \$100 in value of property within its limits for municipal purposes for the year 1886, one of those purposes being the keeping in proper repair of its streets; and the appellants claim that by reason thereof their property is not subject to the county road tax of 10 cents upon each \$100 in value of property levied for 1886, and that, if the act be applicable to them, then it is unconstitutional, and therefore invalid. The question is therefore presented whether the residents of the municipality, and their property situated within its limits, are exempt from the tax for

road purposes generally, because they pay a special tax for municipal purposes, among which is the improvement of the streets of the town.

The right to tax is based fundamentally upon benefits received. The government imposes the burden upon the citizen, and he in turn is entitled to the protection and advantages arising from its existence. The state, as to taxation, can exercise no mere favoritism. No one can have exclusive privileges, save in consideration of public services. Equality in taxation is the rule, and exemption from the burden is the exception. One citizen cannot be taxed more than his fellow-citizen for the like benefit; and the complaint is now made that the inhabitants of the municipality are twice taxed, or made to carry a heavier burden than other citizens of the county, without receiving any additional benefits. But is this true?

The charter of the town confers certain privileges and benefits. A franchise or special privilege is granted to its inhabitants, in which the other citizens of the county do not share. The benefit arising therefrom warrant additional taxation. It is a *quasi* purchase of them. The grant authorizes the resident of the municipality to exercise certain privileges, and invests him with certain rights, which are denied to the other citizens of the county. The municipality makes its own laws. It elects its own officers, and exercises other privileges too numerous to mention. In addition, the citizen of the municipality is also a citizen of the county. He has a voice in its government. He receives benefits from, and exercises privileges under, both the municipal and county governments.

In consideration of this dual right, he is liable to double taxation; that is, he must help to support both the municipal and the county governments. It must, of course, be imposed as equally as is possible, upon all the inhabitants of the municipality alike; but they cannot say, because in consideration of municipal benefits they pay municipal taxes, that, therefore, they are exempt from county taxation. They but pay a bonus for extra privileges, and are only taxed in proportion to the benefits received.

Any other rule would lead to a virtual exemption of the citizen of the town from county taxation altogether; and, instead of its being unjust and unequal taxation as to him, he would, if exempt from it by reason of the payment of municipal taxes, secure exclusive privileges, and obtain the benefit of the county government without paying for it.

The people of the town are especially interested in the county roads. They bring trade to them. They serve to build up their town. They aid in increasing the value of their property. Not only are they benefited by them, but, as citizens of the county, they have a voice in their control; and, in consideration of their being both citizens of the municipality and of the county, and receiving benefits from each, they can constitutionally be required to contribute by taxation to the support of both.

Judgment affirmed.

MILLER v. SMALL.

(Court of Appeals of Kentucky. February 21, 1889.)

EQUITY—REFORMATION OF DEED—MISTAKE—ACQUIESCENCE.

Plaintiff and defendant having agreed to divide a lot owned by them jointly, the legal title to which was in plaintiff, a fence dividing it longitudinally was built, and plaintiff's vendee of one of the parts erected a building thereon. Defendant examined the premises while the vendee was building, to ascertain whether she was encroaching on his land, and made no objection. Ten years after the division, it was found that plaintiff's deed to defendant for his part of the lot divided it transversely, and, thus divided, the building would stand on defendant's land. Plaintiff testified that he had refused to sign a deed dividing the land transversely, and instructed the draughtsman to draw another, and the latter testified that he must

have given plaintiff the first deed to sign instead of the one drawn later. Defendant had offered to sell his lot according to the longitudinal division. *Held*, that plaintiff was entitled to a reformation.¹

Appeal from circuit court, Daviess county; L. P. LITTLE, Judge.

Suit by W. P. Small against P. J. Miller for the reformation of a deed. Defendant appeals.

Owen & Ellis, for appellant. *G. W. Jolly, J. A. Deane, and R. A. Miller*, for appellee.

PRYOR, J. This action was instituted to reform a conveyance that had been executed nearly 10 years before the suit was filed. The facts alleged are that the plaintiff and the defendant were the joint owners of a vacant lot in the town of Owensboro, with the legal title vested in the plaintiff. In order to a division, the plaintiff had to make the defendant a conveyance for his half, and, as is alleged, the agreement was to divide the lot by running the line the long way, so as to make each lot front a certain number of feet on Eighth street. That, by mistake, the draughtsman of the deed so framed it as to divide the lot by running the line the short way, fronting on Center street. That the lot was fenced and built on the division line, it being the long way; and it was not discovered until within the last two months that the deed was not drawn in accordance with the agreement.

The proof is conclusive, from the act of the parties, that they recognized the division as alleged by the plaintiff, and that a building was erected on the lot in pursuance of that understanding, and, if divided as the deed recites, the building of the plaintiff or his vendee would be on defendant's part of the lot. The defendant lived in the same city with the plaintiff, and saw the vendee of the plaintiff erect the building. The plaintiff had made to Mrs. Duffy, his vendee, a deed for one-half of the lot, running the long way of the division line; and the defendant examined the premises, when she was building, to see if she was encroaching on his ground, and made no objection. The testimony of the lawyer draughting the deed sustains the plaintiff in his statement as to the transaction. Still we find the deed dividing the lot one way, and the parties dividing it another way, by both fencing and building upon it, or the one building with the knowledge of the other. It is true, the plaintiff should have read the deed written by his attorney before signing it, and his own neglect would result in his loss, if any one was prejudiced or injured by this want of diligence. He says the reason he did not read it was that his attorney had prepared a deed dividing the lot the short way, and he told him he must write another; and this the attorney did, and promised to leave it at the clerk's office, where the plaintiff found it and signed it, supposing it was all right. The attorney says he must have taken the deed first written, instead of the last, and hence the mistake. No one has been injured; and the parties, by their own action, have fixed the division line. The defendant offered to sell his lot, describing it as a long lot, and, from the testimony, was as ignorant of the contents of the deed as the plaintiff, until the mistake was discovered.

The calls of the deed would no doubt control the division, after the lapse of so many years, if there was no other reason for not discovering the mistake but the failure of the vendor to examine or read the deed before signing it, and there had been no entry on the premises by either party, and a division made in accordance with the parol agreement. Here, the plaintiff or his vendee enters, erects the division fence, builds a house on his half of the lot, with the knowledge of the defendant, and the latter never discovers that he has any other right until a survey is made shortly before this suit is brought, and it

¹As to when equity will grant reformation of written instruments and contracts on the ground of mistake, see *Turner v. Shaw*, (Mo.) 8 S. W. Rep. 897, and note; *Greeley v. De Cottes*, (Fla.) 5 South. Rep. 239, and cases cited.

is ascertained for the first time that the division is not made in accordance with the deed. It would be inequitable, under the circumstances, to require the plaintiff to remove the building, or to eject him from premises that the defendant has in effect conceded belongs to him.

It presents a case of joint owners dividing their land by deed in one way, and taking possession under a division made in a different way; each getting one-half of the land in quantity and value. By permitting the division to stand as actually made by the entry upon and improving the premises, no harm has resulted, or can result, to either party; and, by confining the parties to the deed, the one making the improvements will be required to remove them, sustaining great loss, without any benefit to the party who claims that the deed is the best evidence of what he owns. Judgment affirmed.

MCADAMS v. MITCHELL *et al.*

(Court of Appeals of Kentucky. February 21, 1889.)

FRAUDULENT CONVEYANCES—TO MARRIED WOMAN—HOMESTEAD.

Defendant conveyed to his wife two tracts of land, on which his father had a lien to secure payment of a debt owing to plaintiff. The father soon after released the lien. Another tract was purchased, as alleged, by defendant's son, who had it conveyed to his mother, and another tract was purchased, to be conveyed in the same manner. The negotiations for the purchases were conducted by defendant, who made or had the money. The son worked on the home farm, and had no means outside the products of his labor. Not a greater sum was made in any year than was sufficient to clothe the family. *Held*, that the conveyances to the wife were in fraud of creditors, except to the extent of the homestead rights of the wife.

Appeal from circuit court, Hancock county; L. P. LITTLE, Judge.

Suit by Sarah McAdams against A. G. Mitchell and others, to set aside conveyances alleged to be fraudulent. Plaintiff's judgment was on a note executed by James A. Mitchell as principal, and his son, A. G. Mitchell, as surety. The homestead mentioned in the opinion was one composed of two tracts, one of which was that conveyed to A. G. Mitchell by his father. The attack upon the conveyance of the De Janette tract was made in the amended petition, which was not permitted to be filed. Plaintiff appeals.

W. S. Roberts, for appellant. G. W. Williams & Son, for appellees.

PRYOR, J. This action was instituted in the court below to subject certain land conveyed by the husband to the wife, through the intervention of a trustee, to the payment of appellant's debt, alleging that the debt had been reduced to a judgment upon which an execution issued, and was returned, "No property found." A. G. Mitchell, the husband, owned a tract of 151 acres of land, that was conveyed by him to his son J. F. Mitchell, in trust for the separate use of the grantor's wife. The conveyance was voluntary, and made while the debt of the appellant was in existence. The defense is that the land conveyed was the homestead of the appellee, A. G. Mitchell, and he had the right to make the conveyance because it was not of greater value than \$1,000. In order to avoid the claim of homestead, the appellant attempted to show that the debt originated prior to the passage of the homestead law, and on this point there is much conflict in the testimony; so much so, that the chancellor was justified in holding that the conveyance passed to the wife the homestead, if not of greater value than \$1,000. The appellant also claims that this land, or a part of it, was purchased by the appellee, A. G. Mitchell, of his father, and that the latter had a lien on the land for the sum of \$500, and when he sold the land to his son, A. G. Mitchell, the latter undertook and agreed to pay the debt due the appellant in extinguishment of the lien held by his father on the land, the latter being in fact the principal obligor in the

debt. The appellees admit the agreement to pay, and that a lien was retained on the land as alleged, but say that the father of A. G. Mitchell released this lien, and took the individual obligation of his son that he would pay appellant. This was all done prior to the institution of this action, and, the father of A. G. Mitchell having released the lien, none exists in favor of the appellant. There can be no substitution to the rights of the father, because he has no lien that he can enforce.

It is further alleged by the appellant that a son of the appellee (A. G. Mitchell) was made the instrument through which his father purchased a tract of 100 acres of land known as the "Tabor Tract," and the son, by the direction of his father, had the conveyance made to his mother, in whom was already vested the title to the homestead of 150 acres. An amended petition was also offered to be filed, but rejected, and not made part of the record, in which it is alleged that a fourth tract was purchased by the son in the same manner. This branch of the case we cannot consider, as the amended petition is not properly before the court, except as an additional fact in the way of testimony, showing the intent of these parties in vesting the absolute title in the wife of A. G. Mitchell to all this land. The facts on which the charge of fraud is based are these: In the year 1884, two years prior to the judgment on the debt due the appellant, the appellee, Mitchell, conveyed the two tracts of land to his wife, with a lien on it to secure the debt in controversy, or rather its payment. This lien his father released shortly after, so as to leave his wife the absolute owner. In May, 1885, the Tabor tract of land was purchased, as is alleged, by the son, A. G. Mitchell, who had it conveyed to his mother, vesting in her the fee, and in a short time thereafter the De Janette tract was purchased, to be conveyed in the same way, but the purchase money has not all been paid. The negotiation and contracts for these lands seem to have been made by A. G. Mitchell, and the wife to whom the several conveyances were made seems to have been in utter ignorance of the transactions, and as to some of the conveyances did not know they even existed until this suit was brought. The son claims to have made the money paid for the land by his labor on the farm and the sale of the farm products, when it is apparent that not a greater sum was made in any one year than would have clothed the family. The son had no means of his own outside of the results of his personal labor, and his father was engaged in making contracts and having deeds executed as the pretended agent of his son, when it is evident, from the character of these successive transactions, the details of which are given by both the father and son, that the purpose was to execute these deeds to the wife and mother in order to avoid the payment of A. G. Mitchell's debts.

Why the son was laboring on the farm where they all lived for the accumulation of money necessary to purchase this land, and then conveyed it absolutely to the mother, reserving no right or interest in himself, is a question that from the facts in this case can be answered only in one way. The father was making the purchases in fact, and then causing the deeds to be made to his wife in order to avoid the payment of his debts. It is evident that the homestead cost him greatly more than \$1,000, and equally plain that he purchased the Tabor land. He first conveyed land to his wife that was worth more than \$1,000. His father had a lien on it for \$500, out of which this debt in controversy was to be paid. This lien was released, so that the creditors could not reach it. Then he negotiated with Tabor for the land purchased at commissioner's sale, and the deed was made to his wife. He worked on the farm with his son, was under 50 years of age, made or had the money, and it is perfectly apparent that the sole purpose of these extraordinary transactions was to place this property in a condition so creditors could not reach it.

The chancellor should have rendered a judgment subjecting the Tabor land, or so much of it as might be necessary to pay appellant's debt, and, if this is

insufficient, the homestead should be sold to pay the balance, if any; first paying to the wife \$1,000, or allotting to her so much of the homestead, if she desires it, as is of the value of \$1,000, and selling the remainder.

The judgment is reversed, and remanded for proceedings consistent with this opinion.

JAMES v. COX et al.

(Court of Appeals of Kentucky. February 21, 1889.)

INFANCY—APPOINTMENT OF GUARDIAN AD LITEM—AFFIDAVIT.

An affidavit for the appointment of a guardian *ad litem* for an infant defendant may be made either by the plaintiff or his attorney, under Code Civil Proc. Ky. § 88; and therefore section 550, authorizing an attorney to make any affidavit required by the Code to be made by his client, if the latter is absent from the county, has no application to the affidavit mentioned.

Appeal from circuit court, Henry county; S. E. DEHAVEN, Judge.

Suit by Madison Cox against Rebecca Cox and others to foreclose a mortgage. The land being sold, Rebecca James became the purchaser. She filed exceptions to the report of sale, which were overruled, and the report confirmed. From the order of confirmation she appeals.

William Carroll, for appellant. *John D. Carroll*, for appellees.

PRYOR, J. There is no appeal from the judgment rendered in this case, but the appeal is prosecuted from the order confirming the report of sale made by the commissioner. Section 38 of the Civil Code provides, where the defendant is an infant, that no appointment of a guardian *ad litem* shall be made until an affidavit of the plaintiff or of his attorney is filed, showing that the infant has no guardian, curator, etc., residing in the state, known to the affiant. The affidavit may be filed in court, or with the clerk. In this case the affidavit was made by the attorney, but in it he failed to state that the plaintiff (his client) was absent from the county, and therefore it is claimed the proceeding against the infant is void.

Section 550 of the Code provides that, where the Code requires or authorizes a party to make an affidavit, it may be made by his agent or attorney, if the party is absent from the county, unless otherwise expressed, etc. It will be observed that section 38 authorizes the party or his attorney to make the affidavit, and therefore this case is not embraced by the provisions of section 550. If the party had been authorized to make the affidavit provided for in section 38, then the attorney, by reason of section 550, could have made the affidavit, if the plaintiff was absent from the county. In a case like this, either the plaintiff or his attorney can make the oath, whether the plaintiff is in the county or out of it, as this is the express provision of the Code. Nor are we disposed to adjudge that the judgment would be void if section 550 applied to this case. We perceive no error in the record, either as to the service or the manner of service on the infants, that would render the sale void; and, as the appeal is from the order of confirmation alone, the judgment below is affirmed.

McKENSEY v. EDWARDS *et al.*

(Court of Appeals of Kentucky. February 21, 1889.)

NEGOTIABLE INSTRUMENTS—ACTION ON NOTE—PLEADING—ANSWER.

A note by which "The directors of the J. & S. Turnpike Road promise to pay," etc., and signed with the names of the directors, without any official designation attached, does not on its face show any liability of the turnpike corporation; and, in an action on such note to recover a personal judgment against the signers, an objection that such writing is the obligation of the corporation must be raised by answer, and not by demurrer.

Appeal from circuit court, Owen county; WARREN MONTFORT, Judge.

Action by R. McKensey against J. W. Edwards and others, on a promissory note. A demurrer to plaintiff's petition having been sustained, and the petition dismissed, he appeals.

J. J. Landram, for appellant. *J. W. Greene*, for appellees.

HOLT, J. The appellant, R. McKensey, as the assignee of the obligation, seeks to obtain a personal judgment upon this note:

"JONESVILLE, KY., Aug. 12, 1879.

"The directors of the Jonesville and Glencoe Turnpike Road promise to pay to Andrew Hearne two hundred dollars; this note bearing ten per cent. until paid.

J. W. EDWARDS.

"G. W. HERNDON.

"JOSEPH BROOK.

"J. L. GREENE.

"LEMUEL BEATTY.

"JOHN MCKENSEY."

The petition is in the usual form, when based upon a promissory note. A demurrer was sustained to it, and the action dismissed, upon the ground that the writing is the obligation of the corporation, and not of the signers as individuals. We find no case decided by this court where the obligation sued upon was exactly similar.

In the cases of *Trask v. Roberts*, 1 B. Mon. 201, and *Whitney v. Sudduth*, 4 Meta. (Ky.) 296, the promise of the defendants to pay was both joint and several. The obligations were clearly of this form, and the cases were made to turn upon this point, as it was held that the several promise could not be otherwise than personal.

The case of *Yowell v. Dodd*, 3 Bush, 581, is distinguishable from the one now before us. In that case the obligation reads thus:

"Twelve months after date, the *president* and directors of the Hustonsville and Bradfordsville Turnpike Road *Company* will pay Leroy Yowell twelve hundred dollars, for value received, at six per cent. interest from date, this 16th of November, 1865.

F. J. DODD, *Pres.*

"JAMES YOWELL.

"JAS. J. DRYE.

"M. P. DRYE.

"WM. L. MCCAIN."

It was held to be the obligation of the company. The differences between it and the writing now in question are italicised above. It does not appear that the president of the company united in the execution of this one. This, however, may not be material. The record does not disclose whether it is so or not. The word "company," however, does not appear in it, and no official designation is annexed to the name of any one of the signers. Upon the other hand, no personal pronouns or words expressly indicating a personal liability are used. No action could, however, have been maintained upon it

against the corporation without an averment of mistake or fraud in its execution. No company is mentioned. Upon the face of the note there is no one to sue but the makers of it.

A petition founded upon it against the corporation would not have been sufficient, if drawn in the usual form of one upon a note. It would have been necessary to aver a mistake in its execution, and ask a reformation of the obligation. The party would have been compelled to set up the omission as a mistake in the drafting of the note, and that by inadvertence, or for some other reason, it did not show the real and true obligor. The face of the obligation does not show that the corporation received the consideration, or that it was applied to its benefit; and an action could not be maintained upon it against the corporation without averring, and proving, if denied, that it was executed and received as its obligation, and that by a mutual mistake in its execution this fact was not made to appear. Upon the face of the note the corporation is not *prima facie* liable. It cannot properly be said that upon its face it purports to be the note of the company. The "company" does not promise to pay it. As it would have been necessary to make these independent averments to maintain an action against the corporation upon it, it necessarily results that the writing must upon its face be regarded as the undertaking of the parties whose names appear to it as obligors; and the question of individual or corporate liability must be raised by a proper answer, and not by demurrer. *Pack v. White*, 78 Ky. 243.

Judgment reversed, and cause remanded, with directions to overrule the demurrer, and for further proceedings consistent with this opinion.

TREADWAY *et al.* v. TURNER.

(Court of Appeals of Kentucky. February 26, 1889.)

1. FRAUDULENT CONVEYANCES—CONVEYANCE TO WIFE—ACTION TO SET ASIDE.

As against the husband's creditors, it will be presumed that land purchased by the wife is paid for with money to which the husband is entitled, and is liable for his debts, in the absence of allegation and proof that the money with which she paid for the land was her separate estate.

2. SAME—LANDS HELD IN TRUST—DENIAL OF TRUST.

Where the proceeds of land held by the wife subject to the claims of her husband's creditors are invested in other land, the title to which is alleged to have been taken by another in trust for the wife, a denial that the entire payment on the land was made with the money of the wife is not a denial of the trust, and the allegation must be taken as true, in an action by the husband's creditors to reach the land.

3. SAME—BONA FIDE PURCHASERS.

Though lands of a judgment debtor which have been conveyed in fraud of creditors, and which have since passed to purchasers for value without notice, cannot be reached by the creditors, yet lands held by the fraudulent vendees, into which the proceeds of the former lands have passed, may be so reached.

4. VENUE IN CIVIL CASES—ACTION TO RECOVER LAND.

Under Civil Code Ky. § 63, providing that an action for the recovery of realty, or an estate or interest in it, or for its sale under an incumbrance or charge, must be brought in the county in which the subject of the action or some part of it is situated, the circuit court of one county has jurisdiction of an action to subject to the claims of creditors land in that and another county alleged to have been fraudulently conveyed, the legal title to which, in whole or in part, is in the same person.

5. SAME—LAND IN SEVERAL COUNTIES.

Such court is not deprived of jurisdiction as to the land in the other county because it fails to subject the land in its county to the payment of the debt; the reason of the failure being that such land is subject to *bona fide* liens to the extent of its value.

6. FRAUDULENT CONVEYANCES—DEATH OF GRANTOR—ACTION TO SET ASIDE.

Where more than a year has elapsed since the death of a judgment debtor who is alleged to have conveyed land in fraud of creditors, and administration has not been granted on his estate, it is not necessary that the creditor obtain a return of *nulla bona* before resorting to such land.

Appeal from circuit court, Montgomery county; JOHN E. COOPER, Judge.

Action by Thomas Turner against Louisa Treadway and others, to subject certain lands to the payment of his judgment against Stephen Treadway, deceased. Defendants appeal. By Civil Code Ky. § 62, "actions must be brought in the county in which the subject of the action, or some part thereof, is situated: (1) For the recovery of real property, or of an estate or interest therein; * * * (3) for the sale of real property * * * under a mortgage, lien, or other incumbrance or charge, except for debts of a decedent. * * *

J. H. Hazlerigg, R. Gudgell, and W. S. Gudgell, for appellants. Thos. Turner, for appellee.

BENNETT, J. Stephen Treadway, in 1875, conveyed to his wife, Martha Treadway, about 40 acres of land lying in Montgomery county, Ky. Thereafter, in the same year, he and his wife conveyed to the appellant Louisa Treadway, wife of the appellant Sam Treadway, son of Stephen Treadway and wife, four acres of said land. In 1874, the appellee obtained a common-law judgment against Stephen Treadway for money. In 1883, Stephen Treadway, having died a little over a year theretofore, and no administration having been granted upon his estate, the appellee instituted this action in equity against the appellants and Martha Treadway, to have said conveyances set aside, because, as alleged, they were made without any valuable consideration therefor, and with the design to defraud Stephen Treadway's creditors.

It appears from the testimony of the witnesses in the case that the conveyances were voluntary, and were made with the design to defraud Stephen Treadway's creditors. Besides, the record shows that in 1876 one of the creditors of Stephen Treadway, by an action in the Montgomery circuit court against Stephen and Martha Treadway and others, attacked said conveyance to Martha Treadway as fraudulent. This action was sustained, judgment was rendered for the sale of the land, and Martha Treadway purchased it at the commissioner's sale, and received the commissioner's deed for it. So the fact that the conveyance by Stephen Treadway to Martha Treadway was fraudulent was established by the judgment of a court of competent jurisdiction.

Martha Treadway does not allege that she paid for this land with money to which she was entitled in her own right. In the absence of such allegation, the presumption is that she paid for the land with money to which her husband was entitled. This presumption arises from the fact that the husband is entitled to the money that his wife may be in the possession of during coverture, unless it is shown that she holds it as her separate estate; and the burden is on her to establish that fact. She does not allege that the money with which she paid for the land was her separate estate. The land, therefore, was still liable for her husband's antecedent debts. It also appears that this land was sold by Martha Treadway, and the proceeds of the sale were invested in the purchase of another tract of land, containing 66 acres, lying in Montgomery county, the deed to which was taken in the name of the appellant Louisa Treadway, in trust, as is alleged, for the benefit of Martha Treadway. It is not denied that the proceeds arising from the sale of the 40-acre tract of land were put in this land, in trust for Martha Treadway. The denial is that the entire payment on the land was made with the money belonging to Martha Treadway. As this denial does not put in issue the fact that the money arising from the sale of the 40 acres of land was put in this land

in trust for Martha Treadway, the allegation in that regard must be regarded as true. The four acres of land conveyed to the appellant Louisa Treadway were sold, and the proceeds invested in a tract of land lying in Bath county, Ky. The deed to this land was made to the appellant Louisa Treadway and others.

The appellee sought to trace the proceeds arising from the two parcels of land, originally fraudulently conveyed, into the two tracts, one in Montgomery, the other in Bath, subsequently purchased in the manner above mentioned, and to subject said tracts to the payment of his common-law judgment. As the title to the two pieces of land, originally fraudulently conveyed, passed from the fraudulent vendees into the hands of purchasers for value without notice of the fraud, said lands could not be, by the appellee's action thereafter instituted, subjected to his debt; but as long as the proceeds of said lands could be traced into other lands, purchased and held by the fraudulent vendees, the appellee had the right to subject said lands to the payment of his debt. The action to subject two tracts of land to the payment of the appellee's debt was brought in Montgomery county. The legal title to the tract lying in Montgomery county was in the appellant Louisa Treadway, in trust, in part at least, for Martha Treadway; also the legal title to the Bath county land was in the same appellant and her children, who are appellants.

It is said that, as to the Bath county land, the Montgomery circuit court had not jurisdiction to subject the same to the debt. This is true, unless there was some other fact that gave the Montgomery circuit court jurisdiction. Such fact does not exist; for the appellant Louisa Treadway was a necessary party defendant to the action in the Montgomery circuit court for the purpose of subjecting the land in that county to the payment of the appellee's debt. She was also a necessary party to the action for the purpose of subjecting the Bath county land to the payment of the appellee's debt. There was but one debt, and but one cause of action, and both pieces of property were liable to that cause of action; and, the Montgomery circuit court having jurisdiction to subject the land lying in Montgomery county to said cause of action, it follows that it had jurisdiction to subject the Bath county land. Civil Code, § 62. Otherwise there would be the absurdity of having two actions, one in Montgomery and the other in Bath, against the same parties, and for the same cause of action. But it is said that, as the lower court failed to set aside the deed and subject the land lying in Montgomery county to the payment of the debt, it had no jurisdiction to set aside the deed and subject the land lying in Bath county to the payment of the debt. This failure was not attributable to the want of right of the appellee to have said land subjected, for it was subject to his demand, but for the fact that it was covered with *bona fide* liens to such an extent that the sale of it subject to these liens would yield no fruit. Therefore the court did not order the sale of it.

It is contended that the appellee, not having obtained a return of *nulla bona* on his common-law judgment, is not entitled to maintain this action. The reason a plaintiff is required to obtain a common-law judgment, and a return of *nulla bona*, before he can institute an equitable action to set aside a fraudulent conveyance made by the defendant, is that the plaintiff must resort to and exhaust his legal remedies before he can resort to an equitable action on a return of *nulla bona*. Here there was no administration granted upon the estate of Stephen Treadway; and more than a year after his death, there being no administration, the appellee resorted to this equitable action to subject his real estate in the hands of the appellants and Martha Treadway to his debt. The legal remedy was exhausted, for there was no one against whom an execution could issue, and the appellants were under greater obligations to have an administrator appointed than the appellee. So, in the absence of a person against whom execution could issue, there is no legitimate reason why the appellee could not proceed against the appellants and Mrs. Treadway to sub-

ject the real estate in their hands belonging to the deceased to the payment of his debt. The title to said real estate, so far as the antecedent creditors were concerned, never passed from the deceased, and the estate was subject to their demands against him.

The action was brought within ten years from the perpetration of the fraud, and within five years from the discovery of it. The judgment is affirmed.

HOLT, J., not sitting.

CUMMINGS *et al.* v. POWELL.

(Supreme Court of Missouri. February 4, 1889.)

1. PUBLIC LANDS—SCHOOL LANDS—SELECTION—RESERVATION FROM SALE.

Act Cong. June 13, 1812, § 1, confirmed, to the inhabitants of St. Louis and other towns, town lots, common fields, etc., which had been inhabited, cultivated, or possessed prior to December 20, 1803, and required a survey of the out-boundary line so as to include common-field lots, etc., as soon as might be. Section 2 reserved for the support of schools, among other lands, all common-field lots, etc., included in such survey, not rightfully claimed by individuals, provided that the quantity reserved should not exceed one-twentieth of the land in the general survey of the town. *Held*, that all the unclaimed common-field lots were reserved from sale during the time the portion going to the schools was not set off to them.

2. SAME—NECESSITY OF SURVEY.

Though the out-boundary survey was not made until 1840, and, as then made, excluded the unclaimed "five Grand Prairie common-field lots," an intermediate location and survey under a New Madrid certificate, under the act of February 17, 1815, authorizing the owners of lands in New Madrid county, injured by an earthquake, to locate a like quantity on any public lands the sale of which was authorized, did not become valid, no patent having been issued. The lots having been previously defined and located on the ground, and surveyors having been required to be guided by them, a survey was not necessary to make the reservation effectual.

3. SAME—VALIDITY OF LOCATION.

Such location is not made valid by act Cong. June 30, 1864, relinquishing the title of the United States to the land in such location; the act of June 15, 1864, having granted to the state, for the support of schools, all the interest of the United States to the land in the Grand Prairie common field. Such field and lots having had a prior existence, it was not necessary that the latter act should require a survey of them.

4. LIMITATION OF ACTIONS—RUNNING OF THE STATUTE.

The statute of limitations does not begin to run as to land before the title thereto emanates from the United States.

5. SAME—TITLE OF LAND IN UNITED STATES.

Where plaintiff in ejectment claimed under a New Madrid certificate, and defendant's allegation that the lands were a part of such common-field lots was not conceded, an instruction assuming that the statute began to run before the title emanated from the United States, defendant having been in possession for 40 years, requires a reversal of a judgment for defendant.

6. ESTOPPEL—IN PARI.

A defendant in ejectment, who introduces conveyances from plaintiff's ancestor to his predecessor in title, is not thereby estopped from disputing such ancestor's title to all the lands, especially where he has been long in possession. But he cannot claim part of the lands under, and part against, the same title.

Appeal from St. Louis court of appeals.

Ejectment by Francis M. Cummings and others against Robert W. Powell. Plaintiffs appeal.

D. T. Jewett, for appellants. *Martin, Laughlin & Kern*, for respondent.

BLAOK, J. The plaintiffs commenced this action of ejectment on the 22d June, 1874, to recover a part of lot 38, in Peter Lindell's Second addition to St. Louis. For title they read in evidence New Madrid certificate No. 348, issued to James Conway or his legal representatives on the 20th November, 1817, for 200 arpents of land; a location of this certificate on June 6, 1818;

survey No. 2,712, dated 23d June, 1819, which survey was returned to the recorder of land titles on the 4th September, 1822; a certificate for a patent, but upon which certificate no patent was ever issued; and the act of congress of June 30, 1864, (13 U. S. St. 581.) This survey No. 2,712 is called the "Conway Location," and the property in suit is within its boundaries.

The evidence shows that James Conway died about the year 1810, leaving as his heirs his father, William Conway, and three sisters, namely, Nancy, Polly, and Jane or Janet. The plaintiffs in this suit are the descendants of these three sisters, except Smith, who claims some interest through the other plaintiffs. It seems to be conceded that William Conway inherited a life-estate only from his deceased son; and as William died about the year 1840, long before the commencement of this suit, it is not essential to notice the various deeds from and under him read in evidence by the defendant.

During the trial the defendant read in evidence three deeds, one from each of the three sisters of James Conway to Joseph Harding, dated in the years 1823 and 1825, and a deed from the public schools to Peter Lindell, dated 20th August, 1845, purporting to convey much property of which the property in question is a part.

It was admitted that the defendant had all the title formerly possessed by Peter Lindell and Joseph Harding. The deed from the schools to Lindell is not relied upon as giving to Lindell a good title, and two of the deeds from the sisters of James Conway proved to be of no avail to the defendant. When Nancy executed the deed to Harding she had a husband living who did not join therein, and, while Polly and her husband both signed the deed to Harding, still it was not acknowledged, simply proved up by subscribing witnesses, and for these reasons these deeds proved to be of no avail to defendant. Indeed, the plaintiffs insist that the deed from Jane or Janet to Harding is also invalid. She married Hicks, from whom she had been divorced, and the claim is that the decree is void, and, since he did not join her in the deed, that it is of no validity.

The defendant put in much other evidence which tends strongly to show that the parcel of property now in suit lies within the Grand Prairie common field. The Bizet lot lies to the north, and the Lacroix lot to the south, and both of these common-field lots are identified by United States surveys. Between these two common-field lots there are five others, which are not identified by United States surveys, but the evidence tends to show that they were all occupied or cultivated prior to December 20, 1803. These five lots do not appear to have ever been claimed by individuals under the act of congress of June 13, 1812. The land in suit is a part of two of these five lots.

The defendant, and those from whom he claims, have been in actual possession of the land in suit for more than 40 years before the commencement of this suit.

From the foregoing statement it will be seen that the plaintiffs claim title from James Conway under the New Madrid location. The defendant sets up title under the same location, but, as some of his deeds proved to be of no avail for the purpose of making title, he takes the ground that the location was invalid, and for this reason the plaintiffs have no title, and cannot recover. The third instruction given at his request is, in substance, that if the land in suit is a part of common-field lots in the Grand Prairie common field, and these common-field lots were used by many of the inhabitants of the town of St. Louis prior to December 20, 1803, for the purpose of cultivation, then it was not subject to the location of a New Madrid certificate, and the location and survey are void; and on this state of facts the sixth instruction draws the further conclusion that, by the act of congress of June 15, 1864, the title to the common-field lots, not before disposed of by the United States by confirmation and survey or otherwise, passed to this state for school purposes. These instructions present the most important question in the case.

The act of February 17, 1815, (3 U. S. St. 211,) for the relief of inhabitants of New Madrid county who suffered from earthquake, authorized persons owning injured lands to locate a like quantity on any of the public lands the sale of which was authorized by law. It is clear that under this act the New Madrid certificate could only be located on land subject to sale. That act in this respect is not modified by the subsequent acts of April 9, 1818, or April 26, 1822. The question, then, is whether these common-field lots were reserved from sale by the act of congress of June 13, 1812, (2 U. S. St. 748.)

In the recent case of *Glasgow v. Baker*, 85 Mo. 559, we held that the sixth section of the act of March 6, 1820, which provides that section 16 in every township, and when such section has been sold, or otherwise disposed of, other lands equivalent thereto, shall be granted to the state for the use of schools, did not and was not intended to invade these common-field lots, because the previous act of June 13, 1812, had disposed of them. The judgment of this court in that case has since been affirmed by the supreme court of the United States.¹ The rulings in that case go far to show that these common-field lots were not open to sale, and therefore not open to the location of a New Madrid certificate, under the act of February 17, 1815.

The defendants in that case set up title under and also an outstanding title in individual confirmees under the act of 1812. But in the present case it seems that the five Grand Prairie common-field lots have never been claimed by individuals, and this gives to the question a new aspect. The first section of the act of 1812 enacts "that the rights, titles, and claims, to town or village lots, outlots, common-field lots, and commons, in, adjoining, and belonging to the several towns of, [St. Louis being named,] which lots have been inhabited, cultivated, or possessed prior to the 20th December, 1803, shall be, and the same are hereby, confirmed to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto." It is then made the duty of the deputy-surveyor, as soon as may be, to survey the out-boundary line of the village, "so as to include the outlots, common-field lots, and commons" thereto belonging. The second section provides "that all town or village lots, outlots, or common-field lots included in such surveys which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the president of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby, reserved for the support of schools in the respective towns or villages." The proviso is that the whole quantity of land contained in the lots reserved for schools in any town shall not exceed one-twentieth part of the whole lands included in the general survey of such town.

As to the common-field lots which were thus confirmed to individuals, no title is required to vest the title in the individual owner. This is true, though the lot may not be included in the out-boundary survey, as it was finally made in the year 1840. *Glasgow v. Lindell's Heirs*, 50 Mo. 60; *Glasgow v. Hortiz*, 1 Black, 599. The theory of the act is, and the proof in all of these cases shows, that these common-field lots had an existence in point of fact at the date of the act. A survey would aid in identifying them, but they were previously defined and located on the face of the earth. It required no new survey to bring them into existence. The second section of the act contemplates that there may or will be common-field lots not claimed by individuals, and these are reserved for school purposes, subject to the limitation as to the quantity going to the schools. While this second section reserves only such property as shall be included in the survey of the out-boundary, the first section declares how that survey shall be made. It must run so as to include the common-field lots. They were monuments by which the surveyor should

have been guided. No discretion was vested in him to omit them, or any of them, for the statute segregated them from the public domain. The act undertakes to dispose of all of the common-field lots. Those owned and claimed by individuals go to them in fee; those not owned or claimed by individuals are just as clearly reserved for the designated purposes.

It is true the schools were to get a quantity not to exceed the one-twentieth part of the land included in the general survey, and here it may be said that the act contemplates a possible surplus. But a continued reservation of all of the common-field lots was necessary in order that the schools might get their proper amount. We find nothing in the act of May 26, 1824, or the act of January 27, 1831, that opens up any of these unclaimed lots to sale.

The parcels going to the schools have not, at the date of the last-named act, been set off to the schools; and hence it has been held that the title did not attach in favor of the schools to any particular parcel until set off and designated as the property of the schools. *Papin v. Ryan*, 32 Mo. 21; *Kissell v. Public Schools*, 18 How. 19. But this difference between the time of the vesting of the title in individuals under the first section, and the vesting of title in the schools under the second section, argues nothing against the proposition that these lots were reserved from sale, and hence from the location of a New Madrid certificate. It is said in *Shepley v. Cowan*, 91 U. S. 336: "A sale is as much prohibited by a law of congress, when to allow it would defeat the object of the law, as though the inhibition were in direct terms declared." Here the reservation of unclaimed common-field lots is not only express, but the object of the law would be defeated to hold them open to sale. The difficulty which arises in this and like cases is that the surveyor did not run the out-boundary survey until 1840, and he then run it so as to exclude the Grand Prairie common field, and hence excluded the land in suit. In the mean time, this New Madrid certificate had been located, wholly, it is said, upon these claimed and unclaimed common-field lots. As to the lots owned by individual claimers under the act of 1812, the location of the New Madrid certificate is void. But authorities are cited to show that, as the schools accepted this incorrect out-boundary, it became conclusive as between them and the United States. Let this be conceded, yet, if we are correct in what has been said, there was no time, from 1812 to 1840, when these unclaimed common-field lots were open to sale or the location of a New Madrid certificate. All of the acts done in the way of locating this Conway claim, and in procuring the patent certificate, were done before the last-named date, and it is to be remembered that no patent was ever issued. It is difficult to see how the subsequent erroneous survey could give any validity to the previously unlawful location. We can but conclude that this location of the New Madrid certificate is invalid, as to the unclaimed common-field lots, and that the plaintiffs have no title, lest it be shown that the United States have made the location valid by some act done since 1840.

This conclusion, it is argued, is contrary to former adjudications of this court, and the supreme court of the United States. From the concluding remarks in *Gibson v. Chouteau*, 39 Mo. 570, and *Kissell v. Public Schools*, 18 How. 28, it is clear that neither this nor that court expressed any opinion as to the effect of the erroneous survey of 1840 upon titles to land outside of that survey, and which should have been included. The other cases do not appear to have any direct bearing upon the question in hand.

This brings us to the act of congress of June 15, 1864, and of June 30, 1864, (18 U. S. St. 132, 581.) The first enacts that all of the right, title, and interest of the United States in and to all lots and parcels of land in the Grand Prairie common field, in township 45, range 7 E., which have not been before disposed of, shall be and are granted and relinquished to this state for the support of schools in said township. The other act provides that all the right, title, etc., of the United States, in and to all lands within

the boundaries of designated locations in the same township and range, made by certificates issued under the New Madrid act, shall be and are relinquished to the representatives of the persons in whose names the locations were made. This Conway location is clearly described as one of the locations. Both acts have provisos by which it is declared that nothing in the act shall impair, prejudice, or injure any adverse right, title, or interest of any person or persons in or to any of the lots or tracts of land conveyed.

If this last act stood alone, then it might well be held that it made valid the Conway location as to abandoned or unclaimed common-field lots, but the other act is the prior one, and the property conveyed is limited to lots and parcels of land in the Grand Prairie common field. The reason assigned here why the first act must not prevail, as to the property in the Grand Prairie common field, is that the act describes nothing, and provides for no survey of the land which it undertakes to grant. There was no need of any survey, for, as before stated, the common field, and the lots therein, had an existence without a new survey. It may be difficult at this late day to trace the boundaries, but that fact cannot make the act void. The act of 1812 did take effect without a survey as to the lots confirmed to individuals, and so may this act take effect without a survey. The property previously disposed of by the United States, being determined, the act takes effect upon the residue. It follows that, upon the facts hypothetically stated in the defendant's instructions, the plaintiffs have no title to the property in dispute.

It is insisted that as the defendant put in evidence the deeds from the plaintiffs' ancestors, that he is estopped from disputing their title. There is in this case no relation of landlord and tenant, nor is the defendant in possession under an unexecuted contract for the purchase of the land, nor is he in under one whose land has been sold on execution. The relation of defendant to plaintiffs' ancestors is no more than that of vendor to vendee. In such cases the vendee holds adversely to the vendor. He may set up the statute of limitations as against the vendor, or an outstanding title, and may buy up as many titles as he likes, (*Macklot v. Dubreuil*, 9 Mo. 478; *Landes v. Perkins*, 12 Mo. 238; *Cutter v. Waddingham*, 33 Mo. 269; *Mattison v. Ausmuss*, 50 Mo. 551; *Wilcoxon v. Osborn*, 77 Mo. 621,) and as a consequence show that the vendor had no title.

When both parties claim title from the same grantor, nothing more appearing, the title in the common grantor will be taken as admitted. *Fellows v. Wise*, 49 Mo. 350; *Holland v. Adair*, 55 Mo. 40. But this rule does not prevent the defendant in ejectment from showing that the plaintiff had no title. The defendant could not nor does he claim that the proof which defeats the plaintiffs is to be applied as to the two-thirds for which the deeds failed, and not to the other third,—the Janet Hicks interest. He cannot at the same time claim part under, and part against, the very same title. The case of *Chouquette v. Barada*, 33 Mo. 249, and *Fugate v. Pierce*, 49 Mo. 449, go no further, and are not in conflict with the rule before stated.

We see nothing to take this case out of the rule that plaintiffs must recover, if at all, on the strength of their own title. It is a proper case for its application, and especially in view of the fact that defendant has been in possession for such a long time.

The defendant's eighth instruction is based upon the theory that the statute of limitations began to run before the title to the land emanated from the United States. We understand *Gibson v. Chouteau*, 13 Wall. 92, to plainly establish a different rule, as we have said on several occasions. *Hammond v. Johnston*, 93 Mo. 222, 6 S. W. Rep. 83, and cases cited.

It is not conceded here, as was the case in *Glasgow v. Baker*, *supra*, that the property in suit is a part of a common-field lot. If that was the case here, we should affirm the judgment. It may be the court found for defendant on this eighth instruction, for it is complete in and of itself; and for the error in

giving it the judgment is reversed, and the cause remanded, but for no other reason.

BARCLAY, J., not sitting. The other judges concur.

STATE, to Use of LEVY, v. ADLER *et al.*

(*Supreme Court of Missouri.* February 4, 1889.)

1. ASSIGNMENT FOR BENEFIT OF CREDITORS—STATEMENT OF ASSETS.

Under Rev. St. Mo. § 362, an assignor for the benefit of creditors must file with the deed of assignment a verified statement setting forth the nature and value of the estate and effects assigned. *Held*, where the assigned property consisted of manufactured clothing, fixtures, and accounts, difficult of exact valuation, that a statement of value at "about \$3,500" was sufficient.

2. SAME—PRIOR FRAUDULENT ACTS OF ASSIGNOR.

Where an assignment is made for the purpose of having the property of the assignor administered under the law, prior disconnected fraudulent acts of the assignor will not vitiate it, when it does not appear that the assignee was in any way a party to the frauds.

3. SHERIFFS AND CONSTABLES—ACTION ON BOND—PLEADING—JUDGMENT.

In an action by an assignee on a sheriff's indemnifying bond, to recover the value of property taken from him under an attachment, where the petition sets out the bond and assigns the breach, when there is a trial of the issues upon the answer, the court may, under Rev. St. Mo. 1879, § 3683, grant any relief consistent with the case made by the plaintiff, although the petition prays for a judgment for damages sustained only, and not for the penalty of the bond.

Appeal from St. Louis circuit court; SHEPARD BARCLAY, Judge.

Suit by the state for the use of one Levy, assignee of A. Spiro, against William Adler and others, on a sheriff's indemnifying bond, to recover the value of property taken from him under an attachment. Defendants appeal from a judgment for plaintiff.

Nathan Frank and Dyer, Lee & Ellis, for appellants. *Krum & Jonas*, for respondent.

BLACK, J. A. Spiro made a voluntary assignment of his property to F. Levy for the benefit of his creditors. The deed of assignment was executed and recorded on the 18th November, 1882. On the 20th of the same month, Adler and others, composing the firm of Adler & Co., sued Spiro in attachment, and levied upon the assigned property then in the possession of the assignee. The assignee made claim for the property, and therefore the defendants in this suit gave the sheriff an indemnifying bond. 2 Rev. St. 1879, p. 1555. This is a suit by the assignee upon that bond, to recover the value of the property taken from him. Defendants deny ownership of the property in the plaintiff, and tender the further issue that Spiro made the assignment with intent to hinder, delay, and defraud his creditors.

1. Defendants objected to the deed of assignment, when offered in evidence by the plaintiff, on the ground that the affidavit attached thereto was not in conformity with the statutes. Section 362, Rev. St., makes it the duty of the assignor to make and file with the deed of assignment a verified statement "setting forth the general nature and full value of the estate and effects assigned." The same section makes it the duty of the assignee to give bond in double the amount of the assigned effects within three days; and if the appraisement, thereafter to be made, shall be greater than the value given in the statement, then he must give another bond. In the present case, the statement, duly verified, after giving a general description of the stock of goods and property, concludes: "All which property is of the value of about thirty-five hundred dollars." The validity of the assignment does not depend upon the statement, and, if none had been made and filed with the assignment, the

omission would not invalidate the deed of assignment. *Hartsler v. Tootle*, 85 Mo. 23. But this statement is a fair compliance with the law. It is plain to be seen that the principal object of the statement is to furnish a guide for the amount of the bond to be given by the assignee in the first instance. Here the property consisted of manufactured clothing, unmanufactured jeans, and of fixtures and accounts, and it would have been difficult to give an exact valuation. The value is stated to be about \$3,500, and that is sufficient.

2. Spiro, being called as a witness by the defendants, testified, in substance, that he found he could not go on with his business; that he feared he would be closed up by attachments; that he went to his lawyer to make an assignment, and while there sent for Levy; that he had had no previous conversation with Levy about an assignment; that Levy first refused, and then consented, to act as assignee; and that the deed was then made, recorded, and the property turned over to Levy. His evidence shows that an unsuccessful effort had been made to compromise his debts. It may be here stated that the assignee was examined at length by the defendants.

During the examination of Spiro, numerous objections were made, and by the court sustained, to questions asked by the defendants. They then offered to show by the witness the amount of his indebtedness at the date of the assignment, the amount of the debt which he owed Adler & Co., and that, within 10 days before the assignment, he had transferred property to persons in St. Louis and elsewhere without consideration. This offer embraced what defendants had previously sought to disclose, and the court refused to permit an examination on these subjects. The court, at the close of the case, directed a verdict for plaintiff, and refused to submit the issue of fraud to the jury.

The amount of the debt due to Adler & Co. is admitted by the pleadings, so that there was no occasion to offer proof on that subject. Since considerable latitude is allowed in the examination of witnesses on questions of fraud, and the witness was a party to the alleged fraudulent transaction, the court might well have allowed a more extended examination. But it does not follow that the judgment must be reversed. There is no claim that any creditor of Spiro had anything to do with making the assignment. Before it can be avoided, it must appear that Levy was in some way a party to the fraud. Although the assignor may have made the assignment with intent to hinder, delay, or defraud his creditors, still, unless the assignee knew of or participated in the fraudulent purpose, the fraudulent intent of the assignor will not avoid the deed. *Crow v. Beardsley*, 68 Mo. 435, and cases cited. Moreover, this is an assignment for the benefit of all of the creditors of the assignor, in the proportion of their respective claims, as an assignment must be, under our present statute. It includes all of the property of the assignor. The estate is to be administered under the statute and the directions of the circuit court. Much that is said in the books as to what will render an assignment fraudulent, where preferences are made and allowed, and the estate is to be managed under the powers in the deed, dictated by the assignor, can have no application to an assignment like that now in question. In an assignment of all of the property of the assignor for the equal benefit of all of his creditors, the mere intent to avoid an execution or other legal process does not, in point of law, make such an assignment void. Bump. Fraud. Conv. (3d Ed.) 355. The fact alone that the assignor has made prior fraudulent transfers of some of his effects cannot avoid or make fraudulent the subsequent assignment. We find no evidence whatever showing, or tending to show, that the assignee had any connection with, knowledge, or information of, any fraudulent purpose on the part of Spiro, if any there was. The evidence all tends to show that he accepted the trust for the sole purpose of administering the estate under and according to the law. There was a full examination of Spiro as to all matters having any direct connection with the making of the assignment; and, since it was not proposed to show that Levy was a party to or connected with the

prior fraudulent transfers, the proposed evidence could not and cannot change the verdict. The statute concerning fraudulent conveyances and the assignment law must be construed together. There can be no more just and equitable disposition of an insolvent debtor's effects than that provided by the assignment law. If the assignment is made for the purpose of having the property administered under the law, and according to its spirit and intent, there can be no fraud in the assignment. Prior disconnected fraudulent acts of the assignor will not vitiate it.

3. Although the verdict and judgment are in due form, under section 570, Rev. St., it is argued that the motion in arrest of judgment should have been sustained, because the petition prays for a judgment for damages sustained only, and not for the penalty of the bond sued upon. The petition sets out the bond and assigns the breach, and, regularly, the prayer should have been for judgment for the penalty of the bond, and for an assessment of damages sustained by the breach. There was, however, a trial of the issues upon the answer, and in all such cases the court may grant any relief consistent with the case made by the plaintiff, and embraced within the issues. Section 3683, Rev. St. 1879.

The motion in arrest was properly overruled. The judgment of the circuit court is affirmed.

BARCLAY, J., not sitting. The other judges concur.

KANSAS CITY, ST. J. & C. B. R. Co. v. ST. JOSEPH TERMINAL R. Co.

(*Supreme Court of Missouri*. February 4, 1889.)

1. RAILROAD COMPANIES—USE OF STREETS—EXCLUSIVE RIGHTS—CROSSINGS—COMPENSATION.

Condemnation proceedings having been instituted by a city to extend a street through lands of plaintiff railroad company, the damages were agreed upon, and a decree entered by consent, which, after condemning the land for street purposes as prayed for in the petition, provided that plaintiff "shall have the right to keep and maintain its present tracks and switches upon said land, and shall have the right to construct such other tracks, switches, and turnouts upon said land, and across said street, when opened, as it may deem necessary for the transaction of its business." *Held*, that this privilege was not exclusive, but was equivalent merely to the ordinary permission given to railroad companies to occupy streets with their tracks, and that plaintiff was not entitled to compensation, either under such privilege or as abutting owner, for the incidental injury by delay which would result from the construction and operation of defendant's proposed track along the street and across plaintiff's tracks.

2. EMINENT DOMAIN—TAKING PRIVATE PROPERTY—COMPENSATION.

Such delay, caused by the occasional occupation by defendant's trains of the space in the street where the tracks of the two companies cross, at the same time when such space is needed by plaintiff for its trains, is not a taking or damaging of private property, inasmuch as both have an equal right to use the highway.

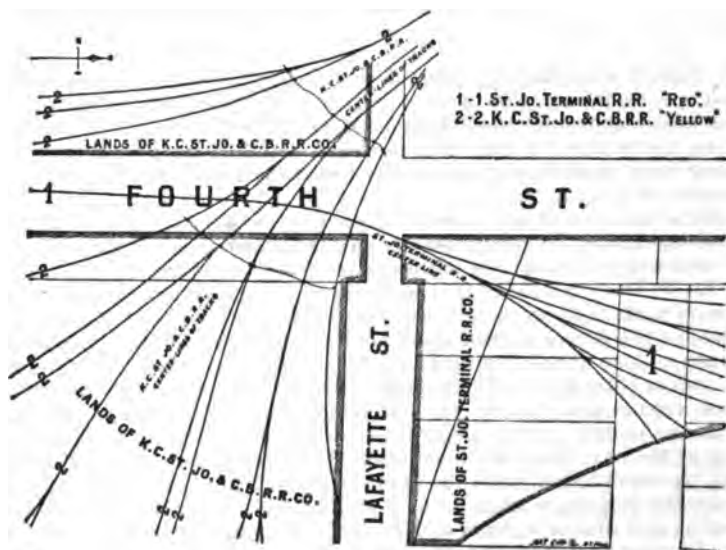
3. SAME—EVIDENCE.

The fact that a part of the consideration for the agreement by which plaintiff consented to the decree condemning its land for the street was the compromise of a claim against it by the city for breach of contract to build a depot within the city limits, is immaterial, as it can afford no light in interpreting the decree.

Appeal from circuit court, Buchanan county; OLIVER M. SPENCER, Judge. *Ramey & Brown, George W. McCrary, and W. D. B. Motter*, for appellant. *Strong & Mosman and Huston & Parrish*, for respondent.

BRACE, J. This is an appeal from a decree of the circuit court of Buchanan county, enjoining the defendant from entering upon, or interfering with, plaintiff's several railroad tracks, as now constructed and operated, on, over, and across Fourth street, in the city of St. Joseph. The defendant at

the time of the filing of the petition was engaged in constructing its track on Fourth street, was approaching the tracks of plaintiff, and purposed crossing them, claiming the right to do so by virtue of an ordinance of the city of St. Joseph duly passed and approved January 7, 1887, granting it "the privilege of laying down, constructing, using, and maintaining forever along Fourth street a single railroad track from the south line of Sacramento street to the north line of Lafayette street." The following map or diagram represents the relative situation of the grounds of the contestants, the tracks of plaintiff as established and operated, and the points of their crossing by the proposed track of the defendant. The plaintiff's grounds and tracks are in yellow, and the defendant's in red.



It will be observed from the map that the defendant proposes to cross six of the plaintiff's tracks on Fourth street, and that at the points of crossing the plaintiff is the owner of the property abutting said street on each side thereof. Prior to September, 1878, the plaintiff was the absolute owner also of the strip of ground between its said abutting premises, designated on the map as "Fourth Street," with its several tracks as located thereon, and was operating the said several tracks in its business as a common carrier of passengers and freight, in connection with its tracks on its adjoining property, of which the street then formed a part.

At the September term, 1878, of the circuit court of Buchanan county, in a proceeding instituted by the city of St. Joseph against the plaintiff herein, to condemn property for the extension of Fourth street, in said city, brought to said court by appeal from the mayor's court, the following decree was rendered and entered of record in said circuit court:

"The City of St. Joseph vs. The Kansas City, St. Joseph & Council Bluffs Railroad Company. Appeal.

"This case is submitted to the court without the intervention of a jury, and by agreement of the parties the court assesses the damages to defendant, for and on account of the matters alleged in plaintiff's petition herein, at one dollar. It is therefore considered by the court that defendant recover of plain-

tiff one dollar, and its costs before the mayor in the condemnation proceedings, and the plaintiff recover of defendant all costs of the appeal. And it is ordered, adjudged, and decreed that the right of way through the lands of defendant for the extension of Fourth street, as prayed in said petition, be, and hereby is, vested in the plaintiff, said right of way being bounded as follows, [here follows a description of the ground of plaintiff embraced within said street, including the land at the crossing in controversy; and then proceeds]. Said defendant shall have the right to keep and maintain its present tracks and switches upon said land, and shall have the right to construct such other tracks, switches, and turnouts upon said land, and across said street when opened, as it may deem necessary for the transaction of its business, subject to such grades as may be established by the city upon said street."

The plaintiff since the rendition of the foregoing decree has continued to use and operate these tracks across Fourth street the same as before. The ground before and since the extension of said street through it is denominated by the witnesses the "Middle Yard," and is used as a freight-distributing yard, in addition to its use as a roadway for plaintiff's trains, both passenger and freight.

Its use, and how that use will be affected by the operation of defendant's proposed track, may be appreciated from the following condensed statement of the testimony of one of the witnesses, read with reference to the foregoing map: W. F. Daily testified "that he was yard-master in charge of plaintiff's St. Joseph yards, and as such had charge of their operation. That plaintiff has two freight depots west of Fourth street, and north of the point shown on the map,—one at the foot of Third street, and one at the foot of Second street, two or three hundred feet apart. That the middle yard lies between Mitchell avenue and La Fayette street, north and south. That the north track in the middle yard leads to the gas-house, for loading and unloading their cars; the next track is a team track; the next, a transfer track, used for making transfers to and from the Hannibal & St. Joseph Railroad; the next, the main-line passenger track to the Union depot; the next two, team tracks for loading and unloading cars with teams. That the next track leads to the Badger Lumber Company's yards, used for loading and unloading cars, and for storing transfers. Then there are two spurs running into the other yard; also that there is a main-line passenger track leading to the round-house, used for specials, and to go to the Consolidated Tank-Line Company and the Anheuser-Busch Brewing Company; also used for storing cars. Then comes a freight track, used for freight trains going to and coming from the round-house, and for switching purposes; also a track for storing transfers, and doing work for the Barber Asphalt Company. West of Fourth street there are tracks leading to the electric light works, and two tracks west of same, used for unloading and storing cars. That these constitute the tracks of the middle yard. All trains of plaintiff pass through this middle yard on some of the tracks named. The regular trains consist of twelve passenger and twelve freight trains. That all freight trains on plaintiff's road are stopped at a place designated as the round-house yard, about one mile south of the south end of the middle yard, where the yard-master receives them, and all trains are made up at that place. These cars are all taken to the middle yard, and are there separated and set for the different transfers, and unloading and loading tracks and freight-houses; and all cars received from or delivered to other roads, excepting the Rock Island, are received at and delivered from the middle yard. All plaintiff's main tracks, and all tracks connecting the different yards of plaintiff in St. Joseph, run through the middle yard, and across Fourth street at the point in controversy." The witness further testified: *Question.* Supposing, Mr. Daily, that this [the ground shaded red on the map] represents

the yard of the St. Joseph Terminal Company as it is to be built on this ground between La Fayette street and Pattee street; state to the court the effect which the operation of the yard would have, if any, upon the operation of the middle yard of plaintiff's road. *Answer.* Well, if this terminal company's yard was worked to its full capacity, as it is shown on the map, it would damage this [plaintiff's] middle yard one-half, if not more. The damage would be caused by impeding and delaying its trains in crossing Fourth street."

A register of the time the Fourth-street crossings were occupied by plaintiff's trains, kept for six days. (August 17-23, 1887,) showed that its trains were on the crossing on an average some indefinite time during 13½ hours out of every 24. Besides the condemnation proceeding in which the foregoing decree was rendered, another suit had been instituted by the city of St. Joseph against the plaintiff in said circuit court, and on the trial in this case the defendant offered to prove "that a suit for \$90,000 was brought by the city against the Kansas City, St. Joseph & Council Bluffs Railroad for the failure to perform an agreement to locate their machine-shops, round-houses, and other buildings at this station inside the corporate limits of the city of St. Joseph; that that suit was compromised with this condemnation suit, as one suit; that the release by the city of the claim upon which this suit was brought, every portion of it, except \$1,500, was a part of the consideration for which the Kansas City, St. Joseph & Council Bluffs Railroad Company surrendered the land now in question to the city. To the introduction of this evidence the plaintiff objected, and its objection was sustained by the court.

By the constitution and laws of this state railways are public highways, and railroad companies common carriers thereon, and every railroad company has the right to construct and operate its road between any points in this state, and with its road to intersect, connect with, and cross any other railroad, (Const. art. 12, §§ 13, 14; Rev. St. 1879, § 819;) and to construct its road across, along, or upon any street, with the assent of the corporate authorities of the city in which such street is situate, (Rev. St. 1879, § 765.) The exercise of these rights is, however, subject to the limitation in the constitution that private property shall not be taken or damaged without compensation; and such compensation must be ascertained and paid to the owner, or into court for the owner, before the property shall be disturbed, or the proprietary rights of the owner therein divested. Const. art. 2, § 21. The manner in which such compensation is to be ascertained is prescribed in the fifth paragraph of section 765, Rev. St. 1879, where one railroad company proposes to cross with its track at any point in its route the track of another railroad company, on the grounds of such other railroad company, and the two corporations cannot agree on the amount of such compensation, or the points and manner of such crossing. Where one railroad crosses another in a public street, private property is not necessarily taken, and therefore no provision is made for ascertaining the amount of damages for property taken in such cases; and in a city of the second class, as in this case, the power to determine the points and manner of crossing is vested in the mayor and common council. Rev. St. 1879, § 4644, pars. 9, 84.

So far as we are advised, no law has yet been enacted by the legislature prescribing the manner in which the amount of compensation shall be ascertained and paid to the owner of private property damaged, but not appropriated to a public use. The constitutional provision being prohibitive, however, of such damage until the amount of compensation shall be ascertained by a jury or board of commissioners, and paid to the owner, or into court for the owner, must be held to be self-enforcing; and a court of equity would enjoin one who proposes continuously to damage private property for a public use without having first made compensation to the owner, at least until such court had caused, by a board of commissioners or jury, as is contem-

plated by the constitution, the amount of such compensation to be ascertained and paid to the owner, or brought into court for him.

In this case the defendant company in its answer thus states its purposes: "That at the time of the filing of the petition herein this defendant was constructing, and intending to construct, its said railroad, along and upon said street, upon the grade of said street, in a careful manner, so as not to interrupt or interfere with travel thereon, and in so constructing its said road intended, when it should become necessary, to build and construct the same across plaintiff's tracks on said street, by placing therein the most modern frogs and appliances for such crossings, of such construction that the same would not interfere with, injure, or in any manner affect the operation or maintenance of plaintiff's said tracks;" and the general question to be determined is, will the carrying into execution of this purpose of laying its track in said street in the manner stated, and operating its cars thereupon in the transaction of its business as a common carrier, damage the private property of the plaintiff? There is no question of the appropriation of such property in the case; for, although the plaintiff, as the owner in fee of the two blocks abutting on each side of Fourth street at the point of crossing, with all the appurtenances thereto belonging, is the owner in fee of the soil over which said street is located, subject only to such a public easement as the city acquired by virtue of the decree recited, and of the tracks located across said street, it is not suggested that the defendant's operations will disturb, or for that matter damage, any of this corporeal property. The damage, if any, must be to some incorporeal, private property of the plaintiff; and it is claimed that the plaintiff has, if we apprehend correctly the argument of counsel, two of such items of property that will be damaged by the construction and operation of defendant's road across its tracks: *First*, the easement which it has in said street as an abutting proprietor; and, *second*, the easement which was reserved to it in the decree in the condemnation proceeding.

As to the first of these rights, it may be said, if by virtue of that decree Fourth street, as located across the plaintiff's property, became a "public street," in the usual and ordinary acceptation of the term, and as used in the statute, then the plaintiff's easement therein as an abutting proprietor can in no way be damaged by the construction of defendant's road, since during its construction it is not proposed to disturb plaintiff's passway; and afterwards it will have the same free and unobstructed use of the street as it had before, by the same vehicles, drawn upon the same tracks, and every one that desires will have the same unobstructed ingress to and egress from the plaintiff's abutting premises that they had before. The only damage that can be conceived of, or that is suggested, to such easement, must flow from the operation by the defendant of its track in the street in its business, and the delay plaintiff's trains at times will be subjected to in crossing the street by reason of the occupation in the street by the defendant's trains of the same space at which it desires to and can alone cross with its trains. But that space being in a public street, the defendant's tracks having been authorized to be laid by the city, its use by the defendant for the purposes of passing to and fro over it with its trains is a legitimate use, belonging to the defendant company, as well as to the plaintiff, in common with every other citizen desirous of passing over it with his vehicles; and the damage caused by such delay is of the same character as that suffered by every traveler on a public highway whose movements are retarded by those of another traveler on the same highway,—is not peculiar to an abutting proprietor, although by reason thereof he may more frequently have use for, and be more frequently delayed in his movements in, the street than other citizens; and the damage resulting from such delay and inconvenience is not the subject of compensation, within the meaning of article 2, § 21, of the constitution.

This brings us to the consideration of the particular and controlling ques-

tion in the case, and that is, has the plaintiff company, by virtue of the decree entered in the condemnation proceedings, a private property in that part of Fourth street which runs through its premises, other than the fee in the soil, and the trucks which are located thereon, upon which we have seen the defendant company proposes to impose only such servitude as they are subject to in a public street, which would be damaged by the operations of the defendant's proposed railroad tracks; in other words, has the plaintiff a right of passway in that street, private and peculiar to itself, not shared in by the general public? If so, then it has private property that may be damaged by the operation of defendant's track. If, on the other hand, it has only a right of passway in the street in common with every other citizen, then it has no private property to be damaged by the exercise by the defendant of its common right of passway conferred upon it by the laws of the state and the ordinance of the city. This question can be determined only by the terms of the decree, and, as upon its construction the evidence offered by the defendant as to the consideration which led to the agreement by the parties to those terms would shed no light, we find no error in the action of the court in sustaining the objections of the plaintiff to its admission, nor, on the other hand, will we be any better enabled to understand those terms from a consideration of the fact that the damage for the right of way was assessed, by agreement, at the sum of one dollar. Whatever rights the plaintiff has in the street, with its tracks, are secured to it by the terms of the decree, whatever considerations may have entered into the agreement of which it was the product. If the proceeding had culminated in a judgment of condemnation *in invitum*, in the usual and ordinary way, and at the same time or thereafter the city had given permission by ordinance to the plaintiff to lay down its tracks in the street for the purposes of its business, and thereafter had given a like permission to the defendant company, there could be no question that the rights of each would be equal and co-ordinate in the use of the street, and that the rights of both would be co-ordinate only with the equal right of every other citizen to the use of the street as a public highway, and there would be no question in the case, and no case. It must be conceded that the clause in the decree dedicating or condemning the ground to public use is as broad and comprehensive as if the proceeding had culminated in such a judgment, and that the reservation from public use of a private right of way across said street from which the public could be excluded, or to which the use of the public could be subordinated by the plaintiff, would be inconsistent with such a dedication. It may also be conceded, for the purposes of this argument only, however, that the city had the power to accept a limited dedication to the public use, subordinate to such private use, yet such a reservation, being inconsistent with the clause of unlimited dedication in the decree, ought to appear in plain and unmistakable terms, to warrant the construction that such is the meaning of the reservation clause, and such a construction ought not to be adopted, if any other reasonable one can be placed on it consistent with the terms of the decree dedicating the street to public use. Such a construction ought to be given to the decree as will give force and effect to every word in it if possible, and make the decree as a whole consistent, effective, and reasonable. Reading the decree, then, to this end, what is a fair construction of its terms? After condemning the right of way for the extension of Fourth street through the lands of the plaintiff as prayed for in the petition, the decree provides that the plaintiff "shall have the right to keep and maintain its present tracks and switches upon said lands, and shall have the right to construct such other tracks, switches, and turnouts upon said land, and across said street, when opened, as it may deem necessary for the transaction of its business." The right secured to the plaintiff by these terms to keep and maintain its present tracks, and to lay others if necessary for the transaction of its business, and to run its trains on such tracks in the prosecution of its business on or across that

part of Fourth street described in the decree after the same shall have been opened for public use, is entirely consistent with the use of such street as a public highway by the general public, or by any other railroad company to whom the city authorities might grant permission to lay its tracks on or across said street. There is not a word or expression in the decree that would warrant the inference that the plaintiff was to have any private, exclusive, or superior right of passway, either along or across said street, or any other or different right therein than was attainable by any other citizen, with the consent of the city. To hold that there was secured to the plaintiff any right in said street, private, exclusive, and peculiar to itself, not shared in by the general public by virtue of this decree, is not only not warranted by anything expressed in the decree, but would be inconsistent with and repugnant to the terms of the decree, expressly condemning the property to public use as a highway. It is clear, we think, that the plaintiff has no right of passway, either along or across Fourth street, that is private property; that as to such right of passway it stands in exactly the same situation as the defendant does, or any other railroad company would who obtains permission from the city authorities to lay down its tracks in that street. As the defendant company has, under the law and the ordinance of the city, the right to lay down its track on Fourth street, and to cross the tracks of the plaintiff, first having made compensation for any private property belonging to plaintiff that it may be necessary to take or damage in so doing; and it appearing that no private property of the plaintiff will be appropriated or damaged by the defendant in the construction of its railway in said street in the manner in which it proposes to construct it, or by the operation of its trains thereon, and that the only damage plaintiff can necessarily suffer by reason of the construction and operation by the defendant of its tracks in said street will result solely from the occupation by the defendant at times, for its passing trains, of a space in said public highway needed at the same time by plaintiff for its passing trains,—a damage not private, but common to all the public who may have occasion to use the street, occasioned by a public service to which said street is legitimately subject, and for which the plaintiff is not entitled to compensation,—we see no reason why the defendant should be restrained from laying down its tracks as it proposes to do, in accordance with the permission of the authorities of the city of St. Joseph, in said street.

The judgment of the circuit court is therefore reversed, and the cause remanded, with directions to the circuit court to dismiss the bill.

RAY and BLACK, JJ., concur. BARCLAY, J., not sitting.

TAYLOR v. CAYCE.

(Supreme Court of Missouri. February 4, 1889.)

1. EQUITY—CANCELLATION OF DEED—MISTAKE.

Where plaintiff seeks to recover the proceeds of lands which he alleges he owned and quitclaimed, by mistake as to his ownership, to defendant, and which defendant afterwards sold, the value of plaintiff's title is immaterial, until the deed is disposed of. If the deed was fairly obtained without mistake or fraud, plaintiff cannot vacate it; especially where the parties cannot be restored to their former positions.

2. SAME—PRESUMPTIONS.

Plaintiff having alleged that he had owned the land for many years before making the deed, his knowledge of his rights in it will be inferred.

3. TRIAL—BY THE COURT—ADMISSION OF EVIDENCE.

The admission of merely irrelevant evidence on a trial by the court is not ground for reversal.

4. SAME—RECEPTION OF EVIDENCE—RULINGS ON TESTIMONY.

A bill of exceptions stating that the court heard all the foregoing evidence, both that objected to and that not objected to, postponing a final ruling until the conclu-

sion of the trial, does not show that the action of the court is prejudicial, where the bill also shows specific rulings on the admissibility of testimony objected to, and exceptions at the time.

5. SAME—DISCRETION OF COURT.

It is within the discretion of the court sitting without a jury to receive evidence objected to, and reserve its ruling on such objection. While a party has a right to an announcement of the ruling before finding on the whole case, he should make known his desire in that regard specifically, and an objection to the reception of evidence subject to objection is not sufficient.

6. SAME—RECEPTION OF EVIDENCE.

The circuit court in its discretion may allow defendant to give further testimony after the close of plaintiff's testimony in rebuttal.

7. APPEAL—REVIEW—WEIGHT OF EVIDENCE.

The finding of the circuit court in an equitable cause will not be set aside unless the supreme court is entirely satisfied that it is against the weight of evidence.

Appeal from circuit court, St. Francois county; JAMES D. FOX, Judge.
Hough, Overall & Judson and John F. Bush, for appellant. *Smith, Silver & Brown and Carter & Clardy*, for respondent.

PER CURIAM. By this proceeding appellant seeks to recover of respondent the proceeds of sale of certain lands. The appellant's petition asserts his former ownership of the lands, and that he made a quitclaim deed of them to respondent, who thereafter sold them, with other lands, to the Iron Mountain Company. Without reciting the allegations of the petition at length, it will be sufficient to note the facts on which appellant predicates his prayer for relief against the effect of his quitclaim so given. He charges that, "on the 27th day of June, A. D. 1882, the defendant made application to plaintiff for a quitclaim deed or conveyance of his (plaintiff's) aforesaid premises, for the purpose of enabling defendant to convey a good title to the whole tract or body of land which said premises of plaintiff and said premises of defendant together form and compose, and which defendant was then endeavoring to sell to said Iron Mountain Company. Defendant made such application, and spoke to plaintiff about and for such quitclaim deed or conveyance, about sunset on said day, telling plaintiff at the time that said company was willing to pay, and was going to pay, for said body of land, forty dollars per acre, which plaintiff avers was the reasonable value of his portion of said lands. From this application for said conveyance, and from the conversation and conduct of defendant in that behalf, did plaintiff first learn that the defendant was endeavoring to sell his (plaintiff's) said premises, and had on hand the foregoing scheme and negotiation. In a few minutes after such application for said conveyance, the same evening, defendant sent his son-in-law and agent or attorney, Kossuth W. Weber, with a quitclaim deed, already prepared without plaintiff's knowledge, for said premises, to plaintiff for his signature and acknowledgment; alleging, as an excuse for his haste in the transaction, that defendant was going to St. Louis that night to close and consummate said negotiation or treaty for the sale of the aforesaid body of land, and was desirous of taking such quitclaim deed from plaintiff along to show said company, as evidence of his authority and ability to convey a good title to said land and premises, and was under the necessity of so doing to succeed in said negotiation. At the time of such application, and of the presentation of said deed for his signature, plaintiff had no occasion to investigate his title to said premises, or to examine the land records of said county of St. Francois for that purpose, and had in fact never made such investigation or examination; and so at such time plaintiff had no adequate, correct, or clear idea of the condition of his said title, or of the numbers, description, and extent of his said lands. Under these circumstances, plaintiff sought time to examine said land records, and investigate the condition of his said title, and of his said premises, the numbers, description, extent, and other incidents thereof, and also sought time to see the defendant in person, and

secure an express and more definite understanding or agreement concerning the consideration which plaintiff was to receive for the making of said quitclaim deed or conveyance of said lands; alleging, also, and saying at the time to said Kossuth W. Weber, agent and attorney of defendant, that the deed of quitclaim which said attorney so brought, and was presenting to plaintiff for his signature and acknowledgment, contained or covered too much land, or too many pieces of land. To plaintiff's request for delay, and for time, and his objection concerning the quantity and description of the lands in said deed, defendant's said attorney made reply; at the time saying that the description of the lands in such quitclaim deed, so awaiting execution at the hands of plaintiff, was a true copy of the description of the sheriff's deed,—meaning a deed which Thomas S. McMullin, acting as sheriff of said county of St. Francois, made to the defendant on a sale under an execution and judgment which defendant held, by equitable assignment at the time, in favor of one Thomas P. Eaves and against David Lasseter, bearing date the 13th day of November, 1860, and purporting to convey to defendant the interest of Lasseter in parcel of plaintiff's said land and premises, namely, [description;] and saying, also, that said attorney and agent of defendant got or took the said description in said deed of quitclaim from the record of said sheriff's deed in the land records of said county. Plaintiff had some hesitancy about executing said conveyance without an express agreement concerning the consideration of such deed, and without an examination of records affecting his said lands and title; but, on receiving the aforesaid assurance from defendant's said attorney concerning the description and source of the description of said lands in said instrument, and having the greatest and most implicit and unlimited confidence in the honesty and integrity of the defendant, and in his good faith and intentions in and concerning the premises or transaction, a confidence arising from an acquaintance and intimacy with defendant for near forty years, plaintiff did, the same evening, at the instance and pressing urgency of the defendant and his said attorney, sign, execute, acknowledge, and deliver said quitclaim deed conveying his aforesaid premises to defendant without time for reflection, or seeing defendant in regard to the consideration for such conveyance, or securing any explicit or express agreement from defendant in that behalf, and without time or opportunity to examine said land records to investigate the condition of his said lands and title, or to take any other action or precautions for his protection in the premises, but with the expectation of receiving forty dollars per acre for said lands. But plaintiff alleges and charges that defendant meant and sought, by procuring such conveyance, to obtain an undue and unconscionable advantage of plaintiff, and to circumvent and defraud plaintiff out of his said premises, and had recourse to the aforesaid devices and pretenses of haste and necessity of dispatch in the transaction for the purpose of carrying his said fraudulent designs into effect, and of succeeding in his said scheme of defrauding plaintiff out of his said lands; and that, by such fraudulent means and contrivances, defendant did succeed in deceiving and taking plaintiff by surprise, and in securing said deed of quitclaim and conveyance at his hands." The respondent's answer puts in issue the material facts of the petition, and asserts, among other things, title in respondent to the lands in question; to which appellant replied, denying all the new matter.

1. In the view which the court takes of this appeal, it will not be necessary to determine with precision whether the petition states a cause of action for relief in equity or at law; referring to the old distinctions between forms of action. Whether the case be regarded as at law for deceit, or for money had and received, or in equity for relief against mistake or fraud, the result will be the same, on the record here presented. This cause was, by consent, tried by the court. No instructions were asked or given. Hence, if the action be treated as one at law, nothing remains for review (*Miller v. Breneke*, 88 Mo.

163; *Weilandy v. Lemuel*, 47 Mo. 322,) except certain rulings on the evidence, and some minor points of procedure that will be later mentioned.

2. On the other hand, if the suit be regarded as in equity, there is abundant evidence in the record to support the finding of the court, negating the appellant's charges of mistake or fraud. This court will not set aside the finding of the circuit court upon a question of fact arising in a cause of equitable cognizance, unless entirely satisfied that such finding is against the preponderance of the evidence. *Cox v. Esteb*, 68 Mo. 114; *Bank v. Murray*, 88 Mo. 191.

In this case the court is not so satisfied. The decisive issue presented by the evidence at the trial (with reference to the only tenable theory which has been suggested by counsel as warranting a decree in appellant's favor) was whether or not he made the quitclaim deed under a mistake as to his ownership of, or title to, the land so conveyed. The case does not turn on the relative legal values of his and respondent's respective titles thereto. The quitclaim deed stands in the way of such an inquiry, and, until appellant can dispose of that, the strength or weakness of his antecedent title is immaterial. If that deed was fairly obtained, in the manner described by respondent, without mistake or fraud, it cannot be vacated at the option of the grantor, especially where the parties cannot be restored to the position they respectively occupied before that deed was made. *Mathews v. Kansas City*, 80 Mo. 231. The party alleging mistake in such a case must establish it by satisfactory proof. In view of the allegation of the petition that appellant, before making the quitclaim, had for years been owner of the land in question, the court would be justified in inferring his knowledge of his rights thereto, and the law would place on him the burden of proving his ignorance of the nature and extent of his title as a necessary essential to any claim of mistake on his part in the matter of such a transfer of his rights as is here under review.

There is evidence sufficient in this record to justify the finding of the circuit court that no such mistake on his part in that regard was made. Whether the alleged mistake should be regarded as one of fact or law need not, therefore, be decided. The allegations of the petition and the evidence do not suggest a case for equitable relief on any other ground than that of mistake. They certainly do not make out a case of fraud or of deceit at law.

Without elaborating this statement, it will be sufficient to refer to the Missouri precedents, indicating the essential facts (many of which are here wanting) to support actions of that nature: *Dunn v. White*, 63 Mo. 181; *Buford v. Caldwell*, 3 Mo. 477; *Morse v. Rathburn*, 49 Mo. 91.

In view of what has already been said regarding the material issue in the case, a review of the exceptions to the admission of many details of the testimony becomes unnecessary. The admission of merely irrelevant evidence in a trial by the court is not ground for reversal. *Craighead v. Wells*, 21 Mo. 404; *McDermott v. Barnum*, 19 Mo. 204.

3. Exceptions were taken by appellant to certain matters of procedure in the circuit court, requiring, perhaps, brief notice. After the close of appellant's testimony in rebuttal, the court, against his objection, allowed respondent to introduce further testimony. There was no error in so doing. The circuit court has a broad discretion in regard to the order of admitting testimony. *Ober v. Carson*, 62 Mo. 209. It may permit the reopening of plaintiff's or defendant's evidence when once closed, if the ends of justice at the time appear to require it.

4. Another point made by appellant is thus presented by the bill of exceptions. "The court, on this trial, heard, for the time, all the foregoing evidence, both that to which objections were made, and that to which no objections were made, according to a rule or practice which is sometimes called 'taking evidence subject to objection,' (and which is gaining ground in this circuit,) reserving or postponing the question of the final and absolute admis-

sion or exclusion of the items of evidence to which objections were made until the conclusion of the trial, and until the final determination of the issues, and the rendition of judgment in the cause; and to this action of the court, in so taking evidence in said cause subject to objection, plaintiff objected and excepted at the time, on the ground of the tendency of such course of practice to mislead and confuse plaintiff to his prejudice, and various other grounds." This recital is contradictory of other parts of the bill, which show specific rulings of the court regarding the admission of different parts of the testimony objected to, and exceptions at the time to such rulings. Therefore the course taken by the court in this particular case cannot be considered prejudicial to appellant. But, beyond that, counsel have no right to insist on immediate rulings of the court on all offers of testimony in cases where the court is sitting as a trier of facts. Usually it is advisable to make such rulings at once, if either party objects to the court's reserving them for more mature consideration. But (like many other matters arising in the progress of a trial) this subject is covered by the sound discretion of the trial court. This court will interfere only when there appears a clear abuse of such discretion. Counsel would undoubtedly have the right to an announcement of the court's rulings on the evidence before its finding on the whole case was made, in order to preserve the right to dismiss or take a nonsuit if desired, should such rulings be adverse; but, in that event, their desire in that regard should be made known to the court at the hearing in a specific manner.

A mere general objection to the reception of testimony "subject to objection" would not be sufficient to preserve the point for review. After a careful consideration of the record in this cause, we do not discover any error justifying a reversal of the judgment, and accordingly it is affirmed.

STANDIFORD *et al.* v. STANDIFORD *et al.*

(*Supreme Court of Missouri.* February 4, 1889.)

DEED—DELIVERY—CONSUMMATION BY RECORD.

A father consulted W. and D. as to whether he could legally convey all the land he owned, saying that he desired to give it to defendant, his minor son. W. informed him that he could legally do so, but suggested that he make a will; but this he declined to do, saying that he wanted "to give it to him now, before his death." The deed was accordingly signed and handed to D., the grantor saying, "You take that deed and file it for record." D. then suggested that it might be prudent not to have it recorded just then, as the grantor might need to sell some portion of the land in order to support himself. The grantor then said, "You take that deed, and keep it safely." D. kept the deed until the grantor's death, when he filed it for record. *Held*, an absolute delivery to D. for the benefit of defendant, consummated as of the date of the first delivery, by filing for record.

Appeal from circuit court, Buchanan county; JOSEPH P. GRUBB, Judge.

Action to set aside a deed, brought by Amanda Standiford and others against William S. Standiford and others. Judgment for plaintiffs, and defendants appeal.

Anderson & McCormack, S. C. Woodson, and Woodson & Woodson, for appellants. *Doniphan & Reed, R. P. C. Wilson, and James W. Coburn*, for respondents.

BRACE, J. On the 9th day of January, 1878, Dodson Standiford, deceased, being in feeble health, made a deed to his son, the defendant William Seigel Standiford, then aged about 16 years, to a tract of land containing 103 acres, situate in Platte county, on which he with his wife, the plaintiff Amanda, and his said son were then residing, in which his wife did not unite, and delivered it to one Hezekiah Dick. In the following August he died, and within 20 days after his death, the said Dick filed the deed in the office of the recorder

of deeds of said county, and the same was recorded. At the time the deed was made, the other children of the grantor were grown and had left the homestead. William S. and his mother continued to reside together on the premises from the time the deed was made until the 17th of July, 1883, when he sold and conveyed his interest in the land to Ephraim B. Worth, the other defendant herein, for the sum of \$2,500 cash. In September, 1883, this suit was instituted by his mother, the said Amanda, and the other plaintiffs, who are the children and descendants of deceased children of the said Dodson, other than the said William S., in which they seek to set aside the deed from Dodson to his son, and the deed from the son to the said Worth, on the ground "that the said deed from Dodson Standiford to his son William S. Standiford was a deed of gift; that said deed was never delivered to the said William S. Standiford, nor to any one for him; that said deed was intended to be delivered to the said William S. Standiford after the death of the said Dodson Standiford, and to take effect after his death only, as a will; and that the deed was not recorded until after his said death,—of all of which the defendants were at the time aware."

The controlling question in the case is, was the deed from the father to the son in contemplation of law delivered in the life-time of the father? While there is a conflict of testimony in some particulars between the several witnesses interested, and otherwise, who testified in the case, the whole testimony tends to support and confirm that of Mr. Dick, who became the depository of the deed, and who was called as a witness by the plaintiffs; and there can be no doubt that his testimony, in connection with that of Mr. Woodson, another intelligent and disinterested witness called for the defendants, presents a connected and truthful statement of all the material facts bearing upon the question.

Mr. Dick testified substantially as follows: "Before the execution of this deed, I had a conversation with Mr. Standiford about executing it. It was in February or March, 1877. He and I were sitting on a log on some land I purchased from him. The first time he had any such notion in his head, he said, 'I am going to deed this land I have here to Seigel,' and said, 'I have been told by some parties that I can't make a valid deed unless I have other lands left, and I want to know what you think about it.' I said, 'You can't deed the land away at the expense of your creditors; but it doesn't make any difference whether you have any other land left or not. That will not invalidate the deed. Then he says to me, 'The first time you go to Platte City, I want you to consult Steve Woodson. Ask him whether I can make a valid deed to this land unless I have any other land or not.' I said, 'It is unnecessary at all; but for your satisfaction I will do so.' Shortly afterwards I got Mr. Woodson's opinion in the matter, and conveyed the same to Mr. Standiford, which was the same as my own opinion, which seemed to satisfy him, and I never heard anything more of it until a day or so before he made the deed, when he notified me that he was going to make me a deed, also one to his son, and wanted me to be present. * * * I was there the morning the deed was made; was notified by Mr. Standiford to be there, probably the day before, to be there on that occasion; that he was going to make a deed to me for land I had bought that he had never deeded to me. And he said, 'I want you to be there on that morning.' Accordingly I went. The deed was made and acknowledged, and my recollection is that it was left lying on the table. I stayed there some little time. The old man motioned to me, and said, 'Squire, you take that deed, and file it for record.' I, having a motive in view, says to him, 'Uncle D., I don't believe that I would have it filed for record, or put on record, at the present time. You may get well, and live some time. You are not making much money, and you may have occasion to sell off a scrap, or something of that kind, or the income from the land, and need it to live on.' He said, 'You take that deed, and keep it safely.' Says

he, 'There are parties who come about the house,'—or persons about the house, I don't recollect which,—'that if they come across it would likely make way with it, and I am not able to be up and around.' And I carried it away, and don't think any one ever saw it after it was given to me. He told me to take it. I don't think it was handed to me by any one. No person ever saw it until about 20 days after his death. I took it to Platte City, and filed it for record. He did not tell me that, at his death, he wanted the deed filed for record, or anything of that kind; but then that was the impression left upon my mind. It was my impression that the deed was to go on record as soon as he died, and that impression was made from the fact that he first stated to me to record the deed."

S. C. Woodson testified: "Mr. Dick first spoke to me about what Mr. Standiford wanted to do, and some time in the fall or winter of 1877 I was up at Edgerton, and saw Mr. Standiford, and he told me that he had an idea that he wanted to give his son William S. the land, and he asked me if he could make a deed to it, and convey it in that way, and I told him, 'Yes, he could deed the land to his son;' but I suggested the propriety of making a will and giving the property to his son after his death. He said, 'No; he wanted to give it to him before his death;' and he said there was so much trouble and litigation over the rest that he wanted to give it to him now, before his death; that his other children were grown, and educated. This conversation was in the fall or winter before the deed was made."

To make a deed effective there must be a delivery, actual or constructive, to the grantee, or to some person for his use, during the life-time of the grantor. *Huey v. Huey*, 65 Mo. 689. Whether a deed has been delivered or not is mixed question of law and fact, dependent largely upon the intention of the parties. The rule laid down by 2 Greenl. Ev. § 297, is that "the delivery of a deed is complete when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee, provided the latter assents." The assent of a minor child, to whom a deed, beneficial to him, is made, will always be presumed. *Huey v. Huey*, *supra*. *Tobin v. Bass*, 85 Mo. 654, disposes of the proviso, and there is no question in this case that the father intended that the deed should pass to his son. "The application of the remainder of the rule cannot be much assisted by adjudicated cases. Each case must stand on its own peculiar facts. It may be actual or constructive, by word or act, to the grantee directly, or to another for him, and a delivery may sometimes be made without the grantor parting with the custody of the instrument. It is sufficient if, after the grantor has signed, sealed, and acknowledged the deed, he makes some disposition of it from which it clearly appears that he intended that the instrument should take effect as a conveyance, and pass the title." *Tobin v. Bass*, *supra*; *Burke v. Adams*, 80 Mo. 505; *Conlan v. Grace*, (Minn.) 80 N. W. Rep. 880. In *Tobin v. Bass*, it was held "that when a deed to a minor child is absolute in form, and beneficial in effect, and the father and grantor voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute *prima facie* a delivery, and afford reasonable presumption that the grantor intended to part with the title, and that clear proof should be made that a person who, under such circumstances, has executed, acknowledged, and caused a deed to be recorded before the court would be warranted in declaring that he did not intend to part with his title." The act of the recorder in recording the deed, of course, has no bearing on the question of delivery. It is the delivery of the deed to the recorder for that purpose that is held to be a delivery.

In this case the deed was delivered by the father to Mr. Dick, to be recorded and be delivered to the recorder, and by him was recorded, and the deed to his minor son was thus caused to be recorded by the father, bringing the case directly within the principle of this case. But it is contended that Mr. Dick

did not deliver it to the recorder until after the death of the father. *Brgo*, there was no delivery to the son in the life-time of the father, and the deed is inoperative and void. This would be so but for that maxim of the law, *ut res magis valeat quam pereat*. Rather than the deed shall perish, the second delivery to the recorder hath relation to the first delivery to Mr. Dick, and it shall be a deed *ab initio*. *Butler and Baker's Case*, 3 Coke, 25, cited in *Huey v. Huey*, *supra*. The application of this principle is thus illustrated in *Belden v. Carter*, 4 Day, 66: "A., having signed, sealed, and acknowledged a deed conveying a tract of land to B., took up the deed in the absence of B., and said to C., 'Take this deed, and keep it. If I never call for it, deliver it to B. after my death. If I call for it, deliver it up to me.' C. took the deed. A. died soon afterwards, having never called for it, and then C. delivered it over to B. Held, that this was the deed of A. presently; that C. held it as trustee for B.; that the title became consummate in B. by the death of A.; and that the deed took effect by relation from the time of the first delivery." And in this case it follows that whether the father delivered the deed to Mr. Dick to be presently recorded, or to be kept safely until his death, and then to be filed for record, or to be kept safely until his death, and then delivered to his son, unless recalled, the deed, having been delivered for record after the death of the father, was by relation to the first delivery, at least, *prima facie* delivered in the life-time of the father, and conclusively so delivered, unless the deed was recalled, or unless it clearly appears from the evidence that when the father delivered the deed to Dick he did not intend the title to pass. It is not pretended that there is any evidence that the deed was ever recalled, and the only question is, does the evidence clearly show that the father did not intend to pass the title by the conveyance when he delivered it? In *Huey v. Huey*, *supra*, the father, after signing and acknowledging a deed, kept it in his own custody, among his papers, to which the son had access, and declared that he did not wish during his life to deliver the deed to his son; that if his son deviated in his treatment of his mother he might make a change; that he wanted to be the owner as long as he lived; that his son could have it recorded after his death. Held, that there was no delivery, the son, after the death of the father, having had the deed recorded; it being perfectly clear that the father did not want the deed to operate as a conveyance until after his death, and that he retained the custody of it for that very reason. The circumstances of this case are widely different, almost antithetical. The father here, after having for months considered the matter, and consulted with his friends, declares that he wants to convey this land to his son; that he did not want to do so by will,—an instrument that could only take effect after his death,—but wants to convey it to him now, during his life; takes legal advice as to whether he can do so by deed, having no other land besides. Being satisfied that he can, he executes and acknowledges the deed; selects one of the friends whom he has consulted, and who is cognizant of his wishes in regard to the matter, as the depository of the deed; delivers him the deed, saying to him, "Squire, you take that deed and file it for record," and when his friend, from motives of his own, suggests that he do not file it for record at present, assigning reasons for the suggestion that he thought might operate upon his mind, his response is, "You take that deed, and keep it safely," assigning cogent reasons why, for its safety, it should be delivered now, without either adopting the suggestion that the recording should be postponed, or intimating that he had changed his purpose to convey his land to his son then, or that he desired that the deed should be held subject to his order or control in any manner whatever thereafter. He insisted that his friend, who also knew he wanted to convey this land to his son by this deed, should take it; and he took it. And we have no hesitation in saying that this was an absolute delivery of the deed to Dick for the benefit of his son, and that Dick from that moment became a trustee thereof for the son; and whenever thereafter he filed it for record,

whether before or after the death of the father, he did but consummate the delivery of the father to the son as of the date of the delivery to him as such trustee. The deed became effective from that date, and operated to vest the title in the defendant William S. Standiford, and the court should have so held.

The decree for the plaintiffs on the evidence was erroneous. The judgment is reversed, and the bill dismissed.

All concur.

LA RIVIERE *et al.* v. LA RIVIERE *et al.*

(*Supreme Court of Missouri*. February 18, 1889.)

1. MARRIAGE—SOLEMNIZATION—CUSTOMS.

A marriage contracted according to the customs of an Indian tribe need not be contracted in the territory of the tribe in order to be valid.

2. EJECTMENT—JUDGMENT—DAMAGES AND COSTS.

Judgment in ejectment for possession, damages, and costs, against one who, or whose wife, was never in possession, and never received any of the rents, though the wife was a tenant in common with the person in possession, is erroneous.

3. TRIAL—INSTRUCTIONS.

An instruction is not liable to the objection that it assumes the existence of a certain fact, where the court by another instruction states that that fact must be proved.

Appeal from St. Louis circuit court; DANIEL DILLON, Judge.

Ejectment by Napoleon La Riviere and others against John La Riviere and others. Defendants appeal.

A. J. P. Garesche, for appellants. *J. D. Foulon*, for respondents.

BLACK, J. This is an action of ejectment for one-fifth of the described premises. The case was here before, (77 Mo. 513.) Both parties claim title under Mary La Riviere, who died in 1872, leaving five children, the defendant John La Riviere, being one, and Antoine was another. The plaintiffs sue as the heirs and children of Antoine by a marriage with a half-breed Ponca Indian woman. The evidence shows or is to the effect that Antoine went from St. Louis to the Indian country, now northern Nebraska, in 1852 or 1856. One witness says, in unqualified terms, that Antoine was then with the Ponca Indians, and that he married a daughter of one Michael Cerre. Captain Lebarge, who knew Antoine well, says the last time he saw Antoine he was at the Ponca agency with Cerre, "father of his squaw." Other evidence shows that, in 1859, Antoine was not living on the Indian reservation, but was living with this woman at a place not far from it. She died in 1872, and he was killed by the Indians in 1873.

There is much evidence to the effect that, during this time from 1859 on to her death, they lived together as man and wife, raised a family, to which he seems to have been devoted, and that he in all respects treated and spoke of her as his wife.

For the plaintiff the court instructed the jury "that, if they believed from the evidence that Antoine La Riviere, the son of Mary La Riviere, was married to the mother of plaintiffs in the Indian country, according to the Indian customs, and that from the time of his said marriage with the mother of plaintiffs he held her out to the world as his wife, and lived with her as such, and that plaintiffs are the issue of such marriage, that both before and after the death of their mother he treated plaintiffs as his lawful children, then his marriage was a valid marriage, and the jury must find for the plaintiffs." But the court refused the following instruction, asked by defendants: "That a marriage, according to the custom of the Ponca Indians, to be valid, must have been contracted in the territory of the Ponca Indians, and without such proof has been made the marriage is not legal."

1. The objection made by defendants to the plaintiffs' instruction is that it assumes that the father of the plaintiffs was the same person as the Antoine, who was the brother of defendant. For the defendants the court told the jury that to find for the plaintiffs it must be established by the evidence "that Antoine La Riviere, through whom the plaintiffs claim, is identically the same Antoine La Riviere, formerly of St. Louis," etc. This direction of the court disposes of the objection, for it in unqualified terms requires the jury to determine the disputed question of identity.

2. The validity of the Indian marriage did not depend upon the fact that it was actually contracted on the territory set off to or occupied by Ponca Indians. This court used this language in the case of *Boyer v. Dively*, 58 Mo. 529: "Although located within state lines, yet so long as their tribal customs are adhered to, and the federal government manages their affairs by agents, they are not regarded as subject to state laws, so far, at least, as marriage, inheritance, etc., are concerned." It cannot be said that, the moment these Indians happen to be off their reservation, they lose the tribal customs. There was therefore no error in refusing the instruction before set out and asked by the defendants.

3. The other instructions given on the one side and the other are, in substance, the same as when the case was here before. They present the case fairly, and cover the entire case made by the pleadings and evidence on both sides, and it is therefore useless to consider the other refused instructions.

4. Michael Badeau, who married a sister of the defendant, John La Riviere, is a defendant in this suit. There is no evidence that he was in possession of the property at the commencement of this suit, or that he received any of the rents arising therefrom. On the contrary, all the evidence is that defendant John La Riviere alone had possession, and that he received and used the entire rents arising therefrom, though his sister, the wife of Badeau, was a tenant in common with him. The judgment, however, is against him, as well as Riviere, for possession, damages, and monthly rents, and costs of this suit, and of this judgment he complains. Ejectment is a possessory action, and must be brought against the actual occupant. *Shaw v. Tracy*, 95 Mo. 532, 8 S. W. Rep. 434. Badeau denied possession, and there is no evidence that he was or ever had been in possession of the property. As to him the judgment is reversed, but it is affirmed as to John La Riviere. Respondents will pay the costs of this appeal.

SHERWOOD and BARCLAY, JJ., not sitting. The other judges concur.

• STATE v. REEVES.

(Supreme Court of Missouri. February 4, 1889.)

1. SEDUCTION—CRIMINAL PROSECUTION—SUFFICIENCY OF EVIDENCE.

Under Rev. St. Mo. §§ 1269, 1912, making it a felony to "seduce and debauch" an unmarried female of good repute, under promise of marriage, and providing that, unless the evidence of the woman as to such promise is "corroborated to the same extent required of the principal witness in perjury," it is error, on a trial for such an offense, to instruct that as to the promise of marriage there must be evidence to corroborate that of the woman, which may be supplied from the circumstances of the case, as the degree of proof required by the statute is ignored by such an instruction.

2. SAME—CORROBORATIVE TESTIMONY.

The instruction is also faulty for failing to designate the circumstances which would supply the necessary corroboration, and for the omission to define "corroboration."

3. SAME—REQUISITES OF CRIME.

In such case, an instruction that if the defendant promised the prosecutrix, an unmarried female of good repute, to marry her, on the faith of which she allowed him to have sexual intercourse with her, the defendant should be convicted, is erroneous, for omitting the element of seduction from the essentials of the crime.

4. SAME.

An instruction that if defendant had carnal intercourse with the prosecutrix, and that she submitted to him without promise of marriage, he should be found not guilty, should be given at the instance of defendant, there being evidence tending to establish that state of facts.

5. SAME—EVIDENCE—COMPETENCY.

There being conflicting evidence as to the material facts in the case, and no prosecution having been instituted until more than a year after the birth of the child alleged to be the result of the connection between the prosecutrix and defendant, during which time the latter married, it is error to refuse to allow the prosecutrix to be asked, on cross-examination, if the idea of prosecuting him did not first present itself to her after his marriage, as that fact might tend to throw light on the *animus* of the prosecutrix.

6. SAME—FELONY.

Under said section 1289, making said offense punishable either by confinement in the penitentiary, or by fine and imprisonment in the county jail, and section 1676, defining a "felony" as any offense liable to be punished by confinement in the penitentiary or death, such offense is a felony, and not within the statute of limitations.

7. CRIMINAL LAW—INDICTMENT—MOTION TO QUASH.

A motion to quash an indictment may be entered pending a plea of not guilty, and will not effect a withdrawal of the plea.

BLACK, J., dissenting.

Appeal from circuit court, Callaway county; G. H. BUREKHARTT, Judge.

Indictment against William M. Reeves for seducing and debauching Zerelda Hall, an unmarried female. On the trial, in November, 1888, the prosecutrix testified that she was unmarried, and 17 years old; that she became acquainted with defendant in July or August, 1886, and that he came to see her about that time. Defendant told prosecutrix that he would marry her if she would allow him to have carnal intercourse with her, which she did, being persuaded by his promise, and by love and sympathy. At the time of the trial the child which resulted from that intercourse was 15 months old. The first intercourse occurred in December, 1886, in Callaway county. She stated that he kept renewing his promise of marriage, and, therefore, she never instituted criminal proceedings until a few days before the trial. No one prompted her to complain but her father. She could not say how often she had intercourse with him; whether as often as 12 times or not, but probably as many as 6 times, but never before he promised to marry her.

L. B. Hall, father of the prosecutrix, testified that she was 17 years old August 21, 1888; that he knew defendant, who began coming to his house in 1886 to see prosecutrix. He asked witness' consent to allow her to marry him in August, 1888, which he gave. Defendant went to see her two or three times a week. Other men came to the house of witness about the same time, but not many. Witness mentioned 11 men who sometimes visited at his house, some of whom came to see prosecutrix, and stated that the prosecutrix stayed at the house of defendant's mother about a week.

Ida Hall, a sister of prosecutrix, stated that she was 15 years old, and that defendant, prior to December, 1886, came to visit prosecutrix very often, and in August, 1888, she heard him ask her father to give his written consent to his marriage with prosecutrix. Witness heard defendant ask prosecutrix to marry him in the presence of her father and mother, to which prosecutrix answered that she would think about it. A number of witnesses testified to the good reputation of the prosecutrix, and one stated that defendant acknowledged that he was the father of her child.

Defendant was himself a witness in his own behalf, and stated that he became acquainted with prosecutrix in June, 1886, and commenced to go to see her, going quite frequently. He first had connection with her in the latter part of July, 1886, in the yard, at the house of a Mr. Jones, where they remained from about 8 or 9 o'clock at night until 1 in the morning, and from that time had intercourse with her frequently. There was no promise of marriage made. He simply asked her for it, and she said he could get it.

The second time she refused to yield at first, but he insisted, and she consented. Witness could not tell the number of times he had connection with her, they were so many. He also mentioned the names of four other young men that took liberties with her. Witness never told her that he loved her, to induce her to have intercourse, but did tell her that she was good looking, to which she replied that he was a good looking fellow. Her way of lying around on him first induced him to make the proposal.

There was other evidence, but it was of little consequence, some tending to show bad character of the prosecutrix, and some in rebuttal.

The jury found defendant guilty, and fixed his punishment at three years in the penitentiary. A motion to set aside the verdict was overruled, and judgment entered thereon. Defendant appeals.

Rev. St. Mo. § 1676, defines "felony" to be any crime for which the offender is liable, on conviction, to be punished with death or confinement in the penitentiary.

B. G. Boone, Atty. Gen., for the State. *Crewe & Thurmond* and *I. W. Boulware*, for appellant.

SHERWOOD, J. Indicted for the seducing and debauching, under the promise of marriage, Zerelda Hall, the defendant, put upon his trial, was found guilty, his punishment assessed at three years in the penitentiary, judgment and sentence accordingly, and he appeals to this court. For the reversal of the judgment numerous grounds are assigned, which are to be passed upon in this opinion.

1. The motion to quash the indictment, though filed with the consent of the court, and after a plea of not guilty entered, but not withdrawn, did not have the effect of withdrawing that plea. A motion to quash is in the nature of a demurrer. It certainly occupies no higher plane; and at common law a defendant in a prosecution for a felony might, at one and the same time, enter his plea of not guilty to the indictment, and his demurrer to the sufficiency thereof, and, upon the indictment being held sufficient in law, he would be triable on his pending plea of not guilty, just as if no demurrer had been interposed. And the like was true of a plea in bar or in abatement interposed at the same time with a plea of not guilty. 1 Chit. Crim. Law, 435, 440; 2 Hawk. P. C. c. 23, § 128; Id. c. 31, § 6, and cases cited. But, though this was true in cases of felonies, the rule did not cover misdemeanors. *Id.* This explains the view taken in *State v. Copeland*, 2 Swan, 626, and *Hill v. State*, 2 Yerg. 248, where the offenses charged were only misdemeanors. These considerations rule the point raised against the defendant, and an eminent text-writer regards the doctrine here announced as the better one; holding, as he does, that a motion to quash is in order at any time down to the rendition of the verdict, and this without any withdrawal of pleas. 1 Bish. Crim. Proc. § 762.

2. The crime charged in the indictment was, under the provisions of section 1259, Rev. St., a felony, because punishable by imprisonment in the penitentiary; and the fact that it might be punished by a lighter punishment does not rob it of its felonious attributes. This is well settled. Rev. St. § 1676; *Johnston v. State*, 7 Mo. 183; *Ingram v. State*, Id. 293; *State v. Green*, 66 Mo. 632. For these reasons the statute of limitations, (section 1705, Rev. St.,) invoked by defendant, does not apply here, and the prosecution was begun in time.

3. By our statute it is made a crime for any person, "under promise of marriage" to "seduce and debauch any unmarried female of good repute," etc. Section 1259, Rev. St., and section 1912, Id., provide that, in trials for that crime, the evidence of the woman, "as to such promise, must be corroborated to the same extent required of the principal witness in perjury." Section 1912. The statutes of no other state have such stringent provisions in re-

gard to the *quantum* of evidence necessary to convict of the crime of seduction. Thus it will readily be seen that decisions of other states, authorizing convictions for that offense, possess but little worth in determining how to apply such a rigid statute as ours. Resort must therefore be had to decisions and authorities respecting the crime of perjury, and no corroboration falling short of that necessary to prove that offense will suffice in prosecutions like the present one; for so the law is written. And, though the strictness of the rule requiring two witnesses in order to convict of perjury has long since been relaxed, yet it is now uniformly held that the evidence offered in corroboration of the accusing witness must at least be strongly corroborative of such witness, and something more than sufficient to overcome the oath of the prisoner, and the legal presumption of his innocence. *PARKER, C. J.*, in *Queen v. Muscot*, 10 Mod. 192, quaintly and tersely expresses the rule by saying: "Therefore, to convict a man of perjury, a probable, a credible witness is not enough; but it must be a strong and clear evidence, and more numerous than the evidence given for the defendant." See, also, *State v. Heed*, 57 Mo. 252; 1 Greenl. Ev. (14th Ed.) § 256, and cases cited; 2 Whart. Crim. Law, § 1319, and cases cited.

Wharton, speaking of the offense of perjury, says: "The preponderance of contradictory proof must go to some one particular false statement." Whart. Crim. Ev. § 387, and cases cited.

In Iowa, the statute respecting the criminal offense of seduction declares that "the defendant cannot be convicted upon the testimony of the person injured, unless she be corroborated by other evidence tending to connect the defendant with the commission of the offense."

In Minnesota, the language of the statute is: "But no conviction shall be had under the provisions of this section on the testimony of the female seduced, unsupported by other evidence."

The statute of New York is like that of Minnesota, and under that statute it has been ruled in the last-mentioned state that the prosecutrix may be supported by "proof of circumstances which usually attend an engagement of marriage." *Armstrong v. People*, 70 N. Y. 88.

Similar rulings have been made in the other states, the statutes of which have been quoted; but it is too plain for argument that to give such a construction to our own statute on the subject would be contrary to its letter, and at war with its obvious meaning. And in respect to its meaning, it must be presumed to mean just what it says. Rev. St. § 3126.

These remarks are prefatory to the consideration of the second instruction given at the instance of the state, as follows: "The jury are instructed that they may find the fact of seduction upon the uncorroborated testimony of the prosecuting witness, but, as to the promise of marriage, there must be evidence corroborating the prosecuting witness; but this may be supplied by circumstances proven in evidence." This instruction entirely ignores the plain statutory language, that "the evidence of the woman as to such promise must be corroborated to the same extent required of the principal witness in perjury."

It is also faulty in other particulars: it does not designate the circumstances which would supply the necessary support to the story of the prosecutrix, nor does it define what "corroborating" means.

In *State v. Chyo Chiagh*, 92 Mo. 395, 4 S. W. Rep. 704, an instruction which told the jury that, as to "matters material to the issue," the testimony of an accomplice must be corroborated, was held erroneous in that it failed to tell them what those words meant. A similar ruling was made in *State v. Forsythe*, 89 Mo. 667, 1 S. W. Rep. 834, where an instruction used the words, "in a lawful manner," but failed to define their meaning. The instruction, in consequence of its failure in these particulars, shed no light on the subject before the jury.

4. The theory of the defendant was that there was illicit intercourse, but no promise of marriage, and his testimony supported that theory. He had the right, therefore, to have that theory presented to the jury. This was done in the fourth instruction which he asked, declaring that, "if the jury believe from the testimony that defendant, in the year 1886, had carnal intercourse with Zerelda Hall, and that she willingly submitted to defendant, without any promise from defendant to marry her, the verdict of the jury should be for the defendant."

5. The language of the statute upon which the indictment in this case was found, as before stated, is this: "If any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc. Rev. St. § 1259. Though in common parlance the crime made punishable by the foregoing statute is simply termed "seduction," yet each of the words "seduced" and "debauch" has its appropriate meaning, and this, under the familiar rule which presumes that the legislature, in drafting a statute, employ no superfluous words, or words without a purpose.

There are two steps necessary to be taken in order to consummate the crime under discussion: *First*, the female must be "seduced,"—that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing; her affections must be gained, her mind and thoughts polluted; and, *second*, in order to complete the offense, she must be "debauched,"—that is, she must be carnally known,—before the guilty agent becomes amenable to human laws. Thus, it will be seen that a female may be "seduced" without being "debauched," or "debauched" without being "seduced."

If Joseph Andrews had yielded to the salacious solicitations of Lady Booby, as she lay naked in her bed, he would have been guilty of debauching her person, but certainly not of corrupting her mind. A similar view of the proper construction to be given to a statute substantially identical with our own was taken in Pennsylvania, and cited with approval in *State v. Patterson*, 88 Mo. 88.

These remarks are made in order to the consideration of the fifth instruction given at the instance of the state, as follows: "(5) If the jury believe beyond a reasonable doubt that the defendant, at the county of Callaway, Mo., and within three years of the finding of the indictment, promised Zerelda Hall to marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise, and she was at the time under the age of 21 years, and unmarried, and of good repute, they will find defendant guilty, and assess his punishment at not less than two nor more than five years' imprisonment in the penitentiary, or by a fine of not exceeding one thousand dollars, and by imprisonment in the county jail not exceeding one year."

The view of that instruction consists in not requiring the female in question to be "seduced,"—to be drawn aside from the path of virtue; but simply that if, without any such arts and wiles as are calculated to operate upon a virtuous female, and to lead her astray, the defendant made to the prosecutrix a plain business offer that he would "marry her if she would permit him to have sexual intercourse with her, and if she did so on the faith of that promise," that then he was guilty. No one can with any degree of plausibility contend that a virtuous female could be seduced without any of those arts, wiles, and blandishments so necessary to win the hearts of the weaker sex. To say that such an one was seduced by simply a blunt offer of wedlock *in futuro*, in exchange for sexual favors *in presenti*, is an announcement that smacks too much of bargain and barter, and not enough of betrayal. "This is hire, or salary, not seduction." Any construction of the statute which would sanction the fifth instruction aforesaid, would strike from that statute the word "seduce," and render any one guilty of a felony who should, under promise of marriage, "debauch" any unmarried female.

6. There were many circumstances connected with the trial of this cause which rendered the testimony of the prosecuting witness open to very jealous observation. The trial occurred on the 26th of November, 1888, the indictment having been found but two days previously, and the complaint was made about that time. According to her testimony, the first congress between defendant and herself occurred in December, 1886, (but what time in that month she does not state,) and the result of their illicit interviews was a child 15 months old at the date of the trial. This would prove the child to have been born on the 26th of August, 1887; but the usual period of gestation, 276 to 280 days, would, according to the books, throw the date of conception into November, 1886. 3 Whart. & S. Med. Jur. §§ 41-55. But she would not designate what time in December the first amorous encounter took place. If on the 15th day of December, this would give but 254 days between conception and birth, even if conception took place *eo instanti*. If on the 1st day of December, but 269 days; and there is no pretense that the child was not fully mature when born.

Granting, however, that she was in error as to the time when the initiatory step was taken,—when the proceeding *in limine* were had,—still it taxes credulity to a great extent to believe that she would continue to believe that the defendant intended to marry her over a year after her child was born, and therefore kept silent upon the subject of the supposed wrong done her. The foregoing remarks are only made in order to show the caution with which this cause should have been tried, considering the peculiar circumstances which surrounded it, and the great length of time which intervened between the alleged criminal act done and its prosecution begun.

Full opportunity, therefore, should have been afforded to sift the witness, and to test and ascertain her *animus*, and the motives which prompted her, after so long a time had elapsed, to institute the present prosecution. For this reason she should have been required to answer the question whether the idea of prosecuting the defendant did not spring into being upon his marriage to another. It is always allowable to ask similar questions, in order for the jury to understand, and understand fully, the attitude of a witness, and especially of a prosecuting witness, towards the accused. *State v. Cooper*, 83 Mo. 698; 1 Whart. Ev. §§ 408, 544, 545, 547, 549, 561; 1 Greenl. Ev. § 450.

Because of the errors aforesaid the judgment should be reversed, and the cause remanded.

BRACE, J., concurs; RAY, C. J., and BARCLAY, J., in the result. BLACK, J., dissents.

MCPHERSON *et al.* v. ST. LOUIS, I. M. & S. RY. CO.

(*Supreme Court of Missouri*. February 4, 1889.)

1. EVIDENCE—OPINION TESTIMONY.

A farmer, who has lived within 200 or 300 feet of a railroad culvert all his life, and who has, without objection, described it, and testified that it was too small for the amount of water that had to pass through it, may testify concerning the result of an examination made by him as to its capacity to carry away waters accumulated in time of freshet, though he has no knowledge of engineering.

2. SAME.

The defense in a suit against the railroad for causing the death of an engineer of the road being that the wash-out was caused by an extraordinary rain-storm, it is proper to ask the same witness, "Did the traces of this storm, which were found next morning, show to you that it was anything greater than storms that you have seen before?" and his negative answer is admissible.

3. MASTER AND SERVANT—INJURY TO EMPLOYE—EVIDENCE—HARMLESS ERROR.

Where two of defendant's witnesses have testified that the railroad was in all respects properly and skillfully constructed, it is not a reversible error to exclude defendant's offer to prove by the same witnesses that the person under whose supervision the railroad was constructed was a competent and skillful engineer.

4. SAME—INSTRUCTIONS—NEGLIGENCE OF MASTER.

There being evidence for plaintiff that the rain was not an unusual one, and that the culvert was insufficient to carry off the waters of ordinary heavy rains, and defendant having pleaded that the engineer was guilty of negligence, an instruction that if the engineer's death was caused directly and solely by defendant's failure to keep its track in a reasonably safe condition for the passage of trains at the point where the accident occurred, in failing to provide a reasonably suitable culvert to discharge the waters of all ordinary rain-storms, or in failing to maintain the culvert in a reasonably fit condition to discharge such waters, and if the engineer himself was exercising ordinary care to avoid danger, the verdict should be for plaintiff, is proper under the issues, other instructions being given as to the defense that the accident was the result of an extraordinary rain-storm.

5. TRIAL—INSTRUCTIONS—HARMLESS ERROR.

An instruction that if the jury, after considering the other instructions given, decide to find for plaintiff, they shall assess the damages, etc., though faulty as omitting to charge them to consider the evidence with the instructions, is not reversible error.

6. DEATH BY WRONGFUL ACT—DAMAGES.

The action being brought by deceased's minor children, the measure of damages is a fair and reasonable compensation to them for the loss of their father's services as a means of support during their minority.

7. TRIAL—COMMUNICATION BY COURT TO JURY IN DEFENDANT'S ABSENCE.

After the jury had retired, the court was notified that the jury were convinced that it would be impossible to agree, and that the jury-room was so damp as to render it unhealthy to remain there. The court sent the sheriff for defendant's attorney, and on his report that he was unable to find him, the jury were brought into court, and, in the presence of an agent of defendant, and without other notice to the latter, were told that, as aids to the court, and to avoid a waste of time, their conference should be in a spirit of fair investigation with a view of reaching a verdict, but that no juror was expected to surrender his honest convictions merely for the sake of reaching an agreement. They were told to retire a short time longer, and it was plainly intimated that if they were then unable to agree, they would be discharged. The extent of the sheriff's search for defendant's counsel did not appear. *Held*, that the communication to the jury, in the absence of both defendant and its counsel, was not reversible error.

8. APPEAL—REVIEW—OBJECTIONS WAIVED.

By putting in his own evidence defendant waives an exception to a refusal of an instruction in the nature of a demurrer to plaintiff's evidence. Following *Bowen v. Railway Co.*, 8 S. W. Rep. 280; *Guenther v. Railway Co.*, Id. 371.

Appeal from St. Louis court of appeals.

Action in the St. Louis circuit court, by Winifred McPherson and Reginald Duncan McPherson, minors, by their next friend, Jennie C. McPherson, against the St. Louis, Iron Mountain & Southern Railway Company, for causing the death of plaintiffs' father, Charles McPherson, an engineer in defendant's employ. The petition averred that decedent's death was caused by his engine being thrown from the track while he was in the discharge of his duties; that he was at the time free from any negligence contributing to the accident; and that the engine was thrown from the track solely and directly by reason of defendant's negligence in failing to keep its track in repair and in a suitable condition for the passage of its cars and engines. The petition further averred that such defective and dangerous condition of the track was caused by reason of the natural drain of water being interrupted by defendant's track, and no proper outlet provided to allow said water to flow off; that thereby, whenever it rained, said water overflowed the track of the defendant, and rendered it dangerous for engines and cars to pass over the same; that by reason of said water being so caused to accumulate against and over said track, the soil was washed out under said track, and upon said engine coming upon said track it gave away, and caused the engine to be thrown from the track, and said Charles McPherson to be killed, as aforesaid.

Defendant, in its answer, admitted the killing of plaintiffs' father in the manner averred in the petition, but denied that he was not guilty of any contributory negligence; denied that the engine was thrown from the track by reason of defendant's negligence in failing to keep its track in repair or in suitable condition for the passage of its cars and engines; denied that the

track, at the place of the accident, was in a defective and dangerous condition, by reason of the natural drain of the water being interrupted by said track, and no proper outlet provided for said water. It then averred that all proper and necessary water-ways and culverts had been and were constructed and existing at the time of and near the place of said accident, amply sufficient to carry off all the water accustomed to fall or flow at or near said point, for more than 20 years prior thereto; that just previous to, and at the time of, the accident, (which occurred in the night-time,) an extraordinary, sudden, and unprecedented rain-storm occurred, or a water-spout burst at and near the place of the accident, of such violence and extent as to cause wood and stones to be thrown against said track, and move and break down the same; that after the occurrence of said storm, and before the happening of the accident, defendant's section-men or track repairers had no time or opportunity to go to or over said track and ascertain its condition.

The seventh instruction given by the court, of its own motion, referred to in the opinion, and necessary to an understanding thereof, was to the effect that if the jury, after considering the other instructions given in the cause, decided to find for the plaintiffs, they should assess the damages, and authorized them to fix the damages at the maximum sum of \$5,000, fixed by statute. Defendant objected to this instruction on the ground that it did not tell the jury to consider the evidence as well as the instructions, and on the ground that, there being no evidence as to what deceased was earning, or could earn, at the time of his death, the verdict should have been limited to nominal damages. There was a judgment for plaintiffs, defendant's motion for a new trial was overruled, and it appealed to the St. Louis court of appeals, where the judgment was affirmed, and defendant now appeals to this court.

Bennett Pike, for appellant. *A. R. Taylor* and *P. Leahy*, for respondents.

RAY, C. J. This is a suit by plaintiffs, by next friend, in the circuit court of the city of St. Louis, to recover damages for the death of their father, Charles McPherson, who was killed by the derailment of a passenger train on defendant's railway near Bismarck, Mo., while he was in charge of the engine drawing the train, as locomotive engineer. The trial resulted in a verdict and judgment for plaintiffs. At the conclusion of the evidence in plaintiffs' behalf an instruction in the nature of a demurrer to the evidence was asked by defendant, and was refused by the court, and this action is the first ground of error complained of in this court. By putting in its own evidence defendant thereby waived its exception in this behalf, except that the court may consider the same in connection with all the evidence in the cause, as we have recently held in the cases of *Bowen v. Railroad Co.*, 95 Mo. 268, 8 S. W. Rep. 230, and *Guenther v. Railroad Co.*, 95 Mo. 288, 8 S. W. Rep. 371.

A further exception was saved to the action of the court in overruling defendant's objections to the following question: "Question. State what the result of your examination was, as to the capacity of those culverts, to carry away waters that accumulated there in time of freshets." The objections thereto were incompetency, and because the question called for an answer that required expert knowledge and skill, of which it was not shown that the witness was possessed. The question was addressed to the witness John W. Denton, who had no knowledge of engineering, but was a farmer of the immediate locality, having lived there all his life, and within 200 or 300 feet of said culvert. Prior to the question objected to said witness had testified, and, we believe, without objection, that the culvert above the wreck consisted of two box-holes, about four feet square, with a partition wall between them, and that the culvert was too small for the amount of water that had to go through it. In answer to the above question, he testified that the capacity was not large enough to carry away any ordinary waters that accumulated there as the result of a freshet, and that the drift, leaves, and logs of any or-

dinary flood were likely to choke up and dam the culvert. His testimony further contains some accounts or descriptions of the adjacent country, and his estimate of the drainage of the locality.

Even if the question is to be regarded as a calling for the opinion of the witness, and even if portions of the evidence as to the capacity and sufficiency of the culvert are to be regarded as containing his opinion on these subjects, the question and evidence were, we think, nevertheless admissible and receivable. The inquiry does not involve any unmixed question of science and skill, but was one on which the judgments of ordinary persons, having sufficient opportunity for personal observation, and giving in their testimony the facts of their observation, might properly be received for such comparison and weight as the jury might see fit to give them. In *Porter v. Manufacturing Co.*, 17 Conn. 249, a similar question as to whether a certain dam was capable of sustaining the water accumulated by it suddenly in time of freshets was considered, and the opinions of witnesses with no peculiar knowledge or skill as to the construction of such embankments having been received in evidence, the court say: "The judgment or opinion of these witnesses as practical and observing men was sought on this point on the facts within their knowledge, and to which they testified. * * * The opinions of such persons on a question of this description, although possessing no peculiar skill on the subject, would ordinarily be more satisfactory to the minds of the triers than those of scientific men who were personally unacquainted with the facts in the case, and to preclude them from giving their opinion on the subject in connection with the facts testified to by them would be to close an ordinary and important avenue to truth." The question and evidence in that behalf was, we think, competent and admissible. See, also, *Dunham's Appeal*, 27 Conn. 192; *Hardy v. Merrill*, 56 N. H. 227, and cases cited.

Defendant also objected upon the ground of incompetency to a further question asked this same witness, as follows: "Did the traces of this storm, which were found next morning, show to you that it was anything greater than storms that you have seen before?" to which he answered: "No, sir; it did not. Didn't appear to be to me. In fact I have seen traces of water higher, right there at our house, than it was at the time of this freshet before the wreck." The question and evidence were manifestly competent and pertinent, as they tended to show that the storm was not an extraordinary, or even an unusual one, the character of the storm being a principal inquiry and defense in the cause.

Nor do we perceive any reversible error in the exclusion of the offer of defendant to show by the witnesses Matner and Flad that James H. Morley, under whose supervision the railroad was constructed, was a competent and skillful engineer, inasmuch as said Morley and said Matner and Flad all testified that the railroad was in all respects properly and skillfully constructed.

In the matter of instructions, the first, given by the court of its own motion, is complained of, and is as follows: "(1) If the jury find from the evidence that Winifred and Reginald McPherson were, on May 9, 1880, the minor children of Charles McPherson, and that on May 6, 1881, Jennie McPherson was appointed by the clerk of this court, Charles F. Vogel, as next friend of said minors; and if they further find from the evidence that the death of Charles McPherson was directly and solely occasioned by the failure of defendant to keep its track in a reasonably safe condition for the passage of its trains, (at the point where the accident to Charles McPherson took place,) in failing and neglecting to provide a reasonably suitable culvert to discharge, in case of all usual and ordinary rain-storms and freshets at that place, the water which would there accumulate, sufficiently to render said railroad track at that point reasonably safe for the passage of trains, or in failing to maintain said culvert in a reasonably fit condition to so discharge such water in all usual and ordinary rain-storms, so as to leave said track there in a reasonably safe condition

for the passage of trains; and if the jury further find from the evidence that at and before said accident, the deceased, Charles McPherson, was exercising ordinary care and vigilance on his part to avoid danger,—then the jury should return a verdict for plaintiffs.” There was, we think, evidence in plaintiffs’ behalf which tended with more or less force to show that the rain in question was not extraordinary or unprecedented in that locality, and that the culverts or water-ways provided were insufficient to carry off the waters of ordinary, and not unusual, though heavy, rains. The defendant was not bound to provide against an unprecedented flood, but was bound to provide sufficient culverts or other means for the escape of water which its embankments and excavations might collect, in any storm or rain, not extraordinary in character and violence; and if, upon the occasion in question, the railroad structure gave way under the engine and train under the supposed circumstances of the instructions, its liability for resulting injury is, we think, clear. *Shear. & R. Neg.* §§ 444, 445, 448; *Stoher v. Railroad Co.*, 91 Mo. 509, 517-519, 4 S. W. Rep. 389. Nor do we think this instruction vulnerable to the criticism that it fails to meet the issues made by the pleading or the evidence in the cause. It embraces, we may observe, the inquiry as to the conduct of said engineer which the answer charged to have been negligent, and a finding of the facts submitted therein would necessarily involve the inquiry as to the further special defense that the injury to the railroad, and the death of said engineer, were the result of an extraordinary storm. This special defense just mentioned was very clearly put to the jury in the second and fourth instructions given at defendant’s instance, and these, together with the third, also given for defendant, and those given by the court of its own motion, obviated the necessity for giving the ninth, tenth, and eleventh asked by defendant.

The seventh, also given by the court of its own motion, is somewhat faulty in construction, but the omission of the word “evidence” therefrom furnishes no sufficient ground for reversal of the judgment. Nor do we think it incorrect as to the measure of damages which is declared to be a fair and reasonable compensation to the infant plaintiffs for the loss of their father’s services as a means of support during their minority. *Stoher v. Railroad Co.*, 91 Mo. 509, 517-519, 4 S. W. Rep. 389.

There is another incident of the trial which remains to be considered. After the jury had retired, and had been deliberating several hours, perhaps, upon their verdict, the foreman of the jury sent the court a communication in substance that two men in the panel claimed it to be unjust for employees to recover damages in consequence of injuries sustained while in the discharge of their duties. The court, it seems, also received, at the same time, a further communication, signed by two of the jurors, who, it seems, were not the dissenting jurors, stating in substance that after numerous ballots and trials they were convinced that it would be impossible to agree, and further stating that the jury-room was so damp as to render it unhealthy to be kept there. The record further shows that the court, after receiving said communication from the foreman and said two jurymen, immediately caused the jury to be brought into court, and in answer to said communications, and “having first sent the sheriff to look for defendant’s attorney, and he not being able to find him, and in presence of R. F. Durphy, one of defendant’s agents or employees, and without other notice to defendant, or its attorney, and not in the presence of said attorney,” addressed them certain remarks, which are preserved in the record, and which, together with said action of the court, are complained of by defendant.

With reference to the remarks themselves, we may observe that they are not subject to the same objections as were those of the trial court in *Edens v. Railroad Co.*, 72 Mo. 212, to which we are cited, and which were disapproved by this court. The jury in this case were brought into court, and told that as aids to the court, and to avoid a waste of time, incident to their disagreement,

their conference should be had together in a spirit of fair investigation of the cause, with a view of reaching a verdict if possible; but at the same time the jury is also expressly told that no juror is to be expected to surrender his honest convictions or opinions merely to reach an agreement. The jury were further told to return to their retirement for a short time longer, to see if they could not reach a verdict, and with the plain intimation that if, upon a further short consultation, they were still unable to agree, they would then be finally discharged. Communications with the jury, not made in open court, and in the presence and with the knowledge of the parties or their attorneys, have been frequently condemned. Public policy unquestionably requires that communications ought not, even in civil cases, to take place between judge and jury unless in open court, and, if practicable, in the presence of the respective parties and their counsel. This whole subject was fully considered by this court in the case of *Chouteau v. Iron-Works*, 94 Mo. 401, 7 S. W. Rep. 467, and we adhere to the views as there expressed; but in order to sustain the position of defendant in the case at bar, we will, we think, have to go somewhat further, and hold that the absence of counsel will, *ipso facto*, require a reversal of the judgment rendered in the cause, although it may further appear that the trial court found it impracticable, after reasonable effort through its sheriff, to secure his attendance, and although the communication itself may not apply to any evidence in the cause, or to the instructions, except to say that those received are the rules of law which govern the case, and should be accepted and followed, and in itself may be a proper one, if made in open court, and in the presence of counsel. We are not satisfied we ought to go so far. The language of this court in the case of *Chouteau v. Iron-Works*, *supra*, on this question is as follows: "Many courts of last resort in the United States have held that communications ought not to take place between the judge and jury, after the cause has been submitted to them, except in open court, and, if practicable, in the presence of counsel in the cause." Other authorities elsewhere use the same language or qualification as above.

In respect to the search by the officer for the absent counsel the facts are not all before us or preserved except as indicated. Where the officer went, whether to other court rooms, to the office or house of counsel, or to such places as from his habits he might be deemed likely to be, and what time had elapsed before his return with his said report,—none of these matters appear; but in view of his being a public officer, acting in behalf of the court, and that the trial court had the facts and circumstances fully before it, we think we must assume that the effort of the officer to secure the attendance of counsel was a reasonable one, and that the court might, upon his said report, properly conclude that it was impracticable to secure the presence of said counsel in a reasonable time. There are, we think, grave objections of public policy against arresting judgments in such instances, upon the mere absence of counsel, after proper attempts by the court to secure their attendance, for this would enable counsel, by neglecting to attend court, or by voluntary and unreasonable absence, to interfere unreasonably with the business of the court and further progress of the cause. Again, a due regard for the efficient administration of the law will not permit jurors alone to determine when their deliberations as to their verdict shall cease, but requires that the trial courts have a large and reasonable discretion in this behalf.

Under all the circumstances of the case now before us, in view of the unsuccessful effort of the court, through the sheriff, to obtain the presence of counsel, and in view of the cautions and limitations contained in the remarks in question, such as that no juror was expected to surrender any honest conviction he might have in the cause, and the intimation that the jury would be discharged if they failed to agree after a further conference for a short time, we feel constrained to acquiesce in the action of the trial court in respect to said communication with the jury so held in open court, and therefore over-

rule defendant's said exception in this behalf. This leads to an affirmance of the judgment, and it is accordingly so ordered.

All concur, except BARCLAY, J., not sitting.

SULLIVAN v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri. February 18, 1889.)

1. DEATH BY WRONGFUL ACT—PLEADING—COMPLAINT.

A petition, in an action for the wrongful death of plaintiff's intestate, which sets out particularly the circumstances attending the killing, and alleges that his death was occasioned by the negligence of defendant's servants, while running, conducting, and managing a train of cars, is good, as against an objection to the introduction of evidence, that it fails to state any specific act of negligence.¹

2. MASTER AND SERVANT—INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE.

Plaintiff's intestate, a track hand, while standing on the track watching some men loading cars with a steam-shovel, was struck by the locomotive of a passenger train, which came around a curve, on a down grade, at the rate of from 20 to 35 miles per hour. Intestate could have seen the locomotive, and been seen by the train-men, for a distance of about 200 yards. A witness for plaintiff, who saw the locomotive distant about 150 yards, testified that no signal was given or effort made to stop the locomotive until intestate was struck. The fireman, who saw intestate when at a distance of 100 yards, and the engineer, who saw him at 50 yards, testified to signals and efforts to stop the locomotive. They also knew that men were working at this point on the road. *Held*, that it was proper to refuse to charge that plaintiff could not recover.

3. SAME—FELLOW-SERVANTS.

The engineer and firemen in charge of the passenger train were not fellow-servants of the section hand.²

4. DEATH BY WRONGFUL ACT—MEASURE OF DAMAGES.

Rev. St. Mo. § 2121, provides that "whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any servant or employee," while running a train of cars, his representatives may recover \$5,000 damages, provided the person would have had a cause of action had death not resulted. A subsequent clause provides for damages when any passenger shall be injured by any defect or insufficiency in machinery, etc. *Held*, that the first clause is not limited to passengers, but also includes the case of an employe whose death is not occasioned by a fellow-servant.

5. DEPOSITIONS—CAUSE FOR TAKING—REVIEW OF OBJECTIONS.

The Missouri statutes relating to depositions provide that the facts authorizing the reading of a deposition may be established by the testimony of the deposing witness, or the certificate of the officer taking the same, and in some instances it is not necessary that the witness should reside out of the county where the trial is had. *Held* that, where the officer's certificate is not preserved on the record, the appellate court cannot review an objection that there is nothing to show that the witnesses were not within the jurisdiction of the court.

Appeal from circuit court, Jackson county; J. H. SLOVER, Judge.

Thos. J. Portis and Adams & Bowles, for appellant. *Warner, Dean & Hagerman and E. A. Andrews*, for respondent.

BLACK, J. The plaintiff is the widow of Patrick Sullivan. He was killed by a passenger train on the defendant's road, and she sued for and recovered \$5,000 damages, basing her cause of action on section 2121, Rev. St., known as the second section of the damage act. The petition states that deceased was a track hand, his duties being that of a track walker over a section of the road; and it then proceeds to state "that while so engaged, on the 8th day of

¹ Concerning the requisites and sufficiency of the averments in actions for negligent injuries, see *Johnston v. Railway Co.*, (Mo.) 9 S. W. Rep. 790, and note; *Railroad Co. v. Crist*, (Ind.) 19 N. E. Rep. 810; *Railway Co. v. Watson*, (Tex.) ante, 781.

² As to who are fellow-servants, within the rule exempting the master from liability for injuries to one caused by the negligence of the other, see *Wolcott v. Studebaker*, 24 Fed. Rep. 8, and note; *Brown v. Sullivan*, (Tex.) ante, 288, and note; *Railway Co. v. Welch*, (Tex.) ante, 529.

May, 1885, he was run upon, injured, and killed by the locomotive and cars of defendant, known as the morning Lexington train west, and resulting from or occasioned by the negligence of the officers, servants, or employes of defendant, while running, conducting, or managing said locomotive and train of cars; that the said train was out of time, and under the control and management of one Fitzgerald as conductor, and one O'Donnell as engineer,—all at or near Rock creek, in said county and state aforesaid, on the line of defendant's railway."

1. The objection to the petition, made by way of an objection to the introduction of any evidence, seems to be that it does not state any specific act of negligence; and in support of this position we are cited to *Gurley v. Railway Co.*, 93 Mo. 445, 6 S. W. Rep. 218. The rule of that case is that it is good and sufficient pleading to set out and describe the acts done with a reasonable degree of particularity, and then allege that they were negligently done. In this case the petition sets out circumstances as a matter of inducement to the unnecessary extent of stating the names of the conductor and engineer in charge of the train. It states that Sullivan was run upon and killed by the designated train, and that his death was occasioned by the negligence of the defendant's servants while running, conducting, and managing the locomotive and train of cars. The petition is clearly within the rule of the case before cited. It would be good as against a demurrer making this specific objection, and, that being so, it is certainly good as against an objection made to the introduction of any evidence, after answer and on trial of the cause.

2. It is next insisted that the court erred in refusing to instruct the jury that upon the pleading and evidence plaintiff could not recover. The evidence shows that deceased had been in the employ of the defendant for about 10 years. On the day in question he walked over his section of about four miles, and then back to a place where some men were loading a train of dirt cars with a steam-shovel. The dirt cars stood on a side track, and the shovel was some 30 or more feet to the north of the main track. Sullivan stood upon the north end of a tie of the main track, facing the shovel, with a wrench and spike-maul on his right shoulder. While in this position the passenger train going west came around a curve, hit, and killed him. At the time Sullivan was talking to some men, and was watching the shovel. The machinery and chains used in operating it made considerable noise, so that he evidently did not hear the coming train, nor did he see it. He could have seen it for a distance of about 200 yards, most of the witnesses say, and they say the engineer could have seen him for a like distance. The train was a regular west-bound train, about 10 to 20 minutes behind time, and going down grade at a rate of speed estimated from 20 to 35 miles per hour. One witness, who was at work with the shovel, says he saw the train when 100 or 150 yards away; that the engineer was watching the shovel, and continued to watch it until he came up to Sullivan; that he heard no bell, but heard a sharp whistle from the engine just as it hit Sullivan; and that no effort was made to stop the train previous to that moment.

For the defendant the fireman on the passenger engine testified that he saw Sullivan when about 100 yards away. He says: "As soon as I saw him, I rang the bell. I didn't see him any more. He was looking at the steam-shovel, and about that time I turned the curve, and I told the engineer there was a man on the track." The engineer says he saw Sullivan when about 50 yards away; that he could not see him at a greater distance from his side of the engine, because of the curve. He testified: "I was going west on train 45, and about a quarter of a mile this side of Rock creek there was a steam-shovel working there, and Mr. Sullivan was standing on the end of one tie looking at the steam-shovel working, as I went around the curve. I whistled at him several times, but he couldn't take his eyes off, it seems, the steam-shovel. He just seemed paralyzed, looking at the steam-shovel. I could not

attract his attention with the whistle, and when I saw him still there I set the air-brakes. I did all I could to attract his attention, but I couldn't do it."

Sullivan was not a wrong-doer because on the track. He was where he had a right to be; and, while there is evidence tending to show that he was guilty of negligence, there is evidence tending to show that his life could have been saved by the use of ordinary care on the part of the engineer and fireman, and that they failed to exercise that care. Indeed, although the fireman and engineer saw Sullivan on the track, and saw that his attention was attracted to the steam-shovel, still there is evidence that no signal was given until the instant the engine struck him. The fireman and engineer knew that a gang of men were working at the point where the deceased was killed, and it was their duty to keep careful watch, and especially so, in view of the curve, which prevented an approaching train from being seen until within about 200 or 250 yards of the place of the accident. The court committed no error in refusing to give the instruction in question.

3. The point made that the deceased was a fellow-servant with those in charge of the train, and for that reason the plaintiff cannot recover, cannot be sustained. We have held that a car-repairer at a station and a train-man are not fellow-servants, within the meaning of the rule that exempts the company from liability to a servant for injury occasioned by the negligence of another servant, (*Condon v. Railroad Co.*, 78 Mo. 567;) nor are section foremen and switchmen fellow-servants, (*Hall v. Railroad Co.*, 74 Mo. 298. The rule of exemption is based upon the assumption that the servants are engaged in a common employment. While there is much diversity of opinion as to what will, and what will not, constitute a common employment, this section man and the servants in charge of the passenger train were engaged in different departments of the general business in which defendant was engaged, and were not fellow-servants. Cases are cited which go further, and hold that servants are not fellow-servants where the relation is much more intimate than that of the deceased and persons in charge of the train in question, but we confine our present ruling to the facts of the case before us.

4. The further point is made that, this being an action by the representative of an employe, the court erred in fixing the damages at \$5,000. In other words, the contention is that the case is not within the second section of the damage act. The case of *Proctor v. Railroad Co.*, 64 Mo. 112, decides, and decides only, that the words "any person" do not include the case of a servant whose death is occasioned by the negligence of a fellow-servant. Considering the second, third, and fourth sections together, it was held that it was not the object, purpose, or intent of the legislature to destroy or interfere with the rule that prohibits a servant from sustaining an action against the master for the negligence of a fellow-servant. "The master himself not being in fault," says the court, "the face of the section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right." That case has been followed to the present time, and we still adhere to the ruling there made. But if we are right in the conclusion that Sullivan was not a fellow-servant with the servants of the defendant, running the train which ran over and killed him, then the *Proctor Case* is without any application here. The statute reads: "Whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any servant or employe, while running, conducting, or managing any locomotive, car, or train of cars," etc.; and a subsequent clause goes on to say: "And when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or machinery thereof," etc. It will be seen that, in case of death resulting from defective road or machinery, this section extends to passengers only, and not to servants, though they may have a cause of action under the third section, but not even under that section, if the death be the result of the negligence of a fellow-servant.

But the first clause of the second section is not limited to passengers. Under that clause, if the person die from the negligence of the servant, while running any locomotive, car, or train of cars, then his representatives will be entitled to recover \$5,000 damages; provided the person would have had a cause of action had death not followed. Sullivan, therefore, not being a fellow-servant with the train-men, the plaintiff's cause of action comes within the said second section of the damage act.

5. The objection to the reading of the depositions of Nicholson, Gillett, and Brittainsteine is that there is nothing to show that the witnesses were not within the jurisdiction of the court. The statute provides when the deposition may be read, and in some instances it is not necessary that the witness should reside out of the county where the trial is had, or be more than 40 miles from the place of trial. The statute also declares that the facts which will authorize the reading of a deposition may be established by the testimony of the deposing witness, or the certificate of the officer taking the same. The certificate of the officer taking these depositions is not preserved in the record; and, this being so, we must indulge in the presumption that the certificate disclosed a proper case for reading the depositions. From the record we cannot tell where or before whom the depositions were taken. The whole deposition, including the certificate of the officer, must be preserved in the record in order to enable us to review such an objection as that made in the present case. The judgment is affirmed. All concur, BARCLAY, J., not sitting.

STATE *ex rel.* BAYHA v. KANSAS CITY COURT OF APPEALS.

(Supreme Court of Missouri. February 18, 1889.)

1. APPEAL—PRACTICE—RIGHT TO DISMISS.

Plaintiff brought an action to have declared null and void certain tax-bills issued by the city authorities of Kansas City against his property to one of the defendants, for the construction of a sewer, and by him assigned to his co-defendant. Plaintiff alleged that these tax-bills were invalid because the city had no authority to construct the sewer, but that they were an apparent lien against his property, and a cloud on his title. The circuit court dismissed his petition, and, pending an appeal to the Kansas City court of appeals, defendants filed a motion to strike the appeal from the docket; stating that they had caused the tax-bills in question to be canceled, and had deposited them with the clerk for plaintiff's use, and had paid all costs. Plaintiff contended that he was prosecuting the suit in the interest of other persons, against whose property similar bills had been issued, who were contributing to the expenses of the suit, as well as in his own behalf, for the purpose of having the bills declared void *ab initio*; that he would not accept the proffered satisfaction; and that he had, during the pendency of the suit, conveyed the property, with covenants against incumbrance. *Held*, that he was entitled to have an adjudication as to the validity of the tax-bills, and the court of appeals erred in striking his appeal from the docket.

2. MANDAMUS—FROM SUPREME COURT TO COURT OF APPEALS.

The supreme court of Missouri has no appellate jurisdiction over the Kansas City court of appeals, but the constitution (amend. 1884, § 8) gives it "superintending control over the courts of appeals by *mandamus*, prohibition, and *certiorari*." *Held*, that *mandamus* will lie to compel the Kansas City court of appeals to reinstate and hear the appeal in the above-stated case.

Petition for *mandamus*.

The relator, John Bayha, brought a suit in the circuit court of Jackson county against William Taylor and the Armour Bros. Banking Company, asking for judgment declaring null and void two tax-bills issued by the city engineer of the city of Kansas against property owned by Bayha to Taylor, in payment for the construction of a district sewer, and held by the banking company as collateral security. Bayha claimed in this suit that these tax-bills

were invalid, because the city had no authority under its charter to cause the sewer to be built, but that they were, nevertheless, an apparent lien against the property, and a cloud upon his title. The circuit court dismissed the petition upon a hearing of the case, and Bayha appealed to the Kansas City court of appeals. Errors were assigned and joined in by the parties, and the case was duly submitted to the court for its decision, and was taken under advisement. While the case was in this position, the respondents, Taylor and the banking company, filed in court, against the objections of Bayha, their suggestion and motion; stating that they had caused the tax-bills, regarding which complaint was made in the suit, to be canceled by the city engineer in his office, and had deposited them, marked "Paid," with the clerk of the court for the use of Bayha, and had paid all the costs which had arisen, or might arise, in the suit, and moving the court to abate and strike from the docket Bayha's appeal. Bayha resisted the motion, and showed by affidavits that he had not paid the tax-bills, and that he rejected and refused to accept the proffered satisfaction; that he was prosecuting the suit in the interest of other property owners against whose property similar bills had been issued, and who were contributing to the expenses of the suit, as well as in his own behalf, for the purpose of obtaining an adjudication upon the legality of the proceedings under which the sewer was built; that the object of his suit was to have the bills canceled as void *ab initio*; and that he was entitled to an adjudication upon that issue, and that the recent offer of satisfaction was not equivalent to such adjudication, and that he had, during the pendency of the suit, conveyed the property, and covenanted generally that the same was subject to no incumbrance whatever; and he demanded that the court proceed and decide the case. The court, however, sustained the motion, and dismissed the appeal.

Gage, Ladd & Small, for petitioner. *Lathrop & Smith* and *Karnes & Krauthoff*, for respondent.

SHERWOOD, C. J., (*after stating the facts as above.*) This is an original proceeding in this court, by which it is sought to compel the Kansas City court of appeals to reinstate a cause which it had refused to hear and determine, and had stricken from its docket. The statement heretofore made sufficiently gives the facts which are to form the basis of the present adjudication.

Those facts present for determination two salient questions: *First*, whether this court, proceeding on the basis of the admitted facts, has the power to control the action of the Kansas City court of appeals in the manner relator demands; and, *second*, whether the facts pleaded by the defendants, in order to induce the action afterwards taken by the Kansas City court of appeals, were such as fully warranted the course taken by that court, and therefore destroyed all ground of complaint on the part of the relator, and all occasion for invoking the mandatory authority of this court. These questions, for obvious reasons, will be considered in inverse order.

1. As already stated, the relator, by his petition filed in the circuit court, sought to have declared void two tax-bills, on the ground that being apparently valid, and apparently a lien upon his property, they were a cloud upon his title. After hearing the cause, the circuit court dismissed the petition, and the relator appealed to the Kansas City court of appeals, where the cause was submitted on briefs and argument. After such submission, the defendants pursued the course already indicated, and the point presents itself whether their action justified the action taken by the Kansas City court of appeals in striking the cause from the docket.

The subject is not altogether free from difficulty. Cases have been instanced to justify the course taken by the court of appeals. Thus it has been ruled that if a party against whom the decree went in the trial court appealed, and pending the appeal availed himself of that decree, by accepting and receiving a large portion of the money deposited to his use, upon the matter being

brought to the attention of the appellate court, in the proper way, he would not be permitted to maintain his appeal. *Atkinson v. Tabor*, 7 Colo. 195, 8 Pac. Rep. 64. So, too, in *York Co. v. Fewell*, 21 S. C. 106, both parties took an appeal; but, pending those appeals, the attorney for the adverse party served a written notice upon the defendant's attorneys, consenting to a reformation of the judgment, and it was thereupon held that, owing to the concession thus made, the appeal of the defendant was disposed of, since the offer made conceded to him all he could obtain by a judgment sustaining his appeal.

In North Carolina, litigation sprang up regarding a slave. Pending that litigation, all slaves were by law emancipated, and it was ruled that the bill must be dismissed, as there was nothing left before the court but a mere hypothetical case. *Kidd v. Morrison*, Phil. Eq. 81. Another cause in that state was ruled upon in a similar way. *State v. Railroad Co.*, 74 N. C. 287. And in still another cause in that state, where it appeared that the parties had settled their differences before final submission in the appellate court, the appellant failed to prosecute his appeal, and, upon suggestion being made of the facts by respondent, on his motion the appeal was dismissed. *Hasty v. Fund-erburk*, 89 N. C. 98. To the like effect is *Schenck v. Lincoln*, 17 Wend. 506.

In *Baucher v. Grass*, 60 Iowa, 506, 15 N. W. Rep. 302, the plaintiff procured a decree enjoining the defendants from carrying on the blacksmithing business on a lot adjacent to his dwelling, and from this decree the defendants appealed. Pending such appeal, the shop alone was sold by the sheriff, and at the sale G. & H. bought the shop, but did not desire to have the blacksmithing business continued, nor did they desire to prosecute the appeal, or to have the same prosecuted, for their benefit. The lot alone being owned by one of the defendants, and as the present owners of the shop proposed to submit to the decree, and as the defendants had no longer any interest in the shop, the court refused to determine or adjudicate their rights in the matter, holding that the issues in the cause were dead. Other cases have been instanced where appeals have been dismissed, because, after appeal taken, the plaintiffs had purchased the interest of the defendants, and were thus representing adverse interests, and conducting the appeal on both sides in the appellate court. *Paper Co. v. Haft*, 8 Wall. 338; *Cleveland v. Chamberlain*, 1 Black, 419. And cases have also been instanced where, after submission in the appellate court, the amount due in one of a number of causes has been paid, and in that cause the writ of error has been dismissed. *San Mateo Co. v. Railroad Co.*, 116 U. S. 188, 6 Sup. Ct. Rep. 317. *Dakota Co. v. Glidden*, 113 U. S. 222, 5 Sup. Ct. Rep. 428, was a case where the writ of error was dismissed because the parties settled and compromised their matters of difference, by making a new agreement which extinguished the judgment appealed from.

It is needless to cite other authorities on behalf of respondents, since those already cited are but types of others. None of them, however, are exactly parallel to the case under discussion. This is no colorable appeal, no moot case, no case which has been compromised or settled; but a case where an offer has been made to the plaintiff by parties defendant; an offer which has been rejected; an offer which does not go the whole length of the plaintiff's demand, but an offer which falls far short of that; an offer which virtually confesses that he is right in his contention, but which seeks to head him off,—to preclude him from attaining all he demands.

After great consideration of the subject, the conclusion has been reached that the offer made was insufficient, and did not, therefore, extinguish the plaintiff's ground of equitable relief. Nothing short of that will answer. The plaintiff had the right to have the full measure of the relief he claimed, or else, by a solemn adjudication of a court, to know the why and the wherefore of the refusal which denied him redress in full of his demand. He had the right to make the demand he did, and it was out of the power of the defendants to prevent adjudication of the matters demanded, except by a concession as broad

as that demand. In that event, and that event only, would the issues in the cause be dead. It would be making a precedent of most dangerous consequence to rule otherwise; in short, it would be sanctioning a colorable dismissal. And the special tax-bills, though void, being an apparent lien on the land, furnished ample ground for the relief plaintiff sought. It has frequently been decided by this court that injunction will lie to enjoin the sale of land for void taxes, whereby a cloud would be cast on the title. *Bank v. City*, 73 Mo. 555, and cases cited; *Society v. Hudson*, 85 Mo. 32; *Hays v. Dowds*, 75 Mo. 250. See, also, *Harrington v. Utterback*, 57 Mo. 519, and cases cited. And, whatever facts furnish basis for an injunction in such cases, will also furnish basis for having the tax declared void; it being optional with a plaintiff which branch of equitable relief he will seek. And Bayha having sold the land after the commencement of the suit, and after appeal taken, it was competent for him, under the provisions of section 3671, to continue to prosecute the suit, and it did not abate. *Smith v. Phelps*, 74 Mo. 598.

It has been suggested that, in any event, the plaintiff's statutory covenant, if broken at all, was broken upon the delivery of his deed. (*Walker v. Deaver*, 79 Mo. 664, and cases cited.) and that there could be no recovery from him by his grantees of but nominal damages, and that, as this would leave nothing but costs involved, an appellate court would not entertain jurisdiction upon that sole ground. Granting the correctness of this position, it only enforces the argument that plaintiff was entitled to insist that the court should make such a thorough disposition of the whole cause as would protect him, even against nominal damages or costs,—as would do full and complete justice between the parties,—before it relaxed its grasp on the *res*, and its jurisdiction of the cause. *Institution v. Collontous*, 68 Mo. 290.

Besides, there is respectable authority for saying that the grantor of land, with warranty, has such an interest therein as entitles him to protect his warranty to maintain a bill to remove a cloud on the title of the land granted. *Ely v. Wilcox*, 26 Wis. 91; *Malins v. Brown*, 4 N. Y. 403; *Owen v. Paul*, 16 Ala. 130. As the result of these views, it must be ruled that the plaintiff, notwithstanding the offer made by the defendants, was entitled to have his cause heard and determined by the court of appeals, and that error occurred in striking it from the docket.

2. This brings up for determination the question whether, in the circumstances mentioned, the law furnishes the plaintiffs any remedy, and, if so, what that remedy is. As we have no appellate jurisdiction over the court of appeals, the only remedy, if remedy there be, is by virtue of our original jurisdiction. Section 8 of the amendment to the constitution gives this court "superintending control over the courts of appeals by *mandamus*, prohibition, and *certiorari*." The provisions of this section, so far as concerns the present inquiry, do not materially differ from similar provisions in the constitution of 1875. Section 8, art. 6. The control thus given to this court over the courts of appeals is not limited to the single instance where a cause may be certified to this court under the provisions of section 6 of the amendment adopted in 1884. The contention that it must thus be limited cannot prevail. The case of *Britton v. Steber*, 62 Mo. 870, is cited in support of that contention, and it was also cited for a similar purpose in *State v. Tracy*, 94 Mo. 217, 6 S. W. Rep. 709, but it was not allowed to prevail there.

The control granted to this court in the particulars mentioned is fettered by no restriction or limitation; it is as broad as the exigency of the case demands; and the same reasoning which would confine our issuance of a writ of *mandamus*, in cases like the present, to the single case mentioned in section 6, *supra*, would also confine our issuance of writs of prohibition and *certiorari* within the same narrow limits. There is nothing in the constitution or its amendments to warrant such a limited construction.

This view of the matter leaves open to discussion the question whether *man-*

damus ought to go in the case at bar. There is perhaps no subject in the whole range of jurisprudence where the decisions of different courts, and frequently of the same court, are so conflicting as upon the subject of the writ of *mandamus*, as to when the writ shall issue. As Chancellor Kent would say, the law on the subject is in a state of "painful vibration." It is said, in a recent text-book of merit, that the writ "will not lie to compel subordinate courts to reinstate appeals which they have dismissed." High, Extr. Rem. (2d Ed.) §§ 191, 247.

Among the cases cited are the following:

Ex parte Newman, 14 Wall. 152, was one where the district court had tried the cause, and rendered judgment for \$712,—a cause over which it had no jurisdiction,—and on appeal the circuit court reversed the decree, and dismissed the libel, because of the Prussian consul's exclusive jurisdiction; and it was held by the supreme court that *mandamus* would not lie to compel the circuit court to entertain jurisdiction of the cause on appeal. It will be observed of that case that the circuit court had acted, and that no writ of error or appeal lay to the supreme court, because the amount in controversy was less than \$2,000, and this is so stated in the opinion.

In the subsequent case of *Insurance Co. v. Comstock*, 16 Wall. 258, a case arose in the district court under the bankrupt act, and was decided by that court, and the amount authorized an appeal to the supreme court. The case was taken on error to the circuit court, but that court refused to hear the cause on account of lack of jurisdiction, and dismissed the writ, and on error the cause was taken to the supreme court, where that court ruled that the circuit court erred in not taking jurisdiction of the cause; that, owing to this not having been done, the cause could not be reviewed on error by the supreme court, but that *mandamus* was the appropriate remedy to compel the circuit court to reinstate the cause, and to proceed and determine it; CLIFFORD, J., who had delivered the opinion in the former case, remarking, in substance, that the writ would go to compel the circuit court to proceed to final judgment in the cause, in order that the supreme court could exercise its power of review given by law; citing with approval *Bradstreet's Case*, 7 Pet. 647, where, in similar circumstances, a like ruling was made through Chief Justice MAXWELL, the amount involved being also within the jurisdiction of the supreme court. A similar ruling was made in *Railroad Co. v. Wiswall*, 23 Wall. 507.

In *Ex parte Schollenberger*, 96 U. S. 369, the circuit court in which the suit was brought, because of opinion it had no jurisdiction, quashed the process, and it was held that *mandamus* would lie to compel it to reinstate and hear the cause, as it had jurisdiction, though it had erroneously decided to the contrary.

In *Harrington v. Haller*, 111 U. S. 796, 4 Sup. Ct. Rep. 697, the supreme court of a territory dismissed a writ of error because of failure to docket the cause in time, and *mandamus* was granted on the grounds that there was no final judgment, and that the dismissal of the writ was a refusal to hear and decide the cause.

But in *Ex parte Brown*, 116 U. S. 401, 6 Sup. Ct. Rep. 887, where the supreme court of a territory, on a cause being removed there by appeal, on motion of the defendant dismissed the appeal, because the action was at law, and could only be re-examined on error, the supreme court held that it was a final adjudication, and that *mandamus* would not lie; citing, in support of the ruling, *Ex parte Morgan*, 114 U. S. 174, 5 Sup. Ct. Rep. 825, where *mandamus* was refused to compel the circuit court to amend a judgment which it had rendered, and had refused, on motion, to amend.

In *Ex parte Parker*, 120 U. S. 787, 7 Sup. Ct. Rep. 767, the supreme court of a territory improperly dismissed an appeal because it was not duly taken and perfected; but the supreme court ruled otherwise, and compelled the lower court to reinstate the cause, and to hear and determine the appeal; MATTHEWS,

J., remarking that the "writ properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof." The case of *State v. Wright*, 4 Nev. 119, announcing that if the district court improperly dismisses an appeal from a justice's court on the ground that the notice of the appeal was not duly stamped, *mandamus* would not issue to compel that court to reinstate the cause, and try it on the merits, seems to have been overruled, or greatly shaken by the more recent case of *Water Co. v. Rives*, 14 Nev. 481.

In *Ex parte Lowe*, 20 Ala. 830, it was ruled that if an inferior court makes an order which is in plain violation of the legal rights of one of the parties, and by virtue of such order refuses to proceed further in the case, *mandamus* will go to compel the vacation of such order.

In *People v. Weston*, 28 Cal. 639, an appeal was dismissed upon a similar ground as that decided in 4 Nev., *supra*, and *mandamus* was denied. A like ruling was made in *Francisco v. Insurance Co.*, 36 Cal. 283.

But in *Beguhl v. Swan*, 39 Cal. 411, where the county court, on motion of the defendant, struck a cause from the calendar, on the ground that it had no jurisdiction, *mandamus* went to compel it to hear and determine the cause.

In a still later case in that state, where the superior court dismissed an appeal because of the insufficiency of the bond taken by the justice, it was ruled that that court could not give itself jurisdiction by holding an insufficient bond sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient, but that the order of dismissal must first be annulled by *certiorari* before *mandamus* could be awarded. *Levy v. Superior Court*, 66 Cal. 292, 5 Pac. Rep. 858.

In New Jersey, an apparent diversity of opinion on the subject is exhibited, but it is believed to be only apparent.

In *Wells v. Stackhouse*, 17 N. J. Law, 355, where there had been delay in entering an appeal as required by the rules of the lower court, and in consequence of this delay that court refused to allow the appeal to be entered, *mandamus* was denied to compel the entry of the appeal; the supreme court remarking that the rule was reasonable, but that, if the lower court had acted contrary to or in disregard of their own rules, or evidently misapplied them, the result would have been different. In *Sinnsokson v. Corwin*, 26 N. J. Law, 811, a similar ruling was made.

But in *Ferguson v. Kays*, 21 N. J. Law, 431, where an appeal was improperly dismissed, although the lower court acted according to the letter of the rule, but not according to its spirit, *mandamus* was granted, and the ruling in *Wells v. Stackhouse* explained as resting on the great delay in entering the appeal. So, also, in *Freas v. Jones*, 16 N. J. Law, 358, where an appeal, improperly dismissed, was ordered by *mandamus* to be reinstated. To the like effect are *Robbins v. Bonnel*, Id. 234; *Adams v. Mathis*, 18 N. J. Law, 810.

In *Com. v. Judges*, 3 Bin. 273, a writ of error lay to the dismissal of the appeal, and consequently it was no case for *mandamus*, so that what was there said about *mandamus* was wholly *otiose*.

In *Cowan v. Doddridge*, 22 Grat. 458, where a circuit court struck a cause from its docket, *mandamus* issued.

People v. Judges, 20 Wend. 658, holds that, where an appeal was improperly dismissed for insufficiency of bond, *mandamus* would not lie, however erroneous the dismissal.

In *People v. Judge*, *mandamus* went to compel the reinstating of a cause, the appeal having been improperly dismissed. 27 Mich. 308.

In Arkansas, where the circuit court, without any basis laid therefor, improperly entered an order continuing the cause, it was contended that as the court had acted its action could not be reviewed except by writ of error; but the supreme court ruled otherwise, holding that it was an abuse of judicial

discretion to continue the cause, and *mandamus* was awarded. *Dixon v. Feild*, 10 Ark. 243.

Where a cross-bill was improperly dismissed, the chancellor having erred as to the proper practice in dismissing the cross-bill before the hearing of the original bill, the statute on the subject being plain and peremptory, *mandamus* was granted, to compel the setting aside of the order of dismissal, and the restoration of the cross-bill on the docket. *Ex parte Thornton*, 46 Ala. 384.

In Kentucky it has been ruled that *mandamus* does not lie where a lower court has dismissed an appeal. *Goheen v. Myers*, 18 B. Mon. 423. But in that an appeal lay from the order of dismissal of the quarter sessions, and so the remarks as to when *mandamus* should issue were not pertinent.

The same diversity of opinion as to when the action of the lower courts in dismissing appeals can be corrected by *mandamus* is exhibited in England as in this country.

These numerous citations of authorities have been made as showing that the rule of law is by no means well settled that the improper dismissal of an appeal cannot be remedied by *mandamus*. The weight of the authority, and certainly of reason, would seem to be that if the lower court has plainly erred on a point of practice, either by misapprehending its own rules or a plain rule of law, and in consequence has dismissed an appeal, *mandamus* will lie to correct and to remedy the erroneous and arbitrary exercise of its discretion, notwithstanding it has acted. Tapp. Mand. p. 14. Of course, this line of remark is not intended to apply, nor can it apply, to cases like that of *State v. Court of Appeals*, 87 Mo. 374, where the court of appeals affirmed the judgment, on the ground that the motion for judgment against a stockholder was not incorporated in the bill of exception; for there a final judgment was rendered in the usual course of judicial procedure, and, however great error was committed therein, it furnished no ground for *mandamus*.

There are cases where courts of last resort have no original jurisdiction to issue writs of *mandamus* to inferior courts, and can only issue such writs in the exercise of their appellate jurisdiction, and in no other. This is true of the federal courts. *McIntire v. Wood*, 7 Cranch, 504; *Bath Co. v. Amy*, 13 Wall. 244; *Graham v. Norton*, 15 Wall. 427; High, Extr. Rem. § 29. And it is true also of some of the state courts, (*King v. Hampton*, 3 Hayw. (Tenn.) 59; *State v. Hall*, 3 Cold. 255; *Cowell v. Buckleto*, 14 Cal. 640; *State v. Biddle*, 36 Ind. 138;) but, as already shown, the constitution has conferred on this court more enlarged powers, and consequently the rulings on the point in courts of other jurisdictions, not possessed of such ample powers, can have no application here. And, whatever the rulings of other courts may have been in respect to the issuance of writs of *mandamus*, the rulings of this court, heretofore made, establish that this court will award its writs of *mandamus*—where the St. Louis court of appeals refused to take a bond for an appeal to this court, on the ground that, the appeal having been granted, that court has no further jurisdiction of the cause, (*State v. Lewis*, 71 Mo. 170;) where a circuit court refused to enter judgment on a verdict, but granted a new trial, (*State v. Adams*, 76 Mo. 605;) where a trial court ordered a cause to be “dropped from the docket,” (*State v. Court of Common Pleas*, 73 Mo. 560;) where a trial court determined it had no jurisdiction of a criminal cause, by reason of the unconstitutionality of a statute, and ordered the cause transferred to another court, (*State v. Laughlin*, 75 Mo. 358;) to compel the judge of a trial court to enter a judgment on a verdict, which he had refused to receive because the jury by that verdict found for the defendants, but required them to pay the costs, (*State v. Knight*, 46 Mo. 83.)

In *Castello v. Circuit Court*, 28 Mo. 274, it is said: “If the circuit court declined to go into the merits of the case because the party complaining had not given the notice required by the statute, that was a preliminary objection upon a point of law which this court can review upon a writ of *mandamus*;

and, if the circuit court called for a notice which the statute did not require, the *mandamus* ought to be made peremptory." See, also, *Müller v. Richardson*, 1 Mo. 310.

Taking the admitted facts of this cause into consideration, the duty of respondents was prescribed by law. Rev. St. § 3376. This duty admitted of no discretion; at least, not of such an exercise of that discretion as would place it beyond the "superintending control" of this court.

A peremptory writ will therefore be awarded, as prayed.

All concur, except BARCLAY, J., not voting.

MINTER v. CUPP.

(*Supreme Court of Missouri*. February 18, 1889.)

1. EVIDENCE—BURDEN OF PROOF.

Plaintiff in ejectment claimed under a trust deed given by defendant to secure two notes to L., and alleged that the smaller note was given for the fees of plaintiff and another, as defendant's attorneys in a suit by L. against defendant, for the compromise of which the other note was given. The trustee, who was L.'s attorney, and made the compromise, had no authority to do so, and he indorsed the smaller note in L.'s name to plaintiff and the other attorney. Held, that plaintiff had the burden of proving ratification by L. of the assignment of the note, though the trust deed provided that the trustee's statements in relation to non-payment should be evidence, and though the recitals in the deed given by the trustee concerning default, etc., are made evidence by Acts Mo. 1881, p. 171, § 1.

2. PRINCIPAL AND AGENT—ACTS OF AGENT—RATIFICATION.

It was not error to refuse plaintiff's request to charge that L.'s collection of the amount of both notes and acknowledgment of satisfaction of the deed of trust were a ratification of the compromise, as defendant alleged that both notes were the consideration of the compromise, while plaintiff alleged that the consideration was the larger one only.

Appeal from circuit court, Chariton county; G. D. BURGESS, Judge.

Ejectment by H. C. Minter against Simpson Cupp. Plaintiff appeals.

Acts Mo. 1881, p. 171, § 1, provide that "whenever any real estate within this state shall have been, or shall hereafter be, sold by any trustee, or mortgagee, or sheriff, or other person acting as trustee, under a power of sale given in any mortgage or deed of trust, the recitals in the trustee or mortgagee's deed concerning the default, advertisement, sale, or receipt of the purchase money, and all other facts pertinent thereto, shall be received as *prima facie* evidence in all courts of the truth thereof."

Crowley & Son and *A. W. Mullins*, for appellant. *Minter & Christian*, for respondent.

RAY, C. J. This is an ejectment suit to recover possession of 40 acres of land in Chariton county, in which, on trial, defendant obtained judgment, from which plaintiff has appealed. Plaintiff, in support of his title, put in evidence a deed of trust, dated 24th February, 1880, executed by defendant, conveying, among other land, the 40 acres in controversy to O. F. Smith, as trustee, to secure to Lee Lingo, executor of Samuel Lingo, the payment of two notes executed by said Cupp, of same date as the said deed, and delivered to said Lingo, whereby he promised to pay said Lingo \$400, one for \$300, due one year after date, with 10 per cent. interest, and one for \$100, due 18 months after date, with 10 per cent. interest from date. The said trustee was empowered, in default of payment of said debts and interest, to sell, on notice, the land conveyed to pay said debts, and execute a deed to the purchaser, and the trust deed provided that any statement of facts or recital by the trustee in relation to the non-payment of the money secured to be paid should be received as *prima*

facie evidence of such fact. This deed was filed for record the 24th February, 1880, and the following marginal entries were put in evidence with the deed:

"MARGINAL ENTRIES.

"The debt mentioned in this deed of trust has been paid in full, and the property conveyed therein is hereby released.

"January 24, 1881.

LEE LINGO, Exr. Est. S. S. Lingo.

"Attest: W. C. APPELGATE, Recorder."

"The note for \$100, due eighteen months after date, has not been paid, but was on the 24th day of April, 1880, assigned and delivered to Minter and Christian, who have the said note in their possession, and neither it, nor any part of same, has been paid.

"February 25, 1881.

H. C. MINTER.

"JOHN R. CHRISTIAN.

"Attest: W. C. APPELGATE, Recorder."

Plaintiff also read in evidence a deed dated September 20, 1881, from said O. F. Smith, trustee, as aforesaid, conveying the property covered by the said trust deed of date February 24, 1880, hereinbefore mentioned, to plaintiff. The question involved in the trial below was as to the ownership of the said note for \$100, and the existence of the said debt in that behalf at the time of the sale, and to satisfy which the said sale under the trust deed was claimed to be made. The oral evidence for plaintiff, which is given by said Smith and said Minter, tends to show that the \$100 note, made payable to said Lingo, and included with the \$300 note in the trust deed, was in fact given for a fee due from said Cupp to Minter & Christian, who were his lawyers in a suit by Lingo against Cupp to enforce a vendor's lien on land sold by said Lingo's father to said Cupp, being the 40 acres in controversy, and that the compromise of this suit, which was had, was in consideration of the \$300 note only, the said note for \$100 forming no part thereof; that the object of said Cupp and his said lawyers (Minter & Christian) was to save the making of additional conveyances, and to have the one deed of trust cover both notes, which was finally so arranged with Smith, who was the attorney of said Lingo, and that the 40-acre tract was included in the trust deed for the better security of said Minter & Christian. It is conceded by plaintiff that said Smith had no authority at the time from Lingo to make any compromise of said suit to enforce said vendor's lien, and no authority from Lingo at the time to assign the \$100 note to Minter & Christian, by indorsing Lingo's name thereon, which had been done; but it is claimed in this behalf, and the testimony of Minter and Smith tends to so show, that Lingo was subsequently apprised of the entire transaction, and, upon explanation thereof, fully ratified and approved the same. Minter further testifies that he and Christian were the owners of the \$100 note, which remained in their hands, unpaid, at the date of sale, and at the time the said marginal entry of satisfaction was entered of record by Lingo, which was done without their authority and before the maturity of said \$100 note.

The evidence in defendant's behalf, given by defendant himself and the said Lingo, tends to show that the \$100 note, as well as the \$300 note, was given by said Cupp to Lingo, the payee therein named, in compromise of the suit to enforce the vendor's lien, and not as a fee to his said lawyers, and that said Lingo repudiated the compromise for the \$300 note as soon as the same was reported to him by Smith, his said attorney therein, and that he continued to refuse to ratify the same. It is unnecessary to further recapitulate defendant's evidence, as it is conceded to be directly and irreconcilably in conflict with that of Smith & Minter, given for plaintiff, as to all material and controlling particulars; so that the only questions before us, as is conceded, arise upon the court's action upon the declaration of law asked by the parties.

The first given for defendant is criticised, and is, we think, faulty in directing a finding upon the given facts for defendant; but it is, we think, apparent that the court's finding was not based upon the mere absence of knowledge or consent on the part of Lingo at the time of the execution and assignment of the \$100 note to plaintiff. This is manifest, we think, from declaration No. 4, given for plaintiff, and the second given for defendant, from which it appears that the case was made to turn upon the finding of the court, sitting as a jury, as to the conflicting evidence in relation to the subsequent ratification by Lingo of Smith's unauthorized action in compromising the suit, and in accepting the note or notes, and in indorsing the \$100 note over to plaintiff and Christian. The second given for defendant declares that before the court can find for plaintiff it must believe from the evidence that at the time of the sale plaintiff and Christian were the owners of the \$100 note; that although the court may believe from the evidence that said note was assigned to them by Smith, such assignment did not convey the title to plaintiff and Christian, unless the court finds that Lingo authorized Smith to make such assignment, or ratified the assignment after he had knowledge thereof; and that the burden is on plaintiff to show such authority in Smith, or ratification by Lingo. Plaintiff claims and contends that the burden of proof is thereby put on the wrong party, by reason of the statute (Acts 1881, p. 171, § 1) and provisions of the trust deed, hereinbefore noticed, making any statement of facts or recitals by the trustee, as to the non-payment of the money to be secured, *prima facie* evidence. Plaintiff not only offered in evidence the trust deed aforesaid, and the deed of the trustee under said sale to plaintiff, but also introduced oral evidence, briefly mentioned above, and which shows that his claim upon the \$100 note is not in virtue of being the payee therein named, or by the usual and ordinary transfer thereof, and that he does not occupy in some respects the position of the ordinary purchaser at such trust sales. Mr. Smith, who is the trustee making said recitals in his deed to plaintiff, testifies that, acting for what he deemed the best interest of his client, Lingo, he made the said compromise upon his own responsibility, and without Lingo's authority, and that, understanding Lingo to be a mere nominal party to the \$100 note, he indorsed the said note in Lingo's name to plaintiff and Christian; that his client, upon a report of the matter, repudiated the settlement, but afterwards ratified his said action in the premises. Plaintiff undertakes by his said oral evidence to show that the deed of trust, under which he claims title, does not express and recite the real facts of the said transaction, in this, that said \$100 note was not in fact executed and delivered as therein recited to Lingo, the payee thereof, and that this \$100 note formed no part of the sum which was to be paid Lingo as recited in the trust deed, but was given as a fee to his said lawyers, and made payable to Lingo, and included in said trust deed given to secure Lingo, to avoid the expense and trouble of two sets of conveyances. Defendant's oral evidence, as is conceded, is directly to the contrary as to all of the material facts of the controversy.

As already said, the controlling question in the case was as to ownership of the \$100 note offered in evidence. Plaintiff and Christian confessedly did not acquire title thereto in virtue of Smith's unauthorized assignment thereof, and their claim in this behalf rests upon the alleged ratification, with respect to which, under the facts and circumstances of the case, plaintiff had, we think, the burden of proof, as the second declaration declares.

Other questions upon the declarations are raised by plaintiff, such as error alleged in the refusal of the fifth asked by plaintiff. The evidence shows that Lingo collected \$400, the amount of both notes secured by said deed of trust, and acknowledged satisfaction thereof on the margin of the record. This may have amounted, as the refused declaration holds, to a ratification of Smith's action in compromising said suit; but there were two theories as to

Smith's action in respect to said compromise, the plaintiff's being that Smith settled the suit of Lingo against Cupp for the sum of \$300, and that Cupp only gave the said \$300 note, secured by the deed of trust to Lingo, whereas the defendant's theory, as shown by the evidence in his behalf, was that defendant agreed to pay Lingo \$400, and evidenced said agreement by the execution of the \$300 note, and the \$100 note in controversy as is recited in the trust deed. Whether the compromise was the one way or the other, it was, in either event, as we have seen, unauthorized by Lingo in the first instance. His said conduct in afterwards collecting the \$400, the amount of both notes secured by the trust deed, and in satisfying the trust deed by said marginal entry upon the record, ratified and confirmed the transaction, as defendant says it was, and as the court, upon conflicting evidence, has found it to be. The finding of the court, under the declarations of law given in the cause, involved the whole evidence as to the controlling questions in the case, which were, as we apprehend them, whether the \$100 note was an undertaking on the part of Cupp to pay said sum to Lingo as part of the consideration for said compromise, or whether it was an independent undertaking to pay the same as a fee to his said lawyers, and whether the said compromise, which both sides say was repudiated in the first instance, was afterwards ratified as plaintiff claims.

With these views, we find no error to plaintiff's prejudice in the court's action upon the declarations of law, and are therefore bound and concluded by its said finding of the facts in the case.

The judgment is therefore affirmed.

All concur.

MANUFACTURERS' SAV. BANK v. O'REILLY *et al.*

(*Supreme Court of Missouri. February 18, 1889.*)

1. CORPORATIONS—CONTRACTS BY DIRECTORS—RIGHTS OF STOCKHOLDERS.

Where a sale of corporate property to pay debts, though made by persons who are directors both of the selling and purchasing corporations, realizes more than the value of the property, stockholders in the former have no ground of complaint.

2. APPEAL—REVIEW—WEIGHT OF EVIDENCE—REFEREE'S REPORT.

A referee's report will not be disturbed as to findings of fact, except upon a clear showing of mistake.

Appeal from St. Louis circuit court; WILLIAM H. HORNER, Judge.

G. Pollard and Krum & Jonas, for appellant. *Geo. A. Castleman and H. I. D'Arcy*, for respondents.

BLACK, J. This is a suit begun by the plaintiff, and now prosecuted in its name, for the purpose of compelling the directors of Big Muddy Iron Company to account for property which it is alleged they fraudulently and secretly sold, and by reason of which alleged fraudulent and secret sale it is claimed the stock held by the plaintiff was rendered worthless. It is also alleged that the defendants converted to their own use pig-iron of the value of \$126,000.

It appears that Benjamin White owned 75 shares of preferred and 150 shares of common stock in the Big Muddy Iron Company. He transferred this stock to Mr. Harding, president of the plaintiff, a banking corporation. The transfer is absolute on its face, but it was made to secure a debt owing by White to the bank. The transfer was made in November, 1872, and in the fall of 1878 the bank caused the stock to be sold, and became a purchaser of it. This suit was commenced in 1874, and slumbered along until 1879, when the bank transferred the stock to Cook, who transferred the one-half to P. C. Bulkley, and this suit seems to be prosecuted by them in the name of the bank. It may be here stated that Bulkley was a director and the secre-

tary of the Big Muddy Iron Co. during the entire time of its existence, though it seems he opposed the sale of which complaint is made.

The general facts are not disputed, and they are these: The defendants, O'Reilly, Whitman, Mills, Lancaster, and White, and other persons, purchased an iron furnace and certain personal property at an assignee's sale in bankruptcy on the 23d March, 1872, for \$139,000. They were stockholders in and creditors of the bankrupt corporation. On the 5th April, 1872, they organized the Big Muddy Iron Company, transferred the property so purchased to it, and the corporation became liable for the payment of the \$139,000. The company was organized with 1,570 shares of stock, of the par value of \$2 per share. But 930 shares of stock were ever taken, so that the company had a capital of only \$1,860. The company conducted the business until the last of December, 1872, when it became involved, unable to pay its debts, and the directors sold the furnace to a new company by the same name. This new company was organized with a capital of \$200,000 for the express purpose of buying the property of the old company, and the defendants were stockholders and officers in the new company, so that in effect the sale was one by themselves, to themselves.

So far as the manufactured pig-iron on hand is concerned, it is sufficient to say that it was sold by the directors in the usual course of business for about \$105,000, and the proceeds were applied to the payment of the debts of the company. This they had a right and were in duty bound to do. The sale to the new company included the furnace, machinery, implements, and raw material on hand. The new company paid for the furnace and existing contracts for material the sum of \$156,000. It also took the raw material on hand at the cost price. There were other assets, such as bills receivable, not included in the sale. It is this sale of which complaint is made.

The plaintiff alleges that the old company was solvent, and was doing a large and profitable business in the manufacture of pig-iron at the time of this sale, and that the sale rendered the stock worthless. The case was heard by a referee, who made a report, and upon which there was judgment for the defendant. For the purpose of determining whether the company was solvent when the defendants made the sale, the referee made an estimate of all of the assets at that date. The sale did not take effect until the 1st January, 1873, and this is made the date of the estimate.

In this estimate the referee places the furnace and works at \$129,120, and the plaintiff insists that it should have been put down at not less than \$156,000. The evidence of the value of the furnace ranges from \$70,000 to \$250,000, so that there is abundant evidence to support the finding of the referee, and it will not be disturbed. He places the value of the pig-iron on hand at \$105,335. This value he gets by taking the sales of it actually made, and it was clearly the correct method; for it appears that the accounts of iron made and shipped, as they were kept at the furnace, were unreliable and conflicting. Objections are also made to other of the items of this estimate, but the plaintiff has furnished no abstract of the evidence, and for this reason we decline to go through the great mass of evidence found in the manuscript record. The referee gives his detailed findings on these disputed items, and his reasons for his conclusions as to the amounts to be set down, and with them we are satisfied. The report shows much care taken by the referee on the trial, and is not to be disturbed as to the finding of facts, except upon a clear showing of mistake, and that has not been done in any instance.

The referee places the assets at \$304,023, and the liabilities at \$288,942, thus showing a surplus of a little over \$15,000. But these assets were not money, and the company needed a large amount of cash to enable it to go on with its business, and the assets were not available at the prices stated, and hence the referee finds that the company "was insolvent, and that it was not possessed of sufficient assets wherewith to pay its liabilities in the usual course

of business as they matured, nor sufficient assets to meet and discharge its liabilities by any usual or ordinary disposition and application of the same." He also finds that the \$156,000 was paid by the new company in debts of the old company, which debts were for the most part held by the defendants, and were then canceled; that the sale was open and authorized, and ratified by a majority of the stockholders in open meetings called for that purpose. Many efforts had been made to sell the property, and we do not see that the company had any prospect of making a sale to persons other than the defendants, for a price in excess of \$75,000. This seems to have been the highest offer made, yet the defendants, for the new corporation, took the same property in payment of debts to the amount of \$156,000.

We held in *Hutchinson v. Green*, 91 Mo. 367, 1 S. W. Rep. 853, that, when a corporation became unable to meet its obligations in the usual course of business, the directors could make a voluntary assignment for the benefit of all of the creditors, and that they could do this without the consent of stockholders. So, too, it is the duty of the directors to pay the debts of the company; and they are justified in using the property for that purpose. They may use the property for such a purpose, though the company be thereby disabled from carrying on its business, if they act in good faith. 1 Mor. Priv. Corp. (2d Ed.) § 513.

Here the corporation was insolvent,—unable to go on with its business. As said by the referee, it had to go into liquidation of some sort. Had this sale been made to persons other than the directors themselves, its validity could not be questioned by the stockholders in any form of action.

Directors of a corporation have no right to use their official position for their own benefit, nor can they represent the corporation and themselves in the same transaction. They may be made to account to the corporation for all profits made by the use of the corporate property. *Ward v. Davidson*, 89 Mo. 440, 1 S. W. Rep. 846; *Paquet Co. v. Davidson*, 95 Mo. 467, 8 S. W. Rep. 545. But, according to what we held in *Kitchen v. Railroad Co.*, 69 Mo. 224, the mere fact that these defendants were directors and stockholders in the selling and purchasing corporation would not make the sale absolutely void.

We do not understand it to be claimed here that this is a suit to avoid the sale. It is rather claimed that the property was sold at less than its value, and, if that were true, the defendants should account for the difference. The sale standing as an accomplished transaction, and the selling corporation having received the full benefit of it, it would seem to follow that defendants should be held only for losses sustained by the old corporation by reason of the price received. The property sold for all and indeed for much more than it was worth, and the old corporation and its stockholders were the gainers, not the losers, by the transaction. This old corporation came into existence with an actual capital of \$1,860, and a debt of \$139,000, and it is perfectly clear that during its short career of about nine months it was at all times insolvent,—a mere shell,—and that the stock never had any intrinsic value.

From November, 1872, to the fall of 1873, the plaintiff held this stock as collateral security only. In the mean time Mr. White, the owner of it, took part in making and perfecting the sale. At a meeting of the stockholders held on the 2d December, 1872, he voted in favor of selling the property; and at another like meeting, held on the 1st February, 1873, he voted to ratify the very sale of which complaint is made. That conduct put it out of his power to prosecute this suit. Since he had a right to vote the stock under sections 934, 935, Rev. St., it is insisted that the bank also became bound by the ratification; but, in view of what has been before said, we need not, at this time, pass upon that question.

The judgment is affirmed.

BARCLAY, J., not sitting. The other judges concur.

HENRY & COATSWORTH Co. v. EVANS *et al.*

(Supreme Court of Missouri. February 18, 1889.)

1. MECHANIC'S LIENS—RIGHTS OF SUBCONTRACTORS—EXTENT OF LIENS.

Rev. St. Mo. 1879, § 8173, provides that "every mechanic or other person, who shall * * * perform any * * * labor upon, or furnish any materials * * * for, any buildings * * * or improvements upon land," under any contract with the owner or his contractor, "upon complying with the provisions of this article, shall have for his * * * labor done, or materials furnished, a lien upon such building * * * or improvements, and upon the land belonging to such owner, * * * on which the same are situated, * * * to secure the payment for" such labor or materials. *Held*, that such lien exists in favor of subcontractors and others, notwithstanding prior payment of the full contract price, in good faith, by the owner to his contractor; also that such liens are not limited to the amount agreed to be paid by the owner to his contractor.

2. SAME—CONSTITUTIONAL LAW—DUE PROCESS OF LAW.

Such construction of the statute does not give it an unconstitutional force and effect, as depriving the owner of property "without due process of law."

3. SAME.

Nor does it conflict with section 4 of the Missouri bill of rights, securing to all "the enjoyment of the gains of their own industry."

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Action by Henry & Coatsworth Company against D. W. Evans, contractor, and C. W. Dickinson, owner, to enforce a mechanic's lien. Plaintiff appeals from a judgment denying its lien.

Traber & Gibson, R. J. Ingraham, Jas. F. Mister, and C. O. Tichenor, for appellant. *Botsford & Williams, B. F. Deatherage, and R. B. Middlebrook*, for respondents.

BARCLAY, J. In this action plaintiff, a subcontractor, seeks to establish, as a lien, a demand for materials furnished towards the erection of a building on land of defendant Dickinson. The exact controversy presented for decision arises from the following undisputed facts: Evans was the original contractor with Dickinson for the erection of certain buildings on land of the latter. Plaintiff, under a contract with Evans, supplied materials used in their construction. Plaintiff's account therefor was not paid. Notice of the demand was served on the owner, and the account filed in due time as a lien on the property, in accordance with the lien law.

No defect in the formal steps taken by plaintiff is suggested, but it appears that the owner had paid the original contractor the full amount of the agreed price for the buildings before notice or knowledge of plaintiff's demand, and that the contractor had applied that amount to discharge other valid claims against the property for labor and materials furnished, reserving nothing for himself. The circuit court rendered a personal judgment for the amount of plaintiff's demand against the contractor Evans, but denied the claim for a lien against the property. After the usual steps for a review of that ruling, plaintiff has brought the case here.

It is necessary to determine in this case whether payment of the full contract price, in good faith, by the owner to the contractor, in the circumstances above described, prevents the establishment of a lien against the property by a subcontractor who has furnished materials for the erection of a building, and otherwise complied with the statute.

The law of this state concerning these liens is the product of a gradual development. Its foundations were laid in our early jurisprudence, (Laws Mo. 1804-1824, p. 803, c. 346,) and improvements were made thereon from time to time until its present form was reached, (Rev. St. 1879, c. 47.) It is unnecessary to give the details of its history, further than to remark that its framers embodied in it some materials acquired from the statutes of other states, and some of the products of their own labor, forming thus a composite

structure in many respects unlike the laws elsewhere on the subject. The points of dissimilarity must be clearly borne in mind to avoid the error of applying, to the interpretation of our own statute, decisions of courts in other states construing language quite different. Liens of the kind mentioned in our statute did not exist under the common law of England. They are founded on principles of natural justice which the civil law recognized, more than a thousand years ago, by giving workmen and material-men a similar right of compensation (called a "privilege," which took precedence even over prior mortgages) against property they had improved.

The Missouri statute undertakes to define the facts which shall create such a lien, and to provide a remedy for its enforcement. It should receive a liberal and reasonable construction to effectuate the purposes disclosed by its terms. *De Witt v. Smith*, 68 Mo. 263. To arrive at a sound interpretation, we must consider the law in all its parts, and ascertain, as best we may, and give expression to, the true intent of the legislature. It is our duty to give full effect to that intention when discovered, without attempting to enlarge or to restrict the legislative meaning to harmonize with any views of our own concerning its wisdom or expediency.

The first section of the law in question is as follows, (omitting the parts immaterial to this case:) "Every mechanic or other person, who shall * * * perform any * * * labor upon, or furnish any materials * * * for, any buildings * * * or improvements upon land, * * * under * * * any contract with the owner * * * or his * * * contractor, * * * upon complying with the provisions of this article, shall have for his * * * labor done, or materials * * * furnished, a lien upon such building * * * or improvements, and upon the land belonging to such owner * * * on which the same are situated, * * * to secure the payment for such * * * labor done, or materials * * * furnished." Rev. St. 1879, § 3172.

It has been already decided that in no event can a subcontractor assert a lien against the property for a greater amount than the reasonable market value of the labor or materials he furnished towards the erection of the building or improvement. *Deardorff v. Everhartt*, 74 Mo. 37; *Schulenberg v. Prairie Home*, 65 Mo. 295.

But there is nothing in this or in any other section expressly limiting the aggregate liens to the amount which the owner agreed to pay the original contractor for the completed work; yet such limitation, in definite terms, appears to have been thought necessary by the legislature of other states desiring to express that purpose in their laws. We shall mention some of those statutes to indicate the differences between them and our own in this particular.

The limitation now referred to has usually assumed one of two forms. In some states the clause conferring the lien is of nearly as broad a scope as our own, but the limitation is supplied by another section, to the effect that the lien notice by the subcontractor to the owner shall give the former a claim against and right to any sum "due, or to become due, under the contract," by the owner to the contractor. Such was the law of Colorado when the decision in *Jensen v. Brown*, (1875,) 2 Colo. 697, was announced. Sess. Laws Colo. 1872, p. 150, § 6.

The law of Iowa was somewhat similar when *Stewart v. Wright*, (1879,) 52 Iowa, 335, 3 N. W. Rep. 144, was decided; the language defining the status of a subcontractor there being as follows: "And, from and after the service of such notice, his lien therefor shall have the same force and effect," etc., "as a lien by the contractor, but shall be enforced against the property only to the extent of the balance due to the contractor at the time of the service of such notice upon the owner, his agent or trustee." Code Iowa 1873, p. 386, § 2133.

In other states this limitation has been expressed as a proviso in the section defining the right of lien, or as a distinct part of the statute. Thus the law of 1851, applicable to New York city, contained the following as a part of the sentence creating the lien: "But such owner shall not be obliged to pay for or on account of such house, other building, or appurtenances, in consideration of all the liens authorized by this act to be created, any greater sum or amount than the price stipulated and agreed to be paid therefor in and by such contract," (i. e., the contract between the owner and original contractor.) Laws N. Y. 1851, pp. 953, 954, § 1.

In Illinois, it was provided that no claim of any subcontractor, etc., should be a lien, "except so far as the owner may be indebted to the contractor at the time of giving such notice * * * of such claim, or may become indebted afterwards to him as such contractor." Rev. St. Ill. 1874, c. 82, § 33.

Kansas laws added this condition to the right of lien: "Provided, that the owner shall not be liable to such subcontractor for any greater amount than he contracted to pay the original contractor." Laws Kan. 1872, p. 295, § 2.

In Connecticut it was declared that "no such lien shall attach to any building or its appurtenances, or to the land on which the same may stand, in favor of any person, to a greater amount in the whole than the price which the owner agreed to pay for such building and its appurtenances." Gen. St. Conn. 1875, p. 360, § 12.

Such limitations, in one or another form, have been in force at different times in many states. Some of them have been changed by later laws. They are mentioned here as types of the forms that have been thought effective to limit the subcontractor's lien to the amount due under the owner's original contract, when the law-makers so intended.

The case at bar turns, of course, on the proper construction of our own law. The latter contains no such language as has been quoted from other states, nor anything substantially similar. The question then arises whether our legislature intended a like limitation to be supplied by construction. If so, the expression of that intent is singularly unfortunate and obscure, when it evidently might have been very plain.

The terms of section 3172, above given, are clear and comprehensive in relation to the question before us. They contain nothing suggestive of any implied condition upon or limitation to the right of lien therein defined. The words of a law are to be taken in their ordinary, usual, and natural meaning. When the legislature says that a mechanic or material-man "shall have a lien," (certain facts occurring,) are we to assume, without more, that it meant thereby to say that such a lien should only exist when the owner had not already fully paid the contractor, and in no event for more than the original contract price? Would not such a ruling, in effect, require more facts to be established as essential to a lien than those mentioned by the law-makers?

So it appears to us, and that it is not our province to make such additions to the statute. If a law is constitutional, it is our duty merely to interpret and declare it, exactly as made by the legislative department, on which the responsibility for its wisdom and policy rests. We cannot properly add to it a meaning not intended by its terms.

Let us now consider such parts of the context to the section already quoted as may throw light on the supposed intention of the legislature as to its scope. The section requiring notice by the subcontractor, in cases like this, should perhaps be noted. It is this: "Sec. 3190. *Subcontractors and Others to Give Notice.* Every person, except the original contractor, who may wish to avail himself of the benefit of the provisions of this article, shall give ten days' notice before the filing of the lien, as herein required, to the owner, owners, or agent, or either of them, that he holds a claim against such building or improvement, setting forth the amount, and from whom the same is due."

This section noticeably omits any qualification of the language of section 3172, regarding the facts necessary to the right of lien. It is undoubtedly intended to provide a measure of protection to the owner by warning him of such claims, so that he may retain, from the original contractor, enough of the contract price to indemnify himself against loss. But the subcontractor may file his claim for a lien (on notice as above) at any time within four months after the indebtedness accrues. It is hence evident that any payment by the owner to the contractor before the time expires for receiving the subcontractor's notice will not defeat the latter's right of lien, unless we are to interpolate into this section also other facts not mentioned as essential by the law-makers, namely, that such notice must be given before full settlement with the original contractor, or that such notice shall only give the subcontractor a right to claim the sum then due, or thereafter becoming due, to the contractor, (as is the law in some other states.) This we cannot do without violence to the meaning of the legislature as expressed, in this regard, by the plain language used.

The other provisions of that chapter do not enlighten the present controversy, except section 3191, which is as follows: "In all cases where a lien shall be filed, under the provisions of this article, by any person other than a contractor, it shall be the duty of the contractor to defend any action brought thereupon at his own expense; and, during the pendency of such action, the owner may withhold from the contractor the amount of money for which such lien shall be filed; and in case of judgment against the owner or his property, upon the lien, he shall be entitled to deduct from any amount due by him to the contractor the amount of such judgment and cost, and, if he shall have settled with the contractor in full, shall be entitled to recover back from the contractor any amount so paid by the owner for which the contractor was originally the party liable." Rev. St. § 3191. If the legislature intended that payment of the contract price to the original contractor should be a defense to the lien demand of a subcontractor, (as is asserted by respondent in this case,) then no such "judgment against the owner or his property" could lawfully be recovered by a subcontractor after such full settlement; yet this section assumes that such judgment may properly be obtained and enforced, and for that reason gives the owner a right of action "to recover back from the contractor any amount so paid." Reading it in connection with section 3172, we think the conclusion irresistible that the legislature used the broad language conferring the right of lien with a full appreciation of its effect, and accordingly then provided by section 3191 for some of its practical applications. We consider these two sections as excluding the inference of any legislative intent to limit the lien of subcontractors to the amount fixed by the contract of the owner with the original contractor.

But it is insisted that this construction of the law would give it an unconstitutional force and effect. We have found difficulty in dealing with this objection because of its generality. The only specific clauses, of either state or federal constitution, with which any clash is suggested, are the federal prohibition against depriving any person of property "without due process of law," (Const. U. S. amend. 14,) and the section of the Missouri bill of rights securing to all "the enjoyment of the gains of their own industry," (section 4.)

A statute like ours, creating a lien on improved property for the reasonable value of the labor and materials furnished to permanently improve it, and providing a mode for its enforcement upon adequate notice to all parties in interest, with an opportunity for a trial of every issue in court, "as in ordinary civil actions and proceedings in circuit courts," (Rev. St. § 3179,) certainly does not deprive the owner of such improved property thereof "without due process of law." It is unnecessary to discuss that contention further, in view of the definite rulings that have been made construing the meaning of that

provision of the federal constitution. *Davidson v. New Orleans*, 96 U. S. 97; *Sheppard v. Steele*, 48 N. Y. 52; *State v. Addington*, 77 Mo. 110.

It is further urged that such a construction of the lien law would violate the Missouri bill of rights, as quoted above. An argument is predicated thereon against the justice and policy of the statute. It is claimed that it abridges the right of the owner to make such contracts as he pleases, and to enjoy the benefits thereof. That hardships may occasionally result from the application of the law to particular cases is possible. That hardships would result to others without such law is equally clear. If the owner engages a contractor to erect a house for \$5,000, and the latter uses in the structure labor and materials worth \$10,000, obtained on credit from others, it is obvious that some one must sustain the loss occasioned by such folly or fraud. Without this statute the loss would often fall on the subcontractors whose labor and materials have enhanced the value of the property. Under its provisions, the latter can enforce payment (from the property) for the reasonable value of their labor and materials used in the building, not exceeding the prices they agreed to accept for the same. The owner can then recover of the contractor any excess he may be obliged thus to pay beyond the original contract price. A hardship to the owner will only result in event the contractor be insolvent, and hence unable to respond to such recovery. In that case the legislature has seen fit to say that the loss should fall on the owner who selected the contractor, and has the benefit of the improvements, rather than upon the subcontractors, who supplied the materials and labor.

It is an application to such transactions of the familiar legal principle that, when one of two innocent parties must suffer a loss by reason of the fault of a third, that loss should be borne by him who gave the third person power to commit the fault. *Bank v. Bank*, 71 Mo. 197. The aim seems to be to protect those whose material or labor has enhanced the value of property, against the business misfortunes or possible frauds of any middle-man, at whose instance they furnished the same. It is made the interest of the owner, for the protection of his property from liens, to see that all valid debts of that nature are discharged by those who incur them. The law-makers considered that, with the exercise of ordinary prudence, the owner would be in a better position to guard against loss under this law than subcontractors would be without the law. The owner may stipulate with the contractor to defer his payment until the time has passed for filing other liens, or to pay the subcontractors himself, or he may take security or any other suitable steps that circumstances may require for the protection of himself, and of those whose labor and materials enter into the building, upon its credit. On the other hand, if the original contract price were the limit of the liability of the property for its improvement, no subcontractor could be sure of securing a lien, when supplying materials or labor, without first ascertaining, not only the contract price, but also the amount of all other outstanding subcontracts. Even then he would assume the further risk of conflict with subcontractors afterwards made by the chief contractor, which the latter might, if he saw fit, satisfy first on the contract account. Thus would difficulties and uncertainties in the operation of the law exist which we think the legislature did not intend.

The owner's liberty of action is not invaded by the statute. He need not employ an intermediary to erect his building; but, if he does, the law ingrafts upon his act certain consequences. It enters into and forms part of his agreement with the original contractor, so far as regards the subject-matter to which the statute relates. By virtue of the law the contractor is invested with a power to charge the property for the reasonable value of the labor and materials supplied to it by subcontractors. The right of lien arises from the statute, which applies, by its own force, to every transaction that parties by their voluntary action bring within its terms. No one is deprived thereby of the "gains of his own industry." The legislative purpose is quite the contrary.

It is rather to prevent one man from enjoying, without compensation, the gains of another's industry, in circumstances which the law-makers regard as imposing a duty on the former to see that the latter is paid therefor. The principle controlling this branch of the case has been frequently recognized and approved in other jurisdictions, in its application to this subject and others. Briefly stated, it is that contracts must be construed and interpreted according to existing laws, when made in relation to the subject-matter of those laws within their jurisdiction. *McMurray v. Brown*, 91 U. S. 266.

A familiar illustration of the principle is found in admiralty. A bottomry bond or mortgage on a vessel may be validly executed, yet the mariner's lien for subsequent wages will have priority over either, because the law to that effect is assumed to have entered into every such instrument when made. 1 Conk. Adm. (2d Ed.) 112. Many other illustrations are at hand, but we will abbreviate the statement of them by merely citing the cases in which they appear: *Spofford v. True*, 88 Me. 283; *Langston v. Anderson*, 69 Ga. 65; *Treusch v. Shryock*, 51 Md. 173; *Winslow v. Uguhart*, 39 Wis. 260; *Vreeland v. O'Neil*, 36 N. J. Eq. 399; *Sims v. Bradford*, 12 Lea, 434; *Atwood v. Williams*, 40 Me. 409. In the matter before us the mechanic's lien law is assumed to be in contemplation of all parties making a building contract. There is hence no injustice in treating them as having accepted the consequences fixed by that law.

We conclude that there is no constitutional objection to the enforcement of a lien by a subcontractor in such a case as that at bar. The result we have reached is reinforced by decisions from some other states, commenting on the effect of statutes like ours: *Laird v. Mooney*, 32 Minn. 358, 20 N. W. Rep. 354; *Bailou v. Black*, 21 Neb. 147, 31 N. W. Rep. 673; *Ainslie v. Kohn*, 16 Or. 371, 19 Pac. Rep. 97; *Lonkey v. Cook*, 15 Nev. 58; *Merritt v. Pearson*, 58 Ind. 386; *Railroad Co. v. Miller*, 80 Va. 821; *Jensen v. Brown*, 2 Colo. 697; *Hill v. Witmer*, 2 Phila. 72.

We have given due consideration to the decision of the Kansas City court of appeals in *Henry v. Hinds*, 18 Mo. App. 497, wherein a different conclusion was reached. Though entertaining great respect for that court, and for the able writer of that opinion, we find ourselves unable to adopt their views of the question presented by the present appeal. We believe the effect of that decision would be to introduce into the statute an implied restriction of the subcontractor's right of lien which the legislature did not intend should be placed upon it. We therefore do not accept it as a precedent for the decision of this case. The supreme court of California has also announced a different interpretation of a statute similar to our own in *Renton v. Conley*, (1874,) 49 Cal. 187, and earlier cases mentioned therein. That decision has been expressly disapproved in Nevada. Although the same statute had been re-enacted there, the supreme court declined to follow such a construction of it. *Hunter v. Truckee Lodge*, 14 Nev. 32. Since that decision was rendered the legislature of California has made several changes in that law, the last and most comprehensive being found in the Acts of 1894, (Ex. Sess.) p. 143. From the nature of these amendments, it appears probable that the law-makers of that state do not regard that ruling as a correct construction of the intention they endeavored to express with regard to this subject in the original statute. At all events, we do not agree with the views contained in that decision. We regard them as at variance with the language and meaning of our law, for reasons that have been already stated in this opinion.

It follows that the judgment of the trial court should be reversed, and the cause remanded, with directions to set aside the finding in favor of defendant on the issue of the lien, and thereupon to enter proper findings and a judgment on the agreed case in accordance with this opinion.

With the concurrence of all the judges, it is so ordered.

STATE *ex rel.* CAMPBELL *et al.* v. ST. LOUIS COURT OF APPEALS.

(Supreme Court of Missouri. February 18, 1889.)

1. COURTS—JURISDICTION—SUPREME COURT—CONSTITUTIONAL QUESTIONS.

To a petition for an injunction by one claiming the exclusive right to operate a ferry between a city in Missouri and one in Illinois, under a license from the former city, against the operators of another ferry between the same points, defendants answered, alleging that the ordinance under which plaintiff claimed was void as an attempt to regulate commerce between the states in violation of the constitution of the United States, and also as an attempt to create a monopoly in violation of the constitution of the state of Missouri. *Held*, that the record presented a question involving the construction of the constitutions of the United States and of the state, within Const. Mo. art. 6, § 12, conferring jurisdiction in such cases upon the supreme court, and that the St. Louis court of appeals had no jurisdiction to hear and determine an appeal from an order dismissing the petition.

2. PROHIBITION, WRIT OF—ISSUANCE OF ATTACHMENT AND INJUNCTION.

An appeal was taken and perfected to the St. Louis court of appeals, where the judgment of the lower court was reversed, and an injunction granted against the operation of defendant's ferry, and also an attachment issued against defendants for contempt in violating the temporary injunction after the appeal had been perfected. *Held* that, as the attachment had not been executed, and as the threatened judgment had been stayed only by rule from this court, defendants were entitled to a writ of prohibition.

3. SAME—CONTENTS OF WRIT.

In such a case, as incident to the general command, a clause will be inserted in the writ, requiring the St. Louis court of appeals to transfer the case to the supreme court, as required by Acts 1885, p. 121, providing that when an appeal is taken to that court, when it should have been allowed to the supreme court, the court of appeals must transfer the cause to the supreme court.

Application for writ of prohibition.

George D. Reynolds, for relators. *J. B. Dennis* and *Dyer, Lee & Ellis*, for respondent.

BLACK, J. The prayer of the petition is that the St. Louis court of appeals be prohibited from taking further cognizance of the case of Richard Carroll against Campbell and Houck, who are the relators in this proceeding, and that that court be commanded to transfer the cause to this court, on the ground that we alone have jurisdiction. From the pleadings it appears the city of Cape Girardeau passed an ordinance giving to Carroll the sole and exclusive right to operate a steam ferry-boat from that city to the Illinois shore, and of receiving and landing passengers and property within the corporate limits of the city, for the period of 10 years. Carroll has a license for a like period of time from the local authorities on the Illinois shore. The city of Cape Girardeau refused Campbell and Houck a ferry license, and, without a license, they put their steam-boat in the ferry business, in opposition to Carroll, receiving and landing passengers within the corporate limits of the city. Carroll commenced his suit in the circuit court against the relators, and procured a temporary injunction, restraining them from operating their ferry-boat within the limits of the city. The venue of that cause was changed to Madison county. The defendants answered, and also filed motion to dissolve the temporary injunction, and upon a hearing the injunction was dissolved, and the petition dismissed. On the 5th October, 1886, Carroll gave bond, and perfected an appeal to the St. Louis court of appeals. In that court Carroll filed an information in the cause, stating that relators had violated the temporary injunction by running their ferry-boat after he had perfected his appeal. To a rule issued by the St. Louis court of appeals to show cause why they should not be attached for contempt, the relators made formal answer, claiming—*First*, that the appeal from the judgment of the circuit court did not reinstate the temporary injunction; *second*, that they had violated no process of the St. Louis court of appeals; and, *third*, stating that the case was one involving

the construction of the constitution of the United States and of this state, and that the supreme court alone had jurisdiction, and asked that the cause be transferred to this court. To this answer Carroll filed a demurrer, and the court took the matter under advisement. The court, in the mean time, heard the case on its merits, the relators insisting that the court had no jurisdiction of the appeal. On the 3d May, 1888, the court of appeals rendered a judgment reversing the judgment of the circuit court, and entered a judgment enjoining the defendants, relators here, from operating their ferry-boat, and at the same time ordered an attachment for defendants, to the end that they be brought to the bar of the court to receive punishment for violating the temporary injunction issued by the circuit court. Thereupon the defendants commenced this proceeding.

The first and most important question to be determined is whether the court of appeals had jurisdiction of the case of Carroll against Campbell and Houck on the appeal from the circuit court. Connected with that is a question of pleading. By section 12, art. 6, of the constitution, and the amendment thereto, adopted in 1884, this court has jurisdiction "in all cases involving the construction of the constitution of the United States, or of this state." In such cases the appeal should be to this court, for it has exclusive jurisdiction in all such cases. Acts 1883, p. 216, § 5. By the act of March 18, 1885, (Acts 1885, p. 121,) it is provided that where an appeal is taken to either of the courts of appeal, when it should have been allowed to this court, the court of appeals must transfer the cause to this, the supreme court.

Turning, now, to the record in the case of Carroll against Campbell and Houck, we find that the city of Cape Girardeau, by its charter passed in 1872, has "the exclusive power and right to regulate, tax, and license all ferries within its limits," and under this power the city gave Carroll the exclusive ferry privilege, for the period of 10 years. The defendants, in their answer, deny the power of the city of Cape Girardeau to grant the exclusive right to plaintiff, admit the other essential statements in the petition, and then go on to say: "And for a further answer the said defendants say that they run their boat between the states of Illinois and Missouri, across the Mississippi river, and they are owners of said vessel, were engaged in the carrying trade between the states, and in the conveyance thereof; that their vessel was duly inspected and officered, as provided by the laws of the United States; and that the said attempt of said city of Cape Girardeau, by ordinance, to create an exclusive right in said plaintiff to do the ferrying business across the Mississippi at a point to and within the jurisdictional limits of the said city of Cape Girardeau was and is an attempt to regulate commerce between the states, and violates the constitution of the United States, and is therefore null and void. And for a further answer the defendants say that the said ordinance set out in the plaintiff's petition is null and void, because of its attempt to create a monopoly, and violates the provisions of the constitution of the state of Missouri in that it attempts to create an exclusive franchise."

These two defenses thus set out in the answer are brought forward and assigned as grounds for dissolving the temporary injunction in the motion filed for that purpose. Indeed, the questions thus raised are the only questions of law presented by that record. The constitution of this state says the general assembly shall pass no local or special law granting any "special or exclusive right, privilege, or immunity," (section 53, art. 4;) and the constitution of the United States gives congress power "to regulate commerce with foreign nations, and among the several states." That the pleadings were designed to and do raise the questions whether the ordinance upon which Carroll founds his right is in conflict with the before-mentioned constitutional provisions is clear enough. It was not necessary to set out in the answer the sections of either constitution, or to refer them by their numbers. The whole theory of our Code of Civil Procedure is that the parties must plead facts, and the courts

must apply the law to the facts pleaded and proved. It is enough that the record shows that in the disposition of the appeal there is involved the construction of some provision of the constitution of the United States, or of this state. This will sometimes appear from the pleadings, and in actions at law it will after appear by the instructions given or refused, and probably in other ways. Looking to the answer in this case, we are referred to the constitutional provisions before quoted, with quite as much certainty as if they had been set out in words.

The court of appeals, when speaking of its jurisdiction to determine the question made in respect to the constitution of the United States, says: "We have uniformly held that such a question, in order to be considered with reference to jurisdiction, * * * must be at least fairly debatable. The question as here raised is not debatable at all. It is set at rest forever, so far as this court is concerned, by our conclusions in the *City of St. Louis v. Turnpike Co.*, 14 Mo. App. 216." We cannot yield our consent to that disposition of the question. It is made the duty of this court to determine constitutional questions when they are fairly raised by the record, and that court is without jurisdiction in such cases, and hence its adjudications cannot set them at rest. This court will not give countenance to sham questions, made for the mere purpose of giving this court jurisdiction of the whole case. But that is not the case here. Conceding to the city of Cape Girardeau the right, and the exclusive right, to license ferry-boats, and to make and collect reasonable wharf charges, and to regulate the landing of such boats, still the ferry is one between different states, and therefore concerns commerce between the states, and whether the city can say that this interstate traffic shall be carried on by one person only, presents a question, to say the least of it, worthy of consideration. But the present inquiry is not as to the merits of these questions, or either of them, presented by the appeal. The inquiry is, does the record in the case of Carroll against Campbell and Houck, as lodged in the court of appeals, present a question involving the construction of the constitution of the United States or of this state, and we have seen that it does. Indeed, as before stated, they are the only questions in the case, and it follows that the court of appeals is without jurisdiction to hear and determine the appeal.

Prohibition is a preventive, and not a corrective, remedy. Says High: "Where the proceedings which it is sought to prohibit have already been disposed of by the court, and nothing remains to be done either by the court or by the parties, the cause having been absolutely dismissed by the inferior tribunal, prohibition will not lie." High, Ext. Rem. § 766. But where the want of jurisdiction appears on the face of the proceedings, prohibition will lie after judgment, if anything remains to be done under the judgment. Lloyd, Prohib. 12; High, Ext. Rem. § 774. But in the present case the proceedings in the court of appeals are not at an end. The attachment for contempt has not been executed. The threatened judgment has been stayed only by the rule issued in the present case. Since, therefore, the relators have no other remedy, they are entitled to the writ of prohibition.

Our rule made on filing of the petition required the court of appeals to show cause why the case of Carroll against Campbell and Houck should not be certified to this court, and the question is whether the writ should contain a clause requiring that appeal to be transferred to this court. In general it is not the office of prohibition to undo that which has been done. Its office, as before stated, is preventive. Lloyd, however, says, when speaking of this general rule: "But as the superior courts will interfere after execution, it follows that in such cases the writ must have a more extensive operation, and we find it so laid down in many of the old authorities." And further as he says: "Prohibition will, in such cases, have an effect similar to that of a writ of restitution, and must not only command the person to whom it is directed to surcease, but also to revoke what has been done." Lloyd, Prohib. 67. The

principle asserted by this author may, we think, be applied to the present case. It should be applied with great care.

But in the present case the writ of prohibition is called into requisition, to some extent, in aid of our appellate jurisdiction. In view of this fact, and since the writ must go, we conclude that, as an incident to its general command, it may contain a clause requiring the court of appeals to transfer that case to this court. With this result we need not consider the other questions discussed in the briefs. The rule heretofore issued to show cause is therefore made absolute.

BARCLAY, J., not sitting. The other judges concur.

STARK v. PIERCE CITY REAL ESTATE CO. *et al.*

(*Supreme Court of Missouri. February 18, 1889.*)

1. EQUITY—ACCOUNTING.

Plaintiff's grantee gave a declaration stating that he held 80 acres in trust for six persons, including plaintiff, each of whom was entitled to a sixth. The owners, each of whom also owned a twelfth interest in other lands, formed a corporation, and stock was issued to them representing their interests, including a twelfth of the whole to plaintiff, who refused to accept it, but who received various payments from the corporation. Plaintiff was not an incorporator or officer of the corporation, but afterwards, for the purpose of settlement, stipulated to acquiesce therein, upon payment of the amount due him, upon which the land should be appraised, and he should be allowed to draw out his one-twelfth interest. The referee found that plaintiff was entitled to a sixth of the 80 acres, and the parties stipulated to divide it according to such finding. *Held*, that plaintiff had a sixth interest in such 80 acres.

2. SAME—DECREE.

Plaintiff is not entitled to a money judgment for his interest in lands sold, for which notes were taken in good faith, and of which sales he claims the benefit, but the judgment should determine his interest in the notes, and direct its payment, when collected, and invest him with his interest in the unsold lots.

Appeal from circuit court, Jasper county; M. G. MCGREGOR, Judge.

Suit by John W. Stark against the Pierce City Real Estate Company and others. Defendants appeal.

C. W. Thresher, for appellants. W. Cloud, for respondent.

BLACK, J. The plaintiff by this suit asks that the defendant corporation and the other defendants account to him for the proceeds arising from the sale of town lots, and that his interest in the unsold lots be invested in him. The suit was begun in 1876. It was heard by a referee, who made a report of the evidence and his findings, and to that report both parties filed exceptions. The venue of the cause was changed to Jasper county, where the case seems to have been tried by the court without regard to the report of the referee, or the exceptions made thereto.

1. The first question is whether the plaintiff is entitled to one-sixth or one-twelfth of a part of the land. On the 1st January, 1870, the plaintiff, Stark, sold the five-sixths of the land hereafter described to Young and others. The agreement states that the parties to this contract had formed a partnership for the purpose of procuring a depot on the land, and that each should bear his proportion of the donation to the railroad company. On the 19th February, 1870, Stark conveyed the whole of the land to McAfee, who gave him a declaration in writing, reciting the conveyance of 158 acres, and stating that the depot was to be built thereon; that the railroad was to have a right of way over it; also 20 acres, and one-half of the balance. This writing then states: "This property is held in trust by said McAfee for the following parties: John W. Stark, one-sixth of one-half, after deducting right of way, and 20 acres

for railroad company; John S. Phelps, E. T. Robberson, T. A. Sherwood, H. C. Young, one-half of one-sixth each, after the deduction aforesaid. That said Stark has also conveyed the following land, to-wit: North-east, south-west, and south-east quarter of north-west quarter, section 21, township 26, range 28. That said McAfee holds the same in trust for himself, John S. Phelps, H. C. Young, T. A. Sherwood, E. T. Robberson, and John W. Stark, and each one of them are entitled to one-sixth of said land. That said Stark conveyed the following pre-emption, to-wit: South half, north-west quarter, section 28, township 26, range 28. That said McAfee holds the same in trust for said parties aforesaid, that is, one-sixth of one-half each, and the railroad company one-half said pre-emption. That said McAfee, as soon as said town is laid off, is to proceed and sell the lots, and divide the proceeds of the sales among the parties according to their rights and interest, as hereinbefore expressed, and convey to the railroad company the amount of land hereinbefore set forth. Witness my hand and seal on the day and year aforesaid." On the 23d June, 1871, McAfee conveyed to the railroad company the right of way, the 20 acres, and the one-half of the balance of the 153 acres, the one-half of the five-sixths of the next described 80 acres, and the one-half of the third tract described in the declaration of February 19, 1870.

By reference to that declaration, it will be seen that Stark retained the one-sixth of the 80 acres, namely, the N. E. of S. W., and S. E. of N. W. $\frac{1}{4}$, of section 21, etc.; while, as to the balance, he has only the one-twelfth interest. This difference between Stark's interest in the 80 and the residue finds further recognition from the fact that McAfee only conveyed to the railroad company the one-half of five-sixths of the 80, the five-sixths being all the interest that he and his associates had therein. On these papers there can be no doubt but Stark owns the one-sixth of the 80 acres.

But the appellants contend that this conclusion is changed by subsequent events. There was purchased in the name of Mr. Young, one of the town proprietors, two other tracts of land, known as the Evans and Cowan land; and on the 19th February, 1870, he gave Stark a declaration in writing, stating that he held the one-twelfth of those lands for Stark. The legal title to all of these lands seems to have been put in the names of McAfee and Young to facilitate the sale and conveyance of town lots. Lots were sold by them until July, 1872, when the town proprietors, except Stark, organized the corporation known as the "Pierce City Real Estate Company;" and McAfee, Young, and the railroad company conveyed the unsold lots and lands to that corporation. Stock was issued to these proprietors in the proportion of their respective interests, including stock to Stark, representing a one-twelfth of the whole. Payments were made to Stark from time to time by the agents of this corporation, and hence it is insisted that he has accepted this stock as representing his proper share in the property of the corporation. But Stark was not an incorporator, nor was he a director or officer in the corporation, and the circuit court found that he refused to accept the stock, and with this finding we are satisfied; so that thus far there is nothing to preclude him from claiming his one-sixth in the 80 acres.

In 1880 the parties to this suit stipulated for a reference, and as to what accounts should be examined by the referee; and in that stipulation it is provided, in substance, that, while Stark contends that he never gave his consent to the organization of the real-estate company, yet he is willing, for the sake of getting an equitable settlement, to acquiesce therein, upon payment of whatever amounts are found due him; provided, further, that upon such payment there shall be chosen three persons to appraise the real estate, and that he shall be allowed to draw out his one-twelfth interest by lot, or in some fair manner. The referee found that Stark was the owner of the one-sixth of the 80 acres, and, after that report had been filed, the parties again stipulated for the appointment of designated persons "to divide and set apart

the property now on hand to the plaintiff, as found by the referee." The first of these stipulations gives some countenance to the theory that Stark had but a one-twelfth interest in the property; but it is to be remembered that he claims no more, as to the great bulk of the property, and the contest as to the extent of his interest is as to the 80 acres only. The subsequent stipulation shows that the parties never intended to cut out any interest he had. The defendants cannot disregard one of these stipulations, and hold onto the other. Indeed, we do not think the first was, or was designed to have, the effect to deprive Stark of any property that might be found to belong to him. The stipulation proceeds upon the assumption that he has the right to take the property belonging to him, whatever it may be found to be.

2. The next question is as to whether there is anything due to Stark for the purchase of the land, or from sales of lots, and the amount thereof. Young and his associates agreed to pay Stark \$7,898.35 for the interest in the land purchased from him. Part of this amount was paid by deducting Stark's share of the purchase price of the Evans and Cowan land, and they assumed the payment of the whole price of those tracts. This left due to Stark \$6,556.13, for which they, Young and others, gave Stark a due-bill. Defendants contend that there is a mistake in the amount of this due-bill, but we are satisfied that it states the correct amount.

3. The town proprietors made large expenditures in the erection of an hotel, and for other purposes not within the original contemplation of the parties; but we are satisfied that Stark gave his consent to these expenditures, and must, therefore, bear his share of them. The business was conducted for a time by Mr. Young, then by Mr. Cowan, and then, to 1874, by Mr. Perkins. The accounts of these persons are much confused, no distinction having been made between payments made for the company and payments made to or for the benefit of the individuals. The counsel for appellants has restated these accounts in his brief, and, after a patient examination of the evidence, we find this restatement to be correct, with one exception. Stark is charged with \$400 as having been paid to him in cash by Young, and by a like amount paid to him by Cowan. There is but one such credit indorsed on the due-bill, and that of date October 18, 1870, and this seems to be about the date that he is charged with the two items. We cannot see that Young paid this item to Stark at all, so Stark should be charged once only with the cash item of \$400. With this correction it appears that Stark received on account of sale, and on account of the purchase price of the land, \$7,734.70. He is entitled to receive, on account of his share arising from sales, \$1,441.75, which, added to the amount of the due-bill for purchase price of the land, makes \$7,997.88; thus showing a balance still due to him of \$263.18.

4. Thus far Stark's interest has been calculated at a one-twelfth, but as to the 80 acres he has a one-sixth interest; so that he should receive an additional twelfth of the proceeds of sales of lots in the 80 acres. This amounts to the sum of \$506.35.

5. Stark is entitled to his decree vesting in him the undivided one-sixth of the unsold lots in the 80 acres, and a one-twelfth interest in the other unsold lots and lands. This portion of the decree of the circuit court is therefore correct.

6. From 1874 to the trial of this cause Stark received his proper share of the proceeds arising from sales, but there were notes on hand for property sold. Stark has a one-sixth interest in some of these notes, and a one-twelfth interest in others, and for which the court gave him a money judgment. This money judgment is manifestly unjust, and ought not to stand. There is no pretense that the defendants, or any of them, have converted these notes to their own use. These sales, for which the notes were given as deferred payments, were made in good faith; and, since Stark claims the benefit of them, he must take according to the terms of the notes. He is not en-

titled to the money until it is collected, and the defendants should not be bound for losses that may occur in making the collections. No foundation is laid for the appointment of a receiver, and the decree should only ascertain Stark's interest in the notes, and direct its payment to him from time to time as collected.

7. In view of the fact that these conclusions lead to a decree essentially different from that rendered by the circuit court, the judgment is reversed, and the cause remanded, with these directions: *First.* The circuit court will enter a money judgment in favor of plaintiff, and against the defendant the Pierce City Real-Estate Company for \$769.51, with interest at 6 per cent. per annum from the date of the commencement of this suit. The evidence shows that it was the understanding that the purchase price for the land should be paid to Stark out of the proceeds of the first sales, and, applying the payment first to the discharge of the due bill, it follows that the judgment should be against the real-estate company only for the \$769.51, and interest. *Second.* The court will enter anew the judgment divesting defendants of, and investing in plaintiff his interest in, unsold lots. *Third.* The court will determine the interest of Stark in the uncollected notes, and order the payment of that interest to him as the money is collected.

In carrying out the second and third of these directions, the court can take account of transactions made, and moneys collected and paid out, since the former decree in this case, but these directions are designed to put at rest all other controversies.

The judgment is therefore reversed, and cause remanded.

SHERWOOD, J., not sitting. The other judges concur.

CORRIGAN v. MORRIS *et al.*

(*Supreme Court of Missouri. February 18, 1880.*)

COURTS—JURISDICTION OF SUPREME COURT.

An appeal from an order overruling a motion to quash an execution to enforce the lien of a city tax-bill for street improvements, title to real estate not being involved, and the amount in dispute being below the jurisdiction of the supreme court, is within the jurisdiction of the Kansas City court of appeals.

Appeal from circuit court, Jackson county; TURNER A. GILL, Judge.

Action by Thomas Corrigan against Margaret J. Morris and others, to enforce the lien of tax-bills. Defendants appeal from an order refusing to quash an execution issued on a judgment for plaintiff.

Scarritt & Scarritt, for appellants. Chrysler & Kenyon, for respondent.

BRACE, J. The respondent brought suit against the appellants, to which the county of Jackson was made a party defendant, to enforce the lien of two special tax-bills issued by the city of Kansas City on a certain lot in said city, for the improvement of a certain street therein. Judgment was obtained against all the defendants in that suit, a transcript thereof filed in the office of the clerk of the circuit court of Jackson county, and an execution issued thereon. The appellants then filed a motion in the circuit court to quash the execution. This motion was overruled by the circuit court, and they appeal. To this motion, and the subsequent proceedings thereon, the county of Jackson was not a party, and is not a party to this appeal. The title to real estate is not involved in the questions to be determined thereon, (*State v. Court of Appeals*, 67 Mo. 200; *Dunn v. Miller*, 96 Mo. —, 9 S. W. Rep. 640,) and the amount in dispute is below the jurisdiction of this court. The case is properly within the appellate jurisdiction of the Kansas City court of appeals, to which it is ordered that it be transferred. All concur.

DAVIS v. MORGAN.

(Supreme Court of Missouri. February 18, 1889.)

ABATEMENT AND REVIVAL—DEATH OF PLAINTIFF PENDING APPEAL.

Under Rev. St. Mo. 1879, § 97, excepting actions for personal injuries to plaintiff from those actions which may be brought against an administrator after his intestate's death, such a case will be stricken from the docket, where defendant has died pending appeal.

Appeal from circuit court, Scotland county; BEN E. TURNER, Judge.

Action by Lee Davis against Robert G. Shaw for personal injuries. Defendant died pending appeal by plaintiff from a judgment of nonsuit, and John A. Morgan, by consent, was made a party.

McKee & Sayne, for appellant. *Smoot & Pettingill* and *Shelton & Dysart*, for respondent.

SHERWOOD, J. This action was brought for personal injuries caused to plaintiff by the fall of a house owned by Robert G. Shaw. Such proceedings were had in the circuit court as compelled the plaintiff to take a nonsuit, and he has appealed here. During the present term, the death of the defendant has been suggested, and by consent the administrator has been made a party to the action.

The merits of this cause cannot be discussed, since the action was for personal injuries, and judgment for the defendant, who, since appeal taken, has died. The action, by reason of defendant's death, abated, and could not be revived in the name of his administrator. Rev. St. 1879, §§ 96, 97. The maxim *actio personalis moritur cum persona* applies, and our statute, so far as concerns this case, is only declaratory of the common law. *Stanley v. Bircher*, 78 Mo. 245; 1 Chit. Pl. 77, and cases cited. Inasmuch as the action has abated, the cause will be stricken from the docket.

All concur.

ALLEN v. WHITE.

(Supreme Court of Missouri. February 18, 1889.)

1. TAXATION—FORM OF TAX DEED.

Although the form prescribed for tax deeds by 2 Wag. St. Mo. 1873, p. 1205, § 217, is prepared for a single tract, it is no objection to the admission of a tax deed in evidence that it contains 10 different tracts, in 10 different sections, in tabulated and abbreviated form, when no recital or statement prescribed by the form is omitted, and the abbreviations used are expressly authorized by statute. *Id.* p. 1212, § 240.

2. STATUTE OF LIMITATIONS—ADVERSE POSSESSION.

A tax deed was dated and acknowledged December 5, and recorded December 7, 1877, covering land sold October 4, 1875, under a judgment rendered July, 1875, for the taxes of 1874. Defendant purchased from the tax deed holder in 1881, and his deed was recorded August 27, 1881; and April, 1883, defendant went into possession of the land, which was wild prairie land. Ejectment was brought August 2, 1884. Neither plaintiff, nor any other person except defendant, has been in actual possession. *Held*, that the action, not having been commenced within seven years after the record of the tax deed, was barred by the statute of limitations. 2 Wag. St. Mo. 1873, p. 1207, § 221.

3. SAME—EXCEPTIONS.

The statute excepts from the limitation of three years, contained in 2 Wag. St. 1873, p. 1207, § 221, cases "where the taxes have been paid, or the land was not subject to taxation, or has been redeemed as provided by law." The plaintiff did not offer any evidence to bring himself within the exception, except records showing that the land was again sold, October 2, 1876, for the taxes of 1875, and was again purchased by the same purchaser. *Held* proper to exclude the evidence, as it had no tendency to bring plaintiff within any of the exceptions provided by the statute.

4. SAME.

The tax law of March 30, 1872, under which the proceedings were had, was amended, and some of the sections repealed, by the revenue acts of April, 1877; but section 221, prescribing a three-years limitation, was neither amended nor repealed by said acts.

Appeal from circuit court, Harrison county; CHARLES S. GOODMAN, Judge. Ejectment by John M. Allen against William W. White. The court, trying the case without a jury, refused the following instructions, requested by plaintiff: "(2) The back-tax law of 1874, in the Acts of 1874, having repealed that portion of the revenue law of 1872, under which said lands were sold for back taxes in 1875, before the said Joseph F. Bryant had received his tax deed, and before said tax deed was filed for record, said Bryant, or the defendant holding under him, cannot set up the three-years statute of limitation contained in the revenue laws of 1872." (3) If the court believe from the evidence that the said Bryant, or the defendant, did not take actual possession of said lands until April, 1882, the statute of limitation would not begin to run in their favor until they took actual possession of said lands. Judgment for defendant. Plaintiff appeals."

D. J. Heaston, for appellant. Alvord & Woodruff, for respondent.

BRACE, J. This is an action in ejectment to recover possession of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 18, township 66, range 29, in Harrison county. The defendant obtained judgment, and the plaintiff appeals.

1. The petition was in the usual form. The answer was a general denial, with a special plea of the three-years statute of limitations, under section 221, 2 Wag. St. 1872, p. 1207. It is conceded that the title is in the plaintiff, unless it has been divested by a tax deed to Joseph F. Bryant put in evidence by the defendant, and under which he claims. To the introduction of this deed in evidence the plaintiff objected, and its admission by the court he assigns as error, for the reason that it is not in the form prescribed by law, in that it contains 10 different tracts of land, in 10 different sections, and all set out in tabulated and abbreviated form. The form prescribed for tax deeds at the time this one was made is contained in section 217, 2 Wag. St. 1872, p. 1205. The deed is too long to be inserted in this opinion, but upon a careful comparison of it with that form, not a single recital or statement is found to have been omitted. Consequently the authorities cited by plaintiff's counsel in support of this objection are not in point, for this deed is not defective in any of the particulars to which the deeds in the cases cited were subject, nor is it obnoxious to objection for any similar defect. The form, as it appears in the statute, is prepared for a single tract, but it does not follow that more than one tract cannot be included in the same deed. On the contrary, the preceding section (216) of the same act expressly authorizes the collector to "include as many tracts or lots" in one deed of conveyance as may have been purchased by one person, at the same sale, for the same year's taxes, as was the case here; and every abbreviation used in the deed is expressly authorized by statute, (section 240, p. 1212, Id.) while the tabulated form used in the deed simply adds to its clearness and conciseness. When a form is prescribed by statute, it must be substantially followed. It cannot and need not always be literally followed, as the circumstances of the cases to which it is applicable are sometimes necessarily somewhat variant, and no form can be prescribed which in every case can be perfected by simply filling the blanks. The deed, being substantially in the form prescribed by the statute, and complying with all its essential requirements, was "*prima facie* evidence that each and every act and thing required to be done by the provisions of the act had been complied with," (section 219, p. 1206, Id.,) and the court committed no error in admitting it in evidence.

2. The deed was dated and acknowledged on the 5th; filed for record and recorded on the 7th of December, 1877; the land was sold by the collector

on the 4th of October, 1875, under a judgment of the county court rendered at the July term, 1875, for the taxes of 1874. In August, 1881, the defendant purchased and received a deed for the land from Bryant, which was recorded on the 27th of August, 1881, and in April, 1882, he went into actual possession of the premises. Prior to the last date, the land was wild prairie land, unoccupied and unimproved. This suit was instituted on the 25th of August, 1884. The plaintiff, nor any other person except the defendant, having ever been in the actual possession of the premises since the tax deed was put to record, on the 7th of December, 1877, the defendant and his grantor have been in the constructive possession of the premises since that date, and continuously ever since, subject to plaintiff's action of ejectment. Section 222, p. 1207, *Id.*; *Callahan v. Davis*, 90 Mo. 78, 2 S. W. Rep. 216. The present action, not having been commenced for more than seven years after the deed was put to record, is barred by the terms of the statute, unless plaintiff brings himself within the exceptions therein contained. Section 221, *supra*; *Hill v. Atterbury*, 88 Mo. 114. That section excepts, from the limitation of three years, cases "where the taxes have been paid, or the land was not subject to taxation, or has been redeemed as provided by law;" and reserves to the person claiming to own the land, if he be an infant or of unsound mind, the right to bring suit at any time within two years after the removal of such disability. The plaintiff, in rebuttal, did not offer any evidence tending to bring himself within any of these exceptions, or impeaching in any way the validity of the proceedings for the taxes of 1874, but offered in evidence the judgment book of the county court, and the special execution record and report of tax sales, showing that the land was again sold on the 2d of October, 1876, for the taxes of 1875, and was again purchased by Bryant, and a certificate of purchase therefor of that date granted him. To the introduction of this evidence the defendant objected, but his objection was overruled, and the evidence admitted.

The case was tried before the court without a jury, and the plaintiff on this evidence asked the court to declare the law as follows: "(1) If the court, sitting as a jury, believe from the evidence that one Joseph F. Bryant bought the lands in controversy, at tax sale in October, 1875, for the taxes of 1874, and again permitted the lands to be returned delinquent for the taxes of 1875, and sold for such taxes at the tax sale in October, 1876, then said Bryant was not entitled to a deed for said tax sale made in 1875, in 1877, and he could not claim or hold said lands under said tax deed for taxes of 1874, as said tax deed was improperly given to said Bryant."

The court refused to so instruct, the plaintiff excepted, and the court found for the defendant; so its action was equivalent to a rejection of the testimony in the first place, and the error assigned stands as if the court had excluded the testimony when offered, and the plaintiff had saved his exception to such ruling. We do not think, however, that the court committed error in excluding this testimony. It tended in no way to bring plaintiff within any of the exceptions provided for in the statute, or to impair the validity of the deed to Bryant, under which the defendant claimed; and, conceding that section 210, p. 1208, *supra*, is applicable to a case of this kind, the only right that plaintiff acquired by Bryant's action, in suffering the land to be again sold for taxes before the expiration of two years from the date of his first purchase, was to extend plaintiff's right to redeem at any time within two years from the date of that purchase to the right to redeem at any time within two years from the date of Bryant's last purchase, by paying the amount he paid on his first purchase, with 10 per cent. interest, and double the amount paid by him on his last purchase. The two years from the date of the second purchase expired on the 2d of October, 1878, and the plaintiff never redeemed, or offered to redeem. Even if Bryant's deed was prematurely delivered to him, he was entitled to it on that day, all taxes having been paid, and all the time allowed

to the plaintiff to redeem having expired, without even an offer to redeem; and, being of record, the statute would then begin to run in favor of the deed, even if it did not before, and it continued to run in favor of the defendant and his grantor for more than six years before this suit was brought. We find no error in the ruling of the court on this evidence.

8. The law under which the tax proceedings were had in this case, "approved March 30, 1872," was amended, and some of its sections repealed, by the revenue acts of April, 1877; but section 221, p. 1207, *supra*, was neither amended nor repealed by those acts, but was in force when these proceedings were had. Consequently the court committed no error in refusing plaintiff's second instruction. The ruling of the court in refusing the third is sustained by what has already been said.

We find no reversible error in the record, and the judgment is affirmed.

All concur.

FIRST NAT. BANK OF CLINTON v. BRENNNEISEN.

(*Supreme Court of Missouri. February 18, 1889.*)

1. PARTNERSHIP—FIRM AND INDIVIDUAL CREDITORS—ATTACHMENT.

A., being indebted to plaintiff, formed a partnership, and transferred his stock of goods to the firm, and the latter then bought new stocks, with which the old was intermingled. Plaintiff afterwards attached part of the goods in the hands of A., but there was no evidence that the latter had become the owner thereof, as his individual property, or that the partnership had been dissolved, except that of one witness, who had been clerking for the firm. No notice of such dissolution was given, and goods purchased by the firm continued to be received and mingled with the partnership stock. *Held*, that the goods attached by plaintiff were partnership property, and that plaintiff's claim should be postponed to the claims of subsequently attaching creditors of the firm, the latter having become insolvent.

2. ATTACHMENT—APPOINTMENT OF RECEIVER—DISTRIBUTION OF PROCEEDS.

Under Rev. St. Mo. §§ 427, 430, 439, providing for the appointment by the court of a receiver when goods are seized on attachment, and that such receiver shall report his proceedings to the court, and for the proceedings in such cases, the circuit court has power to fix the priorities between several attaching creditors, and distribute the fund arising from the sale of the attached property.

Appeal from circuit court, Henry county; JAMES B. GAUTT, Judge.

The First National Bank of Clinton appeals from a judgment postponing an attachment levied by it on property in the hands of its debtor, C. H. Brenneisen, to attachments by creditors of the firm of Brenneisen & Goff, of which C. H. Brenneisen was a member. Rev. St. Mo. §§ 427, 430, 439, cited in the opinion, provide that in attachment proceedings the court may, on application, appoint a receiver, who shall, when required, report his proceedings to the court, and also provide for the proceedings in such cases, and for granting an appeal from the court's decision.

R. B. Lewis and *W. S. Shirk*, for appellant. *A. Haynie* and *S. E. Price*, for respondent.

BRACE, J. This is a controversy between the plaintiff, who is an individual creditor of C. H. Brenneisen, who is named the respondent, and certain creditors of Brenneisen & Goff, a firm of which the said C. H. B. was a member. The plaintiff, on the 5th of February, 1885, in an action commenced by him in the circuit court of Henry county against C. H. Brenneisen, sued out a writ of attachment, and caused the same on that day to be levied on a stock of goods then in the possession of said Brenneisen, in McBeth's building, in the city of Clinton, in said county. Subsequently a number of the creditors of Brenneisen & Goff, some on the same day, some on the next, and some several days thereafter, in actions commenced in the same court, severally sued out writs of attachment, and caused them to be levied upon the same goods as the property of said firm. Afterwards, on the petition of

the plaintiff and the other attaching creditors, a receiver was appointed, the goods sold, the proceeds received and held by the receiver, subject to the order of the court. In the mean time all the attaching creditors obtained final judgment in their several actions, whereupon the plaintiff filed its motion in said court, praying for an order directing the receiver to pay plaintiff out of the proceeds of the sale of said attached property the amount of his judgment, interest, and costs, as a prior attaching creditor, and at the same time the attaching creditors of the partnership firm of Brenneisen & Goff filed their motion, claiming that the property seized and sold was the property of said firm, and subject to the payment of the partnership debts, to the exclusion of the individual debts of the members of the firm, and praying for an order restraining the receiver from paying out of said proceeds any of the judgments of the individual creditors of the partners until the judgments of the several creditors of the firm of Brenneisen & Goff are fully paid. These motions were submitted and heard at the same time. The motion of the bank was overruled, and the motion of the attaching partnership creditors sustained. The court then proceeded to fix the priorities of the several attaching creditors in the fund in the hands of the receiver, postponing the judgment of the plaintiff to those of the firm creditors, and ordering distribution accordingly. From this action of the court the plaintiff appeals.

The evidence tended to show that prior to February, 1884, Brenneisen & Goff were doing business in partnership; that about that time they dissolved, Goff selling out to Brenneisen; that thereafter, until the following December, they each conducted business on their own individual account; that in July, 1884, Brenneisen contracted the debt to plaintiff, for which it sued out its attachment, and for which it obtained judgment for \$2,621.10; that at the time this debt was contracted Brenneisen's stock of goods was of the value of about \$8,000; that in December, 1884, Brenneisen and Goff again went into partnership, under the firm name of Brenneisen & Goff, each putting into the concern his stock of goods. The value of Goff's stock put in does not appear. The goods were intermingled, and they commenced doing business together under the firm name, and during the following month purchased largely new goods, for which they contracted the debts due to the attaching creditors of the firm, and for which their several judgments were obtained. About the 10th of January, 1885, they started a branch store at Brownington, to which the stock that Goff put in was transferred. The new goods bought were some retained at the Clinton store, in the McBeth building, some sent to the Brownington branch, and some sold in bulk, at a sacrifice, without going into either store. The concern was insolvent when the attachments were levied. The proceeds in the hands of the receiver from the sale of the goods in the Clinton store amounted to \$4,546.

The power of the circuit court on the motion of the plaintiff and all the other attaching creditors, both individual and partnership, of Brenneisen & Goff, to fix the priorities, and distribute the fund *in custodio legis*, arising from the sale at the instance of all the parties, of the same property upon which they had all caused their attachments to be levied, in the hands of the receiver of the court appointed upon their application for that purpose, is, we think, too plain for argument. Rev. St. 1879, §§ 427, 430, 439.

There can be no question that the goods in the McBeth building, in Clinton, upon which the attachments were levied, were at the time the partnership property of the firm of Brenneisen & Goff. Some of them were the old goods of Brenneisen, which he had transferred to the firm when the last partnership was formed, the rest goods that had been purchased by the firm afterwards; but if they had consisted exclusively of goods of the old stock, the plaintiff would have been in no better situation. It had no lien on that stock. The title to it passed to the firm when the partnership was formed, and it became a part of the capital stock of the firm, and there is no evidence that

afterwards Brenneisen became the owner of it, in any way, as his individual property. It is true that one witness, who had been clerking for the firm, testifies that about 10 days before the attachments were levied the partnership was dissolved; but he seems to have been the only person in the world that ever knew it. The partners never spoke of it, nor was any notice of such dissolution ever given. The goods purchased by the firm continued to be received and mingled with the partnership stock, and made away with as before, up to the time the store was closed by the levy of the attachments. And there is not a tittle of evidence that Brenneisen, even by the terms of the dissolution, if there was one, was to have the goods in the Clinton store as his portion of the partnership stock. At best it was a mere naked dissolution of an insolvent partnership, in the effects of which the individual partners had only an interest subject to the right of each partner to have the partnership assets applied to the payment of the partnership debts. The partnership creditors, by the levy of their attachments on the partnership goods, acquired the right to have this equity of each of the partners enforced, and the proceeds of the sale of the partnership goods applied to the payment of the judgments for their partnership debts, before the plaintiff, under his judgment, could claim any of such proceeds by virtue of his prior attachment of the individual interest of one of the partners in the goods. The court so held, and in this there was no error. *Shackelford's Adm'r v. Clark*, 78 Mo. 491; *Julian v. Wrightsman*, 73 Mo. 569; *Phelps v. McNeely*, 66 Mo. 554; *State v. Spencer*, 64 Mo. 355; *Wiles v. Maddox*, 26 Mo. 77; *Story, Partn.* § 360; *Pars. Partn.* 359 *et seq.*

The judgment is affirmed. All concur.

SHARKEY v. KIERNAN *et al.*

(Supreme Court of Missouri. February 18, 1890.)

APPEAL—REVIEW—OTHER SUIT PENDING.

When it appears on the trial of a partition suit that there is a former suit pending on appeal in the supreme court, between the same parties, involving the same land, and adverse claims thereto, the trial court should suspend proceedings until the determination of the controversy in the former suit; and if it proceeds to judgment, and there is an appeal to the supreme court, the latter court will reverse and remand the cause, with directions to await the determination in the former suit.

Appeal from St. Louis circuit court; WILLIAM H. HORNER, Judge.

Suit for partition by Thomas W. Sharkey against Mary Kiernan, Margaret Milham and her husband, Charles Milham, Mary Ellen Hansen and her husband, Charles Hansen, John Sharkey, Annie McDermot and her husband, Thomas McDermot, and Julia Sharkey. Decree for plaintiff. Defendant Julia Sharkey appeals. For opinion on former appeal, see 4 S. W. Rep. 107.

M. F. Taylor and *F. M. Estes*, for appellant. *Frank K. Ryan*, for respondent.

RAY, C. J. This is a suit in partition by plaintiff against defendants, brought to the December term, 1884, of the circuit court of the city of St. Louis, Mo. The petition alleges that plaintiff and defendants are tenants in common of the described real estate as heirs at law of Catherine McLaughlin, who owned the same in fee-simple, and died intestate. On the part of plaintiff testimony was offered tending to sustain the allegation of the petition, and to authorize the decree, from which only one of the defendants, to-wit, said Julia Sharkey, has appealed.

At the trial said Julia Sharkey, in her own behalf, offered in evidence, without objection, the judgment and proceedings had in a certain other cause instituted by her as plaintiff in June, 1883, in the said circuit court of St. Louis, against this plaintiff and her co-defendants in this suit; the object of which

was to vest in her the title to the whole property involved in this partition suit, under a parol agreement alleged to have been made by one James McLaughlin and his wife, Catherine McLaughlin, in the life-time of the husband, and by said Catherine after the death of the said husband, the purport of which was, in brief, to adopt the said Julia Sharkey as their child, and to leave her their said property at their death. To the petition of said Julia Sharkey in said former suit the present plaintiff, Thomas Sharkey, and said Annie McDermot, although personally served, made no appearance, and judgment was taken by default against them. Other defendants in the former suit, being also co-defendants with said Julia Sharkey in the present suit in partition, did appear in said former suit in equity, and filed a demurrer to the petition therein upon the ground (so far as it is necessary to now state) that the same did not state facts sufficient to constitute a cause of action; which demurrer was sustained, and final judgment entered thereon in favor of the defendants so demurring, and at the same time the judgment by default was made final as to the defendants not appearing, one of whom was, as we have seen, Thomas Sharkey, the plaintiff in this suit in partition. From the judgment sustaining said demurrer, so interposed by some of the defendants as aforesaid, said Julia Sharkey prosecuted her appeal to the St. Louis court of appeals, where the judgment was affirmed, and then to this court, where—as both parties, in their respective briefs in this court, concede—the judgments, both of said circuit court and said St. Louis court of appeals, were reversed, and the cause remanded; this court there holding that the petition contained and set forth a good cause of action, and such as, if proved, would entitle the plaintiff to a specific performance of the said alleged parol agreement. *Sharkey v. McDermott*, 91 Mo. 647, 4 S. W. Rep. 107.

Upon this state of the record, the parties here claim and urge conflicting theories (1) as to the force and effect of the judgment by default, made final at the hearing of the former suit between these parties; and (2) as to the force and effect of the judgment of reversal and remanding by this court, on appeal, by plaintiff in said prior suit,—the one party claiming a reversal and remanding in this partition suit, by reason of said judgment by default in the former suit, and the other asking an affirmance, on account of the judgment of reversal and remanding, subsequently obtained in this court, on appeal by plaintiff in former suit.

From the view we have taken of this record, and the questions arising thereon, we deem it unnecessary and unadvisable at this time to consider or pass upon these conflicting propositions. When it was made to appear, in the progress of the trial of the partition suit in the court below, that there was a former suit still pending on appeal to the supreme court, between these same parties, in reference to these same lands, and involving adverse claims of title thereto, the proper thing for the trial court to have done, under the facts of the case, was to suspend all further proceedings in the partition suit until the determination of the controversy in the prior suit.

In order, therefore, to avoid all further complications, and the possible infliction of irreparable loss to one or the other of these litigants, we deem it all the more important, and also agreeable to law, that this court shall, in effect, do, as far as possible, what the trial court should have done; and to that end the judgment of the lower court in this partition suit is reversed, and the cause remanded, with directions to await the determination of the controversy in the former suit, which, in the absence of anything appearing to the contrary, we may fairly presume is still pending in the court below, since its reversal and remanding, on appeal to this court as aforesaid; and it is accordingly so ordered. Section 3776, Rev. St. 1879.

BLACK, J., concurs; SHERWOOD and BRACE, JJ., in the result. BARCLAY, J., not sitting.

COLE COUNTY v. SCHMIDT.

(Supreme Court of Missouri. March 4, 1889.)

1. COURTS—JURISDICTION OF COUNTY COURT—SETTLEMENTS WITH COUNTY TREASURER.

Under the provisions of Rev. St. Mo. 1879, §§ 5378, 5380-5383, relating to settlements by the county treasurer with the county courts, and the power of said court to enforce such settlements, the county court has exclusive jurisdiction of a proceeding by the county against the executrix of a deceased treasurer to enforce a claim due to the county, the proceedings not being on the bond; and the probate court has no jurisdiction of such case.

2. COUNTIES—ACTION AGAINST DECEASED TREASURER'S ESTATE—PARTIES.

Such proceeding must be instituted in the name of the deceased county treasurer's successor in office, who alone has authority to receive, keep, and disburse the moneys of the county, under Rev. St. Mo. 1879, § 536.

3. SAME—DEATH OF TREASURER—DEMAND OF SETTLEMENT.

Under Rev. St. Mo. 1879, § 5378, requiring that the county treasurer shall settle his accounts with the county court semi-annually, and, if he die, his executor or administrator shall immediately make such settlement, the estate of a deceased treasurer is not in default until notice to make such settlement is served on the executrix; and until such notice the county court has no authority to make the settlement.

4. SAME—ACCOUNTING BY COUNTY COURT.

Section 5378 provides that the county court shall ascertain by actual examination and count the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund it appertained, and cause to be spread on its records, in connection with the entry of settlement, the result of such examination and count. In a proceeding by a county against the estate of its deceased treasurer to recover a claim alleged to be due to the "county interest fund," the evidence showed that the course prescribed by the statute as to what fund the claim belonged was not pursued. *Held*, that the proceeding could not be sustained.

Appeal from circuit court, Cole county; E. L. EDWARDS, Judge.

Proceeding instituted by Cole county against Kunigunda Schmidt, executrix of Frank Schmidt, late treasurer of the county, to recover a balance of \$1,646.79 due to the "county interest fund." Judgment for defendant. Plaintiff appeals.

Smith, Silver & Brown, for appellant. *Edwards & Davison*, for respondent.

SHERWOOD, J. This proceeding was instituted in the probate court of Cole county against the estate of Frank Schmidt, deceased, late treasurer of that county. The claim was based on an alleged balance of \$1,646.79, claimed to be due by the estate of Schmidt to the "county interest fund."

1. The statute concerning the county treasurer provides that: "Sec. 5378. He shall settle his accounts with the court semi-annually, at its first and third regular terms in each year; and at the end of his term, or if he resign, or be removed from office, he, or, if he die, his executor or administrator, shall immediately make such settlement, and deliver to his successor in office all things pertaining thereto, together with all money belonging to the county; and at each settlement the court shall immediately proceed to ascertain, by actual examination and count, the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its record, in connection with the entry of such settlement, the result of such examination and count." Section 5380 has the following: "If any person thus chargeable shall neglect or refuse to render true accounts, or settle, as aforesaid, the court shall adjust the accounts of such delinquent according to the best information they can obtain, and ascertain the balance due to the county." Section 5381 provides that "in such case the court may refuse to allow any commissions to such delinquent, and shall, moreover, require him, without delay, to pay into the county treasury the balance found due, as aforesaid." And section 5382, specifies that the money thus ascertained to be due is to be paid by the delinquent into the

county treasury, and, in default of so doing, section 5383 provides for judgment to be entered against him for the amount due, with 30 per cent. per annum until paid, and that execution issue, etc., unless he appear at the first day of the next term after the settlement, and show good cause for setting the same aside. Section 5384 provides that upon good cause being shown the settlement may be set aside, the accounts re-examined, and the penalties remitted; and section 5385 requires the county clerk, upon being thereto ordered, to make out an abstract of the judgment rendered, and file the same in the office of the clerk of the circuit court; whereupon, as the next section declares, such abstract shall have the same lien on the real estate of the delinquent, etc., as would a judgment of the circuit court.

When these specific, summary, and highly penal provisions are considered; when it is considered that the county court with whom the officer has been accustomed to deal in his official capacity is possessed of the records and papers relating to the business in hand, (records and papers possessed by no other court;) when it is considered that such a judgment as here provided would, according to our rulings in similar cases, be conclusive on the sureties of the official who has failed to settle, (*State v. Creusbauer*, 68 Mo. 254, and cases cited;)—the opinion is entertained that, as to the officer, if living, or if dead, the county court (when the proceeding is not on the bond) is the only tribunal authorized by the law to take jurisdiction of the case; and this upon the principle of the maxim *expressio uni est exclusio*, etc., and that "affirmative specification excludes implication." *McGuire v. Association*, 62 Mo. 344; *Ex parte Snyder*, 64 Mo. 58; Dwar. St. 655, and cases cited; Broom, Leg. Max. (8th Ed.) 651, and cases cited; *Matthews v. Skinner*, 62 Mo. 329. And this view is further strengthened by the provisions of section 1087, Rev. St. 1879, giving to all courts "power to issue all writs which may be necessary in the exercise of their respective jurisdictions," etc. *Yeoman v. Younger*, 83 Mo. 424.

There are peculiar reasons which will readily suggest themselves why a tribunal situated as is the county court, and having under its control the finances of the county and of the officers in charge of the county funds, should have the fullest and most ample jurisdiction over such officers; a jurisdiction which should not be shared with any other tribunal until the powers mentioned in the sections already quoted have been fully exercised. Such appears to have been the intention of the legislature in enacting such statutory provisions.

2. But if it be granted that the probate court had jurisdiction in this case, still the action of the circuit court may well be upheld on the ground that the proceeding was not instituted in the name of the then treasurer, Tanner. He, and he alone, was treasurer, and had authority to receive, keep, and disburse the moneys of the county, (Rev. St. 1879, § 536; and the county court had ordered him, in that capacity, to take charge of the funds in question. In *Arkansas, Haynes v. Builer*, 30 Ark. 69, *Hummicutt v. Kirkpatrick*, 39 Ark. 172, it has been ruled under the provisions of a similar statute that the succeeding treasurer is the proper party to bring suit for moneys remaining in the hands of his predecessor; and this upon the grounds that under the law he is entitled to the possession of all county funds; that under the Code he is the real party in interest, and under the principle that all public officers, though not expressly authorized, have a capacity to sue commensurate with their public trusts and duties. *Supervisors v. Stimson*, 4 Hill, 186; *Overseers v. Overseers*, 18 Johns. 407; *Todd v. Birdsall*, 1 Cow. 260. Under a statute which required that if any administrator should die, resign, or his letters be revoked, he or his legal representatives should account for, pay, and deliver to his successor, etc., all money, etc., found to be due upon final settlement from such outgoing or deceased administrator. And upon this statute it was ruled that the administrator *de bonis non* was the only proper party to sue for the assets of the estate. *State v. Dulle*, 45 Mo. 269; *State v. Hunter*, 15 Mo. 490; *State v.*

Fulton, 35 Mo. 823. It will be observed that the statute just referred to very closely resembles the provisions of section 5378, *supra*. For the reason aforesaid it must be ruled that Tanner was the only party who had the legal capacity to sue.

3. But the estate of Frank Schmidt was not in default until notice was duly given to come forward and settle with the county court as provided by section 5378, *supra*. Until such notice was duly served, the county court had no right, power, or authority to make any settlement of the matters in controversy with Kunigunda Schmidt, the executrix. This necessity of notice prior to passing upon a man, either in person or estate, is among the fundamentals of the law, and has been recognized by this court as often as it has been raised, and it cuts no figure that the statute, in providing for adjudication, does not in terms require notice to be given; for the law, in such cases, will always imply notice as indispensable to the acquisition of jurisdiction over the person or the estate. *Laughlin v. Fairbanks*, 8 Mo. 367; *Wickham v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152; *Wells, Jur.* § 82; *Ray Co. v. Barr*, 57 Mo. 290. It follows from the premises that, the executrix not having been served with notice, the action of the county court in making a settlement without such notice was wholly unwarranted, and that the settlement thus made was no evidence of the facts which the alleged settlement, so made, contained.

4. Aside from other points already discussed there is this final one, which of itself must be regarded as fatal to the plaintiff's case: The claim in suit is based on a balance due by the deceased treasurer to the "county interest fund," though no settlement was ever made or balance struck in the only method and before the only tribunal known to the law for that purpose. But the evidence, considered as a whole, did not correspond with the allegations in respect of the claim made. As will have been observed, section 5378, *supra*, provides that the county treasurer shall settle his accounts with the court semi-annually, "and at each settlement the court shall ascertain, by actual examination and count, the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund or funds it appertains, and cause to be spread on its records, in connection with the entry of such settlement, the result of such examination and count."

Now, according to the witness Judge Stampfli, this was not the course pursued. He says: "In ascertaining the balance, the county court did not know exactly to what fund the balance was due, and we just concluded this, as we had plenty of money in the interest fund, that we could better spare the money from that fund than any other, and we just charged it up to this fund." And Grimshaw, the county clerk, to whom the law confides the duty of keeping the accounts between the county treasurer and the county, testifies: "Frank Schmidt's estate is indebted to the county, or its county interest fund, in the sum of \$1,646.79." It will thus be seen that the charge made that the estate of deceased treasurer is indebted to the "county interest fund" is wholly unsupported by the facts in evidence. A case strongly analogous to the one at bar is presented in that of *State v. Roberts*, 62 Mo. 888, where a similar objection was successfully urged in a suit on the bond of a sheriff, it being impossible to tell to which account a supposed balance belonged. There exists no authority in the county court to transfer a balance due one county fund to another, except in one instance, and that is where such balance is no longer needed for the purpose for which it was raised, when the county court may make the transfer by order entered of record, directing said balance to be transferred to the credit of the general revenue fund, etc. Rev. St. 1879, § 5392.

Holding these views results in affirming the judgment.

All concur, except BARCLAY, J., not sitting.

BLODGETT v. PERRY.

(Supreme Court of Missouri. March 4, 1889.)

1. EXECUTION—ISSUANCE—RETURN—PRESUMPTION AS TO SHERIFF.

Under Rev. St. Mo. 1879, § 2338, an execution may issue returnable, at plaintiff's option, either to the first or second term after its issuance; and, in the absence of a showing to the contrary, it will be presumed that the sheriff who sold under the execution complied with the law.

2. ESTOPPEL—IN PARS.

A plea in ejectment that plaintiff was attorney for the creditor in an attachment suit against P.; that defendant claims under one S., and has acquired all of his rights in the premises; that S. was the purchaser at the sale under the attachment proceedings, and purchased relying upon the acts of the creditor in attaching and selling the property, as a declaration that P. was, and that the creditor was not, the owner of the property; and that plaintiff acquired his deed from the creditor with notice, etc.,—does not contain a single element of an estoppel *in parte*.

3. SAME.

Evidence to support such plea, which shows that S. bought at the sale, relying not upon the act of the creditor in having the sale made, but upon the advice of his own counsel that his purchase would be good, as the sale under that execution would bar and estop the creditor from asserting title under any former deed, is equally foreign to the notion of an estoppel.

4. EXECUTION—SHERIFF'S DEED—EX PARTE JUDGMENT.

Many years after the death of S., who had never received a deed from the sheriff for the land purchased by him at the sale, defendant instituted an *ex parte* proceeding against the sheriff, and without any notice to plaintiff, who claimed under an earlier conveyance, obtained an order directing the sheriff to execute a deed to defendant as assignee of S. Held, that the deed so executed was of no force whatever, as against plaintiff.

Appeal from circuit court, Johnson county; NOAH M. GIVAN, Judge.

Ejectment by Wells H. Blodgett against Nathan W. Perry. Judgment for defendant, and plaintiff appeals.

S. P. Sparks and *H. S. Priest*, for appellant. *Cockrell & Suddath*, for respondent.

SHERWOOD, J. Ejectment for certain land in Johnson county. Both parties claim title under Amos M. Perry, the former owner. Action brought January 22, 1885.

1. The agreed statement of facts shows that the Union Bank of Missouri was the creditor of Amos M. Perry, and the purchaser of his interest at execution sale; that the Union National Bank of St. Louis is the successor of the former bank as to all rights, interest, etc. The plaintiff claims under a quitclaim deed made by the latter bank to him, October 22, 1884, and filed for record November 1st next thereafter. The sheriff's deed to the Union Bank is dated October 20, 1866, and filed for record October 22, 1870. To this deed objection is made that it shows that the special execution therein mentioned was issued September 5, 1865, delivered to the sheriff on the 15th of that month; but that no sale thereunder occurred till April 17, 1866, long after the return-day of the writ, and that, therefore, the sale was void. To this objection it may be replied that, under the law as it then stood and now is, executions might have issued, and may issue, returnable, at the option of the plaintiff, either to the first or the second term after such issuance, (Rev. St. 1879, § 2338;) and, in the absence of aught to the contrary, it will be presumed that the clerk who issued, and the sheriff who sold under the execution, obeyed the dictates of duty, and complied with the law. The indulgence of such presumptions is of common occurrence, and of daily recognition in the courts. *Long v. Joplin*, 68 Mo. 422, and cases cited; *Addis v. Graham*, 88 Mo. 197; *Hammond v. Gordon*, 93 Mo. 223, 6 S. W. Rep. 93.

2. Now, as to the plea of estoppel *in parte*, or equitable estoppel, as set forth

in the answer. The gist of the plea is that plaintiff was the attorney for the Union Bank in the attachment suit instituted by the bank against Amos M. Perry, in 1870; that defendant claims under one Shumate, and has acquired all of Shumate's rights in the premises by proper conveyances; that Shumate, under the sale made by virtue of the attachment proceedings aforesaid, bought the premises in controversy, relying upon the acts of the bank in attaching and selling under execution said property as that of Amos M. Perry, as a declaration and admission of the bank that it was not, and Amos M. Perry was, the owner of said real estate, purchased the same, and paid therefor, and this defendant, as his assignee, has received a deed from the sheriff for said land; and that plaintiff had acquired his deed with notice, etc. This plea is plainly bad on its face. It does not contain within its allegations a single element of estoppel. It is not alleged that Shumate was misled by any act of the Union Bank, or of plaintiff, or that he was in ignorance of the true state of the title, or that the former deed to the Union Bank was not put on record, or that the act of the Union Bank induced Shumate to buy the land, which otherwise he would not have bought.

An eminent text writer, treating of the subject of equitable estoppels, says: "The cases, when carefully analyzed, show that all of the following elements must actually or presumably be present in order to an estoppel by conduct: (1) There must have been a false representation or a concealment of material facts; (2) the representation must have been made with knowledge of the facts; (3) the party to whom it was made must have been ignorant of the truth of the matter; (4) it must have been made with the intention that the other party should act upon it; (5) the other party must have been induced to act upon it." *Bigelow, Estop.* (3d Ed.) 484.

In *Dezell v. Odell*, 3 Hill, 215, COWEN, J., says: "We then have a clear case of an admission by the defendant intended to influence the conduct of the man with whom he was dealing, and actually leading him into a line of conduct which must be prejudicial to his interests, unless the defendant be cut off from the power of retraction. This I understand to be the very definition of an 'estoppel in pais.' " Nor will mere silence, or some act done, where the means of knowledge are equally open to both parties, estop the party doing the act or remaining silent.

Thus, in *Brinkerhoff v. Lansing*, 4 Johns. Ch. 63, Lansing was a mortgagee, whose mortgage was duly recorded, and he witnessed a lease made by his mortgagor of a part of the mortgaged premises; and it was ruled by Chancellor KENT that no estoppel arose by reason of the fact of the registry of the mortgage, the lessee being charged with constructive notice of it. Similar rulings have been made elsewhere. *Odlin v. Gove*, 41 N. H. 479; *Carter v. Champion*, 8 Conn. 554; *Bigelow v. Topliff*, 25 Vt. 273. The same doctrine has been recognized by this court. *Bales v. Perry*, 51 Mo. 449, and cases cited; *Acton v. Dooley*, 74 Mo. 63, and cases cited.

Furthermore, there must be a certainty about the alleged estoppel. The misrepresentation must be plain, not doubtful, or matter of mere inference or opinion; for the courts will not suffer a man to be deprived of his property or security where he had no intention to part with it. It is much the same thing to say that the representation or conduct is such as would naturally lead to the action taken; that is, it should be such as to justify a prudent man to act upon it. *Bigelow, Estop.* (3d Ed.) 490, 491. Tested by these authorities, and the rule they enunciate, the plea was wholly worthless.

8. And the evidence to support the plea of estoppel is of a piece with it, since it is clear that Shumate was acting under and relying, not on the act of the bank in having the sale made, but upon the advice of his counsel, F. H. Cockrell, that his purchase under the second execution would be good, as the sale made thereunder would bar and estop the bank from asserting title under any former deed to the latter.

4. Nor is it seen that the case of the defendant is strengthened by the fact that the plaintiff's name is marked to the petition as counsel with Elliot and Land, since his uncontradicted testimony shows that he was not counsel for the bank; that Land was, and that plaintiff's name was signed merely as an accommodation to Land.

5. Something has been said about plaintiff's agreeing to the sale in question; but there is not a *scintilla* of evidence tending to show this to be true, granting it to be material. That he was present at or near the sale is indeed testified to; that he was seen to converse with Land is also testified to; but that he agreed to the sale, or the terms upon which Shumate bought, no one swears.

6. Shumate died in 1875. Prior to his death, however, and prior to the execution sale to him, to-wit, December 19, 1870, Amos M. Perry had conveyed by quitclaim to the defendant the premises in dispute. No deed was ever made to Shumate for the premises. About nine months after the present action was begun, however, and some fifteen years after Shumate's death, the defendant instituted in the Johnson circuit court a decidedly unique proceeding,—a proceeding wherein the said defendant appears as plaintiff, and the former sheriff as defendant, and wherein it is gravely recited that "due notice" of the motion was given to the defendant, *i. e.*, to the former sheriff; whereupon, after numerous recitals of facts, it was ordered by the court that said former sheriff execute a deed to the present defendant as assignee of Shumate. Of this proceeding—one without notice to plaintiff, a purely *ex parte* proceeding—it is scarcely necessary to say more than that there yet remains in this country a certain instrument, commonly called a "constitution," which forbids a man to be passed upon either in person or estate without an opportunity to be heard. The deed, therefore, though made under the order of the court, passed no title to defendant as against plaintiff, and was as to him utterly worthless; saying nothing about the great laches exhibited by defendant, and those under whom he claims, in coming forward and asserting any right which it may be supposed was acquired by Shumate at the sheriff's sale, as to which point see *Hoge v. Hubb*, 94 Mo. 489, 7 S. W. Rep. 443.

7. Furthermore, as no title to lands sold at sheriff's sale passes except upon delivery of the deed, (*Leach v. Koenig*, 55 Mo. 451.) Shumate had no such interest in the premises as could be the subject of administrator's sale, and consequently Crittenden & Cockrell took nothing by their purchase, and, of course, could transfer nothing to the defendant; and the deed of the former sheriff to the defendant was, as already seen, invalid as to the plaintiff. So that the defendant occupies the attitude of a stranger to the title attempting to invoke against the plaintiff an equitable estoppel; something which cannot be done.

8. Moreover, the plaintiff bought of the successor of the Union Bank the premises in question about 14 years after Shumate had bid in the land, but had failed to take a deed. From the great lapse of time without a deed having been taken, plaintiffs might well conclude that Shumate, and those claiming under him, had abandoned all claim to the premises in litigation. It follows from what has been said that a peremptory declaration of law in favor of plaintiff, as asked, should have been given.

The judgment is reversed, and judgment will be entered in this court for plaintiff.

All concur, except BARCLAY, J., not sitting.

FLANNERY v. KANSAS CITY, ST. J. & C. B. RY. CO.

(Supreme Court of Missouri. March 4, 1889.)

APPEAL—PRACTICE—BILL OF EXCEPTIONS—WAIVER OF DEFECTS.

On appeal to the Kansas City court of appeals, appellant filed a transcript containing a bill of exceptions, from which the signature of the judge was omitted by mistake; the original bill being signed. Rule 15 of said court requires the appellant to file a transcript and a brief, copies of which must be furnished respondent, who must furnish appellant with his brief and such further abstract as he may deem necessary. The abstract of appellant (no counter-abstract being filed by respondent) stated that a bill of exceptions had been filed, and no objection to such statement was made by respondent, and no point thereon was made in his brief or argument, but he treated the case as if the bill had been duly taken. The record recited that the bill was duly signed by the judge, and was made a part of the record. Held that, by his failure to file a counter-abstract, or to make any objection to the absence of the judge's signature in his brief or argument, respondent waived his right to take advantage thereof.

Certified case from the Kansas City court of appeals.

Strong & Mosman and *Ellison & Edwards*, for appellant. *C. W. Freeman*, for respondent.

BRACE, J. At the March term, 1886, of the Kansas City court of appeals a decision was rendered in this case reversing the judgment of the circuit court of Platte county, wherein one of the judges of said court sitting in the case delivered a dissenting opinion, in which he says: "In this case, what purports to be a bill of exceptions has been considered by a majority of the court as a bill of exceptions proper, because it has been so considered by the counsel on either side. The fact is, the paper purporting to be a bill of exceptions is not signed by the judge of the trial court, and therefore is not a part of the record in the case. * * * I deem the decision in this case contrary to the decisions in *State v. Jones*, 58 Mo. 506, and *Smith v. Railway Co.*, 55 Mo. 601, and the case should be certified to the supreme court." It was accordingly so certified. Since the case has been in this court, a certificate of the clerk of the circuit court of Platte county has, by agreement, been filed herein, showing that the original bill of exceptions was duly signed by the judge of the circuit court. The omission of his signature in the transcript was a clerical inadvertence. The majority of the court of appeals, in reply to the dissenting opinion, say: "* * * By rule 15 of this court it is provided, in substance, that in all cases the appellant or plaintiff in error shall file with the clerk of this court, on or before the day on which the cause is docketed, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order the points or legal propositions relied on, with citation of authorities, etc. The rule then provides that copies of this abstract shall be furnished to the opposite party, who shall within eight days thereafter deliver to the appellant or plaintiff in error a copy of his brief in response, with briefs and points relied on, 'and any such further abstract of the record as he may deem necessary,' and shall file with the clerk said briefs, etc., before the hearing of the cause. Under this rule this court has repeatedly and uniformly held that where respondent or defendant in error does not file any additional abstract, we will accept that of the appellant or plaintiff in error as containing a correct statement of the record, and we will not go behind the abstract. * * * The appellant in this case complied with this rule. The respondent filed no counter-abstract controverting the correctness of appellant's abstract in the particular in question. The abstract expressly states, on page 23, that thereupon, in due time, the defendant (appellant) filed its bill of exceptions. This was accepted as correct in considering the case. * * * The respond-

ent made no objection to this recitation in the abstract, and no point thereon in his brief and argument, but throughout has treated this case as if the exceptions were duly taken and saved. * * * The record recites that the bill of exceptions was duly presented and signed by the judge, and is made a part of the record. It is quite clear that the omission of the judge's name at the bottom of the bill of exceptions is a mere clerical mistake in transcribing the record by the circuit court clerk, and had the respondent made any question as to this fact in his brief in response, as he should have done, if any advantage is to be taken thereof, the probabilities are that the whole matter would have been rectified by appellant by asking for a *certiorari*, unless respondent had consented to treat the case as if the judge's signature was appended to the bill of exceptions."

It is unnecessary to recite the cogent reasoning of the majority of the court in support of its position. Its correctness is obvious, and in harmony with the practice in this court under a similar rule. Rules 15 and 16, consolidated, April term, 1884. There is nothing in this ruling in conflict with the decision in *State v. Jones*, 58 Mo. 506, or in *Smith v. Railroad Co.*, 55 Mo. 601, in which it is held that the signature of the judge is essential to a bill of exceptions to make it a part of the record. The suggestion that there is such conflict is fully met in the opinion of the majority, in the following extract: "We are all agreed that a bill of exceptions must be signed by the judge before it is entitled to record; but the question here is one of practice, under the rules of this court, as to what is evidence of what the record does contain. The rule says the abstract on which the parties have agreed. The parties surely could come into this court and stipulate that while the transcript sent up here, through mistake of the clerk, omitted the signature of the judge, as a matter of fact the bill of exceptions was signed by the judge, and this court would accept this as correct, and dispose of the case accordingly without *certiorari*. The effect of the respondent's silence, and treating the case as if the bill of exceptions as stated in the appellant's abstract was regular, is equivalent to such stipulation." In harmony with this ruling are the cases of *Snyder v. Hopkins*, 39 Mo. 418, and *Disse v. Frank*, 52 Mo. 551, which hold that a case cannot be by agreement submitted to the court on the record, without abstract, brief, statement, assignment of errors, or joinder; the sense of the whole matter being that while the parties can agree upon what is in the record, the court will recognize and act on such agreement. It will not recognize and act on an agreement that the court may find out for itself what is in the record. To obviate the necessity of its doing so is the purpose for which the rule was made.

It is not suggested that the appellate court, in its ruling on the merits, committed error, nor do we discover any. The judgment of the court of appeals, reversing the judgment of the circuit court of Platte county, is therefore affirmed.

All concur.

MASONIC MUT. BEN. SOC. v. LACKLAND *et al.*

(*Supreme Court of Missouri. March 4, 1889.*)

1. EVIDENCE—HEARSAY—RESULTS OF EXAMINATION OF ACCOUNTS.

Where evidence is the result of voluminous facts, or of the inspection of many books and papers, the inspection of which cannot conveniently take place in court, or where a witness has inspected the accounts of parties, though not allowed to give evidence of their particular contents, he will be allowed to speak of the general balance or result of such examination, and such statement is not hearsay.

2. TRIAL—OBJECTIONS TO EVIDENCE.

When the exhibit or tabulated statement, this being the result of the examination made by the witness, an accountant, from which witness testified as a memorandum, was offered in evidence, it was objected to as incompetent, etc. *Held*, that the objection was worthless, because not specific.

Appeal from St. Louis circuit court; W. H. HORNER, Judge.

Action by the Masonic Mutual Benefit Society against Rufus J. Lackland and George S. Drake, executors of Gerard B. Allen and others, on the bond of Luke, who was secretary of plaintiff association; Gerard B. Allen and Edwin Harrison being his sureties. Judgment for plaintiff. Defendants appeal.

Krum & Jonas, for appellants. *Boyle, Adams & McKeighan, A. C. Stewart*, and *S. B. Jones*, for respondent.

SHERWOOD, J. Action on the bond of Luke, who was secretary of the association; Gerard B. Allen and Edwin Harrison being his sureties. By way of avoidance of the bond, the defendant sureties pleaded that prior to its execution Luke had been a defaulter to the association; that this fact was well known to the executive committee and the officers of plaintiff; but that such knowledge was not communicated to said defendants, and they were allowed to become bondsmen in ignorance of such material and damaging facts. Issue was joined on this plea, and the cause was referred to Alexander Martin to try all of the issues. After hearing the testimony, he made his report and finding in favor of the plaintiff. This report was confirmed by the circuit court, resulting in a judgment in plaintiff's favor, and the defendants have appealed to this court. About the fact of the defalcation upon which defendants were sought to be held liable there was no real contest. The evidence seems to fully sustain the finding of the referee that prior to the giving of the bond in suit there was no misconduct on the part of the principal in the bond, or at least knowledge of it on the part of the association or its officers. Objection was made to the accountant, Spinney, testifying as to his examination of the books and papers in the office of plaintiff. The books, packages of vouchers, etc., were present at the examination, and were used from time to time by counsel on both sides. There is no rule in the law of evidence better settled than that where the evidence is the result of voluminous facts, or of the inspection of many books and papers, the examination of which cannot conveniently take place in court, or where a witness has inspected the accounts of the parties, though not allowed to give evidence of their particular contents, he will be allowed to speak of the general balance or result of such examination, and such statement is not hearsay. 1 Greenl. Ev. (14th Ed.) § 98, and cases cited. The case of *Ritchie v. Kinney*, 46 Mo. 298, does not militate against this view. Besides, the exhibit or tabulated statement, this being the result of the examination made by the accountant, and from which he testified as *memoranda*, when offered in evidence, was only objected to in a general way as incompetent, etc. Such an objection was worthless, because not specific. *Margrave v. Ausmuss*, 51 Mo. 561. Moreover, the witness was asked by counsel for plaintiff the following questions: "Question. Can you give the total amount collected according to these vouchers or *memoranda* and agents' reports from May 15, 1879, to October 1, 1881? Answer. According to the vouchers, \$354,464.99. Q. What is the total amount collected as by the cash-book? A. \$348,634.60. Q. What is the difference? A. \$5,830.39." This is the amount found by the referee. These questions, being asked and answered without objection from defendant's counsel, would have cured any supposed error, if error there had been in the former part of Spinney's examination.

Finding no error in the record, the judgment will be affirmed.

All concur.

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NOTE. A star (*) indicates that the case referred to is annotated.

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ABATEMENT AND REVIVAL.

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1. An action for breach of contract of marriage is an action "affecting the character of the plaintiff," within the meaning of Code Mill. & V. Tenn. § 8580, providing that no civil action commenced, except actions for wrongs affecting the character of plaintiff, shall abate by the death of either party; and such action does not survive against the administrator of the promisor.—*Weeks v. Mays*, (Tenn.) 771.

Pending appeal.

2. Under Rev. St. Mo. 1879, § 97, excepting actions for personal injuries to plaintiff from those actions which may be brought against an administrator after his intestate's death, such a case will be stricken from the docket, where defendant has died pending appeal.—*Davis v. Morgan*, (Mo.) 881.

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libel, see *Libel and Slander*.
negligence, see *Carriers*, 5-18; *Death by Wrongful Act*; *Highways*, 2; *Master and Servant*, 7-10; *Negligence*; *Railroad Companies*, 14-26; *Telegraph Companies*, 1-7; *Turnpikes and Toll Roads*, 2.

price of goods sold, see *Sale*, 2-4.

Joinder, see *Animals*.

On insurance policy, see *Insurance*, 6, 7.

promissory note, see *Negotiable Instruments*, 8, 4.

Particular forms, see *Creditors' Bill*; *Ejectment*; *Partition*; *Trespass*; *Trespass to Try Title*; *Trover and Conversion*.

Parties, see *Parties*.

Pleading, see *Pleading*.

To set aside fraudulent conveyance, see *Fraudulent Conveyances*, 11-14.
try tax-title, see *Taxation*, 31-33.

Venue, see *Venue in Civil Cases*.

Joinder of causes.

Under the Code system, a simple contract creditor may in the same action recover a judgment for the indebtedness, and have set aside a fraudulent conveyance by the debtor to a co-defendant.—*Shirley v. Waco Tap K. Co.*, (Tex.) 548.

Adjournment.

See *Continuance*.

Administration.

See *Executors and Administrators*.

Admissions.

See *Evidence*, 5, 8.

ADULTERATION.

Indictment.

1. An information under Willson's Crim. St. Tex. § 650, charging that defendant "did unlawfully and knowingly offer for sale" adulterated milk, is not open to the objection that

it does not charge that defendant knew that the milk was adulterated.—*Sanchez v. State*, (Tex.) 756.

Evidence.

2. A conviction cannot be sustained where the record shows no proof that defendant knew the milk was adulterated, or that he offered it for sale, though impure milk was found in his possession at the usual time in the day for peddling milk.—*Id.*

3. Conviction for knowingly offering for sale adulterated food will be reversed where there is no evidence either that defendant knew the food was adulterated, or that he offered it for sale.—*Cantee v. State*, (Tex.) 757.

ADVERSE POSSESSION.

See *Lts Pendens*, 1, 2.

Boundary agreed on, see *Boundaries*, 3, 4.

Defense to ejectment, see *Ejectment*, 6-8.

Title to support ejectment, see *Ejectment*, 1.

What constitutes.

1. Possession of land for school purposes for such length of time each year as school is taught may be regarded as actual, continuous, and adverse, so as to give title if continued for the statutory period.—*Singleton v. School-Dist. No. 84*, (Ky.) 798.

2. Adverse possession, to be available, must have been continuous for the statutory period; Rev. St. Tex. art. 8198, defining adverse possession to be an actual and visible appropriation commenced and continuous under claim of right, etc.—*Holstein v. Adams*, (Tex.) 560.

3. Possession resumed by a grantor cannot be held to be under color of his original grant, and his claim under the statute of limitations is restricted to the limits of his actual occupation, unless they embrace less than 640 acres, and his title by adverse possession matures before Rev. St. Tex. took effect, in which case he is restricted to 640 acres, including his improvements as occupied. If such title matures after the Revised Statutes took effect, he is restricted to 160 acres, unless a larger area is inclosed. Rev. St. Tex. art. 8198.—*Bullock v. Smith*, (Tex.) 687.

4. Where a part of a single uninclosed tract is sold, and the grantee fails to pay the purchase price, and abandons possession and claim of right, the grantor's possession of the remainder of the tract, and his exercise of acts of ownership over the part sold, are constructive possession of that part, under Rev. St. Mo. 1879, § 8228, providing that the possession of a part of a tract or lot of land, in the name of the whole tract claimed, and exercising the usual acts of ownership over the whole tract, shall be deemed a possession of the whole.—*Hickman v. Link*, (Mo.) 600.

5. It is competent to show that before the grantee abandoned possession suits were prosecuted against both him and the grantee to recover the land, as showing a cause and reason for his abandonment, and refusal to pay the purchase price.—*Id.*

Acts of ownership.

6. The grantor's defense of possession, and assertion of title to the whole tract, in a suit

by third persons claiming a superior title, is a sufficient act of ownership where the property is in a state of nature.—*Id.*

7. The record of that suit in which the plaintiffs were nonsuited, while not color of title, is admissible to prove the required act of ownership.—*Id.*

Color of title.

8. Where plaintiff's only right to recover is ejectment depends on the claim that his holding has been adverse to those having the right of entry, and being *sui juris*, and the evidence shows that his holding has been under a bond for deed executed by the ancestor of those persons, a married woman, during coverture, and therefore null and void, and it is not shown when she died, or when her heirs became of age, he cannot recover.—*Chiam v. Trent*, (Ky.) 648.

Interruption of possession.

9. A purchaser at a trust sale succeeds to the possession of the mortgagor, and the continuity of adverse possession is not broken because, after executing the deed of trust, the mortgagor conveyed to one who held for several years before the sale.—*Atchison v. Pease*, (Mo.) 159.

10. Where defendant alleges adverse possession, evidence that while he was in possession his right was "contested" is properly excluded; the only available contest being by suit carried to judgment.—*Bullock v. Smith*, (Tex.) 687.

Tacking.

11. The possession of the widow before assignment of dower, and that of the deceased husband's heirs, may be tacked to complete the statutory period of limitation.—*Hickman v. Link*, (Mo.) 600.

AFFIDAVIT.

For appointment of guardian *ad litem*, see *Infancy*.

attachment, by attorney, see *Attachment*, 2, 3.

Of jury, to explain verdict, see *New Trial*, 3.

Acknowledgment.

It is not error to refuse to strike out an affidavit of plaintiff's inability to give security for costs, on the ground that it was acknowledged before plaintiff's attorney as notary.—*Ryburn v. Moore*, (Tex.) 898.

Agency.

See *Principal and Agent*.

Ancient Instruments.

See *Evidence*, 13.

ANIMALS.

Dogs killing sheep.

Under act Tenn. 1859-60, c. 45, § 1, providing that the owner of any dogs shall be liable for sheep killed or injured by them, where two

dogs, owned by different persons, injure sheep, the owners cannot be sued therefor jointly.—*Dyer v. Hutchins*, (Tenn.) 194.

APPEAL.

See, also, *Error, Writ of; Exceptions, Bill of; New Trial*.

Costs on, see *Costs*, 2, 3.

In criminal cases, see *Criminal Law*, 38-48.

From inferior courts.

1. Appeals from judgments of county courts to the circuit courts being guaranteed by Const. Ark. art. 7, § 83, and required to be granted as a matter of right by Dig. Ark. § 1486, which also provides the practice therefor, the petitioners for an order for the prohibition of the sale of liquor under the "three-mile law" (Dig. Ark. § 4524 et seq.) may appeal from the order of the county court denying their petition, though the latter statute makes no provision for an appeal.—In re McCullough, (Ark.) 259.

Bond.

2. Under Rev. St. Tex. art. 9201, requiring an appellant to file a bond "payable" to the judge, "conditioned," etc., but not providing that it shall be given in any sum, the former statute (Pasch. Dig. art. 1884) having required that the amount should be fixed by the judge, a bond is not void because given for a stated amount, and the appeal on which it is given should not for that reason be dismissed.—*Hicks v. Oliver*, (Tex.) 97.

3. Where a bond, on appeal from an order for the sale of decedent's real estate, describes the property as a brick store-house and lot, no further description is necessary.—*Id.*

Assignments of error.

4. An assignment that the court erred in refusing to give the special instructions numbered 1, 2, 3, and 4, asked by defendant, is too general.—*Missouri Pac. Ry. Co. v. James*, (Tex.) 383.

5. An assignment simply stating that the judgment is contrary to the law and evidence of the case is too indefinite.—*Houston v. Blythe*, (Tex.) 520.

6. An assignment stating that "the court erred in overruling defendant's motion for a new trial on the grounds therein stated," there being more than one ground therein, is too general.—*Cullen v. Drane*, (Tex.) 720.

7. When the motion for new trial presents 13 different grounds, an assignment that the court erred in overruling said motion will not be considered.—*Ruby v. Von Volkenberg*, (Tex.) 514.

8. An assignment that "the court erred in refusing to grant a new trial for the reasons fully set out in defendant's * * * motions therefor, including closing arguments for plaintiffs, as set out in defendant's bill of exceptions number 5," raises no objection, except the closing arguments; there being more than seven objections raised in the motions.—*Mayer v. Duke*, (Tex.) 565.

9. Cross-assignments of error will not be considered when they are not referred to in appellee's brief, and the independent proposi-

tions of the brief are not predicated of or germane to them.—*Willis v. Smith*, (Tex.) 683.

Record.

10. On appeal to the Kansas City court of appeals, appellant filed a transcript containing a bill of exceptions, from which the signature of the judge was omitted by mistake; the original bill being signed. Rule 15 of said court requires the appellant to file a transcript and a brief, copies of which must be furnished respondent, who must furnish appellant with his brief and such further abstract as he may deem necessary. The abstract of appellant (no counter-abstract being filed by respondent) stated that a bill of exceptions had been filed, and no objection to such statement was made by respondent, and no point thereon was made in his brief or argument, but he treated the case as if the bill had been duly taken. The record recited that the bill was duly signed by the judge, and was made a part of the record. *Held* that, by his failure to file a counter-abstract, or to make any objection to the absence of the judge's signature in his brief or argument, respondent waived his right to take advantage thereof.—*Flannery v. Kansas City, St. J. & C. B. Ry. Co.*, (Mo.) 894.

11. Where there is no bill of exceptions, statement of facts, nor assignment of errors in the record, judgment will be affirmed, under Rev. St. Tex. art. 1087, which provides that all errors not distinctly specified by an assignment of errors shall be considered by the supreme court as waived.—*Draper v. Hillen*, (Tex.) 457.

Death of appellee.

12. Where, pending an appeal from a judgment concerning land, the appellee dies, and one of the heirs conveys her interest to a trustee, and afterwards prepares to sue for cancellation of the conveyance, a motion by the trustee, the other heir, and the appellant, to reverse the judgment and remand the cause, with instructions to the trial court to dismiss the suit, to which the grantor in the deed of trust objects, will be overruled.—*Maxwell v. Bryant*, (Ky.) 279.

Effect of appeal pending.

13. When it appears on the trial of a partition suit that there is a former suit pending on appeal in the supreme court, between the same parties, involving the same land, and adverse claims thereto, the trial court should suspend proceedings until the determination of the controversy in the former suit; and if it proceeds to judgment, and there is an appeal to the supreme court, the latter court will reverse and remand the cause, with directions to await the determination in the former suit.—*Sharkey v. Kiernan*, (Mo.) 886.

Review.

14. Questions decided on a former appeal will not be re-examined.—*Keith v. Johnson*, (Mo.) 597; *Galveston County v. Galveston Gas Co.*, (Tex.) 583; *Willis v. Smith*, (Tex.) 683.

15. Where several causes are alleged for the removal of a county officer in the petition therefor, it is not necessary to sustain a judgment of removal that all the grounds should be found to be true.—*Poe v. State*, (Tex.) 737.

16. If the trial court refuse instructions, because substantially given, which the appellate court finds, on inspecting the record, to be contrary to the fact, the verdict will be set aside, without examining as to the technical accuracy of the instructions.—*Missouri Pac. Ry. Co. v. Brazil*, (Tex.) 408.

17. The demurrer to an answer having been sustained, the appellate court will not look into the record to see whether the answer was true or false.—*Evans v. English*, (Ky.) 626.

18. Where defendant's petition for relief from default does not entitle him to introduce proofs, and he is permitted to do so, it is not essential to plaintiff's right of appeal that he should move for a new trial as in an ordinary action.—*Reinke v. Morse*, (Ky.) 468.

19. An objection to a juror for disqualification, if discovered during the trial, must be then brought to the notice of the court, or it will be waived.—*Blanton v. Mayes*, (Tex.) 452.

20. In determining whether or not any evidence was given on a particular issue, the court must look, not to the charge of the trial court, but only to the statement of facts.—*Bisso v. Southworth*, (Tex.) 528.

21. In an action by a holder for value, before maturity, on notes assumed by a vendee of land, where the vendee alleges that the grantor made fraudulent misrepresentations as to the non-existence of liens, any admissions by the holder, at the time of payment of one of the notes by the vendee, tending to show complicity in the fraud, should have been disclosed at the time of offering testimony of the circumstances in order to raise error in its rejection because of such alleged admissions.—*Fitzgerald v. Barker*, (Mo.) 45.

Review — Objections not raised below.

22. Exceptions to the introduction of evidence, not made a ground of complaint in the motion for new trial, cannot be considered on appeal.—*City of St. Louis v. Excelsior Brewing Co.*, (Mo.) 477.

23. The admission of illegal evidence, not objected to at the trial, is not sufficient cause for reversal, though it may have had some influence with the jury on the question of damages.—*Singleton v. School-Dist. No. 34*, (Ky.) 798.

24. In a proceeding by the state to collect excessive commissions retained by a revenue collector, no objection having been made in the court below that it was improper to impose penalties for delinquency in the payment of the excess, it will not be considered on appeal.—*Wilson v. State*, (Ark.) 491.

25. Where plaintiffs show that a certain person acquired title on a specified date, and that a person of the same name, who was in the state about that time, died in another state, and that they are his heirs, and there is nothing to disprove the identity of the owner and such ancestor, a judgment for plaintiffs will not be reversed for want of further proof of identity; the objection not having been made below.—*Holstein v. Adams*, (Tex.) 560.

Presumptions.

26. The record being silent, it will be presumed that a court of general jurisdiction ac-

quired jurisdiction of all the defendants against whom it rendered judgment.—*City of St. Louis v. Lanigan*, (Mo.) 475.

27. Where on appeal from proceedings resulting in a rule made absolute, portions of the pleadings or evidence are omitted from the transcript, they will be presumed to sustain the action of the lower court.—*Brassfield v. Burgess*, (Ky.) 123.

28. Where counsel in his closing argument used improper epithets, applied to the opposing party, the words applying to no facts outside the record, and the court promptly reprimanded him, and fined him for contempt, the words will not be presumed, on appeal, to have influenced the jury.—*Mayer v. Duke*, (Tex.) 565.

29. In construing a charge, the jury will be presumed to have considered other parts of the charge referred to in it.—*Missouri Pac. Ry. Co. v. James*, (Tex.) 382.

— Weight of evidence.

30. Upon the filing of an answer in ejectment, raising an equitable defense, the proceedings are thereafter governed by the rules of equity, and an appellate court may inquire into the sufficiency of the evidence to support the trial court's conclusions of facts.—*Allen v. Logan*, (Mo.) 149.

31. Where on a trial by the court incompetent evidence is admitted, and given great weight, and the finding is clearly against the preponderance of the evidence, and it also appears that the facts of the transaction in dispute were not fully developed, the case will be reversed and remanded.—*Clapp v. Engledow*, (Tex.) 462.

32. The court will not review a verdict which depends on the weight given by the jury to conflicting testimony.—*Wills Point Bank v. Bates*, (Tex.) 343.

33. A referee's report will not be disturbed as to findings of fact, except on a clear showing of mistake.—*Manufacturers' Sav. Bank v. O'Reilly*, (Mo.) 865.

34. Where the evidence is conflicting, the findings of the trial court will not be disturbed, though the preponderance of the evidence may seem to the appellate court to be the other way.—*Walker v. Terry*, (Tex.) 820.

35. A finding of the trial court that defendant is entitled to nominal damages only for breach of contract by plaintiff to sell him goods, set up as a counter-claim, will not be reversed where the evidence as to whether the market price of such goods at the time in question was above or below the contract price is conflicting.—*Harrison Wire Co. v. Hall & Willis Hardware Co.*, (Mo.) 612.

36. The report of commissioners in condemnation proceedings will not be set aside on the evidence, unless the court is clearly satisfied that they have erred in the principles upon which they have made their appraisal.—*City of St. Louis v. Lanigan*, (Mo.) 475.

37. A finding that the value of lumber used on was \$10 per thousand will not be disturbed, though the only competent testimony as to its value was that of one witness that lumber generally at the place was worth about \$10, it appearing that defendant, who was to deliver the lumber, testified afterwards, and failed to

testify as to the value, and that the contract called for first-class merchantable lumber.—*Fisher v. Dow*, (Tex.) 455.

— **Matters not apparent of record.**

38. Where the action of the trial court in refusing to allow plaintiff to file an answer to a motion by defendant is not made a ground for new trial, nor included in the assignment of errors, the supreme court will not consider it.—*Atkison v. Dixon*, (Mo.) 163.

39. The action of the court in entering judgment *nunc pro tunc*, at a term subsequent to that at which it was rendered, after hearing evidence, will not be reviewed where the evidence is not brought up.—*Missouri Pac. Ry. Co. v. James*, (Tex.) 882.

40. The supreme court of Kentucky will not refuse to consider an appeal from the circuit court on the ground that no order was entered on the record of the latter court refusing appellant's motion for a new trial, where the bill of exceptions filed in that court recites that such motion was refused, and that appellant excepted thereto.—*King v. Ohio Val. R. Co.*, (Ky.) 631.

41. Where an order of the county court transferring a cause to the district court recites as the reason thereof that the county judge had been counsel in another suit growing out of the same cause of action, in the absence of evidence in the record to the contrary, the supreme court is not authorized to hold that the cause was not properly transferred.—*Kahanek v. Galveston, H. & S. A. Ry. Co.*, (Tex.) 570.

— **Harmless error.**

42. There is no reversible error in ruling that no recovery can be had under the allegations of tort in a complaint on the ground that there is an attempted double recovery for the same wrong, where it is alleged that the wrongful acts complained of were committed in 1899, and the petition was not filed until 1885. The statute of limitations, which was interposed, was a bar to any recovery for the tort.—*Shirley v. Waco Tap R. Co.*, (Tex.) 548.

43. Error in excluding evidence is harmless where, had it been admitted, it would have remained the duty of the court to direct the verdict which was actually returned.—*Lewis v. Simon*, (Tex.) 554.

44. Where illegal evidence is admitted over defendant's objection, and is subsequently expressly excluded at plaintiff's request, defendant has no ground for complaint.—*Durrant v. Lexington Coal Min. Co.*, (Mo.) 484.

45. Where the bill of exceptions states that defendant proposed to show by certain witnesses that improvements were made in good faith, but does not show that such witnesses would testify to any facts from which good faith may be found, the rejection of the evidence is harmless, as a witness could not be permitted to state his conclusion that the improvements were made in good faith.—*Holstein v. Adams*, (Tex.) 560.

46. The exclusion of a notarial certificate attached to a designation of homestead is harmless error where the instrument itself is admitted in evidence, and the notary called as a witness.—*Equitable Mortg. Co. v. Norton*, (Tex.) 301.

47. A defendant cannot complain of erroneous instructions where the evidence admits of a verdict for plaintiff only, especially as by Rev. St. Mo. § 3775, there cannot be a reversal except for error materially affecting the merits.—*Fitzgerald v. Barker*, (Mo.) 45.

48. In an action for damages for maintaining a bawdy-house adjoining plaintiff's premises, where a case warranting exemplary damages is presented, there is no error of which defendant can complain in instructing that injury to plaintiff's feelings is an element of actual damage, but that the case does not warrant the allowance of exemplary damages.—*Bisso v. Southworth*, (Tex.) 528.

49. Appellant assigned as error that the court refused to instruct the jury on the law of the case, and ordered a verdict for defendant, stating, in the hearing of the jury, that plaintiff had failed to prove his case. The record failed to show that the court charged the jury at all, and no bill of exceptions was taken, showing that he made the remarks attributed. *Held*, that it appearing that plaintiff had failed to make out his case, whatever error was committed, if any, was harmless.—*Berry v. Texas & N. O. Ry. Co.*, (Tex.) 726.

50. On trial of an issue involving the validity of the deed under which defendants claimed, the court charged that, unless the jury believed the deed a forgery, they should find for defendants. It was not contended that the deed was forged, but the uncontradicted evidence showed that the grantor therein, through his own gross negligence, allowed the grantee to mislead him into the execution of a deed different from what he intended. The court refused to submit the question, as requested by plaintiffs, whether defendants were *bona fide* purchasers under said deed, without notice of the fraud, but the evidence showed without dispute that such was the fact. *Held*, that a verdict for defendants should not be set aside for the errors in giving and refusing the instructions mentioned, as on the uncontradicted evidence the jury, if properly instructed, must necessarily have found the same verdict.—*Link v. Page*, (Tex.) 699.

51. Where there is an excess of only a few cents in the amount of damages awarded, and no effort is made below to have it corrected, the judgment will not be reversed or corrected on appeal.—*Wills Point Bank v. Bates*, (Tex.) 548.

— **Dismissal.**

52. When the party whose duty it is to file a transcript on appeal fails to do so, and the judgment is affirmed on certificate, a motion to set the judgment aside, based on "unavoidable absence and other engagements of counsel," will be overruled, when it is not shown how the absence of counsel became unavoidable, and no offer is made to file the transcript and submit the case.—*Gulf, C. & S. F. Ry. Co. v. Edwards*, (Tex.) 525.

53. An appeal will not be dismissed on the motion of one to whom the appellant has sold all his interest in the property in litigation, with the agreement that he (the purchaser) shall pay all costs and attorney's fees, until payment or tender of such fees and costs is made.—*Maxwell v. Bryant*, (Ky.) 279.

54. Plaintiff brought an action to have declared null and void certain tax-bills issued by the city authorities of Kansas City against his property to one of the defendants, for the construction of a sewer, and by him assigned to his co-defendant. Plaintiff alleged that these tax-bills were invalid because the city had no authority to construct the sewer, but that they were an apparent lien against his property, and a cloud on his title. The circuit court dismissed his petition, and, pending an appeal to the Kansas City court of appeals, defendants filed a motion to strike the appeal from the docket; stating that they had caused the tax-bills in question to be canceled, and had deposited them with the clerk for plaintiff's use, and had paid all costs. Plaintiff contended that he was prosecuting the suit in the interest of other persons, against whose property similar bills had been issued, who were contributing to the expenses of the suit, as well as in his own behalf, for the purpose of having the bills declared void *ab initio*; that he would not accept the proffered satisfaction; and that he had, during the pendency of the suit, conveyed the property, with covenants against incumbrance. *Held*, that he was entitled to have an adjudication as to the validity of the tax-bills, and the court of appeals erred in striking his appeal from the docket. —State v. Kansas City Court of Appeals, (Mo.) 855.

Reversal.

55. Though a judgment is warranted as to one of the defendants, yet being erroneous as to others, it must be reversed as to all. —Floyd v. Patterson, (Tex.) 535.

56. A judgment in condemnation proceedings will not be reversed because of failure to obtain jurisdiction of certain defendants whose lands and interests are distinct from those of the defendant who appeals. —City of St. Louis v. Lanigan, (Mo.) 475.

Remand and proceedings below.

57. Defendants lost possession of certain land by a judgment in ejectment, which on appeal was reversed, and they obtained a writ of possession, on return of which A. intervened, claiming possession by title under tax-deeds. On trial of the issue, the court entered judgment against intervenor for the value of the ground-rent, and refused to vacate the return. On appeal, the judgment was reversed; the supreme court saying: "The duty of the circuit court was simply to determine whether he [intervenor] was in possession under" his alleged tax-title; and, if so, "then to restore him to possession, and nothing more." *Held*, that the circuit court, after the mandate in that appeal was filed, properly proceeded to determine the question of intervenor's alleged superior title. —Atkison v. Dixon, (Mo.) 160.

Assault.

With intent to rape, see *Rape*, 1, 2.

Assets.

Statement of, in assignment, see *Assignment for Benefit of Creditors*, 1.

Assignment.

Of errors, see *Appeal*, 4-9.
Judgment, see *Judgment*, 11.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

See, also, *Bankruptcy*.

Statement of assets.

1. Under Rev. St. Mo. § 863, an assignor for the benefit of creditors must file with the deed of assignment a verified statement setting forth the nature and value of the estate and effects assigned. *Held*, where the assigned property consisted of manufactured clothing, fixtures, and accounts, difficult of exact valuation, that a statement of value at "about \$8,500" was sufficient. —State v. Adler, (Mo.) 824.

Fraud.

2. Where an assignment is made for the purpose of having the property of the assignor administered under the law, prior disconnected fraudulent acts of the assignor will not vitiate it, when it does not appear that the assignee was in any way a party to the frauds. —*Id*.

Associations.

See *Corporations*; *Religious Societies*.

ATTACHMENT.

Property subject to, see *Partnership*, 2.

Grounds—Subsisting indebtedness.

1. On the dissolution of a firm, the partner who was to continue the business took the assets, and assumed all indebtedness of the firm, and gave his notes to the retiring partner to secure him against the firm creditors. Payments made by the former on the debts were to be credited on the notes, which were unconditional upon their face. *Held*, that the notes were evidence of such a subsisting indebtedness as would authorize a writ of attachment. —Brown v. Wyatt, (Tex.) 831.

Affidavit by attorney.

2. Under Civil Code Ky. § 196, authorizing an order of attachment on plaintiff's affidavit, and section 550, permitting any affidavit required of a party to be made by his attorney, if he is absent from the county, the petition, the statements of which purport to be those of the plaintiff, verified by his attorney, the verification stating that plaintiff is absent from the county, may be used for an affidavit. —Clark v. Miller, (Ky.) 277.

3. A verification "that statements in" the petition are true, omitting the word "the" before the word "statements," is sufficient. —*Id*.

Sale.

4. It is error to direct a sale in gross of attached lands, which are separate tracts, and situated in different counties. The judgment should direct a sale by the tract, and only so

much as necessary to satisfy the debt and costs.—*Starks v. Curd*, (Ky.) 419.

— Distribution of proceeds.

5. Under Rev. St. Mo. §§ 487, 489, 490, providing for the appointment by the court of a receiver when goods are seized, on attachment, and that such receiver shall report his proceedings to the court, and for the proceedings in such cases, the circuit court has power to fix the priorities between several attaching creditors, and distribute the fund arising from the sale of the attached property.—*First Nat. Bank of Clinton v. Brenneisen*, (Mo.) 884.

Wrongful attachment—Damages.

6. In an action for seizure of goods under a wrongful attachment, an instruction that, if the attachment was malicious, and without probable cause, the jury should give exemplary damages, is not error.—*Mayer v. Duke*, (Tex.) 565.*

7. The sheriff having sold part of the goods wrongfully seized, and credited the amount received on the judgment in the attachment suit, plaintiff can only recover as actual damages the value of the goods less such credit.—*Id.*

8. An allegation that plaintiff was damaged to the extent of the value of the goods seized and a general denial authorize defendant to show that plaintiff received the benefit of the proceeds of the sale under the attachment, and that his loss was to that extent diminished.—*Id.*

ATTORNEY AND CLIENT.

Advice of counsel, see *Malicious Prosecution*, 2.

Affidavit for attachment, by attorney, see *Attachment*, 2, 3.

— of party acknowledged before attorney as notary, see *Affidavit*.

Arguments of counsel, see *Trial*, 7.

Authority of attorney.

1. Where an attorney has authority to consent to a compromise judgment, which he does, and the judgment is satisfied, and he compromises other cases arising out of the same occurrence, the jury may infer that he has authority to agree, as part of the compromise, that his client shall employ the person with whom the compromise is made.—*East Line & R. R. Co. v. Scott*, (Tex.) 99.

Lien for compensation.

2. Where an action for specific performance is dismissed by agreement, each party paying his own costs, and no intention to defeat the claim of plaintiff's attorney for services appears, the latter has no lien against the defendant, under Gen. St. Ky. c. 5, § 15, providing for attorneys' liens on demands arising on contracts, or on judgments in actions of tort or on contract.—*Rowe v. Fogle*, (Ky.) 426.*

Attornment.

To stranger, see *Landlord and Tenant*, 2.

Autrefois Convict.

See *Criminal Law*, 2.

RAIL.

When allowed.

Relator was arrested for the murder of a locomotive engineer, effected by wedging slats torn from a cattle-guard on the track. The guard was intact an hour and three-quarters before the disaster. Relator lived half a mile from the cattle-guard, and tracks corresponding with his were found near the guard, and followed in the direction of his house. Relator had made threats against the railroad company on account of its rejection of a claim for a colt killed on the track. Former unsuccessful attempts to wreck trains at that point were shown, relator having been seen near by when one of them was discovered. Relator, some two hours before the disaster, was seen going towards the track, though not directly towards the cattle-guard. A woman testified that relator had asked her to testify that she spent that night with him at his house. Another witness testified that relator had asked him to write a note for the railroad authorities to the effect that the criminal had left the country; also that before the disaster relator had found a bull of witness' dead near the track, and had proposed to break its legs, so as to found a claim against the railroad. Relator attempted to prove an *alibi*, but the evidence was conflicting and unsatisfactory. *Held*, not such proof evident as would justify the refusal of bail.—*Ex parte Jones*, (Tex.) 114.

Ballots.

See *Elections and Voters*.

BANKRUPTCY.

See, also, *Assignment for Benefit of Creditors*.

Rights of assignee.

Under the federal bankrupt act, § 14, all the property rights of the debtor vested in the assignee, as from the commencement of the proceedings, and though creditors having attachments levied four months before that time waived their liens as against the assignee by filing their claims as unsecured, yet such waiver cannot be taken advantage of by the bankrupt, whose title is extinguished.—*Starks v. Curd*, (Ky.) 419.

BANKS AND BANKING.

Deposits—Application.

1. A note executed by a depositor, payable at the bank, is not equivalent to a check, and the bank has no authority to pay such note to a third person in the absence of a usage or of instructions from the maker to that effect.—*Griscom v. Commercial Nat. Bank*, (Tenn.) 774.

2. There was evidence that a certain bank was in the habit of paying such notes on presentment, without instructions from the maker. But among other banks in the neighborhood the custom was not uniform; some of them so paying only when given for personal property, and others only when the depositor executing the note was engaged in mer-

cantile business. *Held*, that a depositor of the first-named bank, who had no knowledge of any such custom, was not bound by it.—*Id.*

3. And where it appeared that such a note, executed by such depositor, and paid by his bank without instructions, was an accommodation note, and that the maker had no notice of such payment until after the insolvency of the party primarily liable, and after a settlement had been had between him and such party, in which such note was credited to the latter, the bank had no right to set off the amount of such note in an action against it by the maker to recover a deposit. *LUTON, J.*, dissenting.—*Id.*

Officers—Contracts.

4. The president borrowed of his bank money, which he loaned to a falling debtor of the bank and of himself. The debtor gave a mortgage, and delivered the mortgaged property to the president, with authority to sell, and apply the proceeds, etc. The president promised that the debtor's debt to the bank should thus be paid. *Held* that, directors having relied on the president's promise that the debt would be paid by means of such dealings, and having made no other attempt to collect it, but having permitted the president to acquire the mortgage lien on property which otherwise might have been subjected to the debt to the bank, it was not necessary that they should formally authorize or ratify his proceedings. — *Apperson's Ex'r v. Exchange Bank, (Ky.) 801.*

Bill of Exceptions.

See *Exceptions, Bill of.*

Bills and Notes.

See *Negotiable Instruments.*

Bona Fide Purchaser.

See *Negotiable Instruments, 1, 2.*

BONDS.

See, also, *Principal and Surety.*

Action on sheriff's indemnifying bond, see *Sheriffs and Constables.*

For price bid at judicial sale, see *Judicial Sales, 2.*

Of guardian, see *Guardian and Ward.*
tax-collector, see *Counties, 10.*

On appeal, see *Appeal, 2, 3.*

Recognition on appeal in criminal cases, see *Criminal Law, 38, 39.*

Obligees not named.

1. It is no defense to an action by the state to the use of a county, on a county treasurer's bond, that the bond names no obligee; the conditions of the bond being that the treasurer shall well and truly account for and pay over all moneys coming into his hands by virtue of his office. The requirement of *Mansf. Dig. Ark. § 1187*, that the treasurer shall execute a bond to the state, is not a matter of substance; the statute merely contemplating that the state shall stand as trustee for the

parties beneficially interested. — *State v. Wood, (Ark.) 624.*

Breach of bond.

2. It having been made to appear that the county court, upon its settlement with the treasurer, found him in default for funds of the county which had been lost by the failure of a local bank in which he had deposited them, and charged him with the amount, a sufficient breach of the bond was shown; the settlement being conclusive as to the state of his accounts.—*Id.*

BOUNDARIES.

Of state, Mississippi river, see *States and State Officers, 1.*

Settlement by agreement.

1. A mere license by the owner of one tract of land permitting the owner of an adjacent tract, the boundary line between which and the former tract is disputed, to fence and occupy over the true line, will not amount to an agreement accepting the line claimed by the licensee as the boundary, though his possession extends up to the line so claimed. — *Wright v. Lassiter, (Tex.) 295.*

2. Where there is a dispute as to the true division line between adjoining proprietors, and they agree on a permanent boundary, and take possession accordingly, the agreement is binding on them, and those claiming under them, and such agreement is not within the statute of frauds. Following *Jacobs v. Moseley, 4 S. W. Rep. 135.*— *Atchison v. Pease, (Mo.) 159.*

Adverse possession.

3. When there is a dispute as to the true division line between adjoining proprietors, and they agree on a permanent boundary, and remove the fence to the line agreed upon, an action will be barred by a continuous adverse possession to that line for 10 years.—*Id.*

4. Possession of part of a tract of land by one holding an unrecorded bond for a deed for the whole, the boundary of which is disputed by a coterminous owner, not extending to any portion of the disputed boundary, is not notice of claim of title to the part in controversy. — *Wright v. Lassiter, (Tex.) 295.**

Breach of Marriage Contract.

Death of defendant, see *Abatement and Revival, 1.*

Bridges.

Obstructing navigation, see *Navigable Waters, 1, 2.*

Taxation of railroad bridges, see *Railroad Companies, 10, 11.*

Toll or railroad bridges, see *Railroad Companies, 6.*

BUILDING AND LOAN ASSOCIATIONS.

Usury.

A subscriber to nine shares of stock of \$100 each of a building association discounted them

to the association for \$675, securing the loan by mortgage on realty, agreeing to pay as interest installments 50 cents per month on each share. The debt, interest, premiums, and fines, calculated according to the charter for a period of three years, four months, and six days, amounted to \$1,188.52, subject to a credit of \$459.25, leaving the mortgagor still in debt \$679.27. *Held* that, as the transaction was in fact usurious, the association could not protect itself by a provision in its charter that "no dues, premiums, interest, or fines that may accrue to the association in accordance with its charter shall be deemed usurious."—*Henderson Bldg. & Loan Ass'n v. Johnson*, (Ky.) 787.

BURGLARY.

Theft at night.

Pen. Code Tex. art. 710, relating to burglary, defining "day-time" to include any portion of the 24 hours from 30 minutes before sunrise until 30 minutes after sunset, a theft at night, within the meaning of the above act, is a theft committed at any time between 30 minutes after sunset and 30 minutes before sunrise.—*Laws v. State*, (Tex.) 220.

CARRIERS.

See, also, *Railroad Companies*.

Injuries to passengers, accidents to trains, see *Railroad Companies*, 16, 17.

Delivery of goods.

1. Under Rev. St. Tex. arts. 281, 282, providing that a common carrier's liability continues until delivery, but that if he uses due diligence to notify the consignee, who does not take the goods, and they have to be stored, the carrier is liable only as warehouseman, a railroad company remains liable as a common carrier for goods not discharged from its car, though a third person has agreed with the consignee to unload them, and the car is at the place of discharge; there being no agreement by the consignee to receive the goods on the car, and no notice, or diligence to give notice, of the arrival of the car.—*Missouri Pac. Ry. Co. v. Haynes*, (Tex.) 398.

Rights of passengers.

2. Though a train, which ran regularly on week days as a mixed freight and passenger, was running specially on Sunday, in charge of the usual conductor, and deceased could not of right have demanded to be carried as a passenger on that day, and neither paid nor was asked to pay fare, yet if the company, through its conductor, permitted deceased to ride, it assumed the same duties towards him as if he had been a regular passenger thereon. *RAT, C. J.*, and *SHERWOOD, J.*, dissenting.—*Wagner v. Missouri Pac. Ry. Co.*, (Mo.) 436; **Zuendt v. Same*, *Id.* 491.

3. Plaintiff, a woman, boarded defendant's train, having purchased a ticket. There was evidence that the train passed her destination without stopping; that plaintiff asked to be put off, but the conductor refused, offering to take her on to the next station; that plaintiff got off the train between stations, the con-

ductor not offering to assist her in any way, and his voice and manner being rude and insulting; that she walked back about a mile, carrying a bundle and valise; that her route lay through an uninhabited country; and that, as a result of the walk and the excitement, she was sick for several days. The conductor, brakeman, and others denied the story, and testified that the train stopped 60 yards beyond the station. *Held* on a second trial, that a verdict of \$3,005 against the railroad company would not be disturbed.—*Louisville & N. R. Co. v. Ballard*, (Ky.) 429.

4. An instruction in such case that, if defendant's employés "were insulting, either in words, tone, or manner," to the plaintiff, the jury should award damages, is not erroneous, on account of the use of the word "tone."—*Id.*

Injuries to passengers.

5. Plaintiff's husband was killed by the derailment of defendant's special freight train, consisting of an engine, tender, one box, and several flat cars. Deceased and others were riding on a flat car next the engine, to the knowledge of the conductor and brakemen, who did not warn them that it was dangerous; nor was there danger if the train had not been derailed. The conductor and a brakeman told them it was more comfortable in the box car, but they preferred to ride on the flat car. The road was rough, and the engine and tender were reversed, which was dangerous on a rough track, and the train was running too fast for safety. No one was injured except those on the flat car. *Held*, that the questions of negligence, and absence of contributory negligence, were for the jury. *RAT, C. J.*, and *SHERWOOD, J.*, dissenting.—*Wagner v. Missouri Pac. Ry. Co.*, (Mo.) 436; **Zuendt v. Same*, (Mo.) 491.

6. A judgment for injuries received by a woman in alighting from a train will not be disturbed, as contrary to the evidence, where she was obliged to step down onto a box about 11 inches square at the top, and somewhat larger at the bottom; and plaintiff and several witnesses testify that she was unassisted, that the box was standing on rough stones, and that it tipped as she stepped on it, though several witnesses for defendant testify that plaintiff was assisted in alighting, that the box stood on level gravel, that the accident was due to her stepping on its edge, and that several others alighted by means of the box with safety.—*Missouri Pac. Ry. Co. v. Wortham*, (Tex.) 741.

7. An instruction, in such case, that if defendants failed to furnish such facilities or assistance to plaintiff in alighting as prudent and competent persons in the same business would commonly employ in like circumstances, and the injury resulted therefrom, plaintiff should recover, unless guilty of contributory negligence, is not erroneous as against defendants.—*Id.*

8. An instruction that it was not defendants' duty to assist plaintiff to alight if reasonably safe and proper appliances were supplied, so that she could with reasonable care have alighted safely, and that if the platform or depot ground at the time of the injury had been in daily use for years, and had proved ade-

quate and safe, then defendants could use the same without the imputation of negligence, and verdict should be for defendants, was properly refused, as the company is bound to furnish the safest appliances.—*Id.*

9. A charge, requested by defendants, that if the stepping-stool was a reasonably safe appliance, and was properly placed on ground sufficiently smooth to prevent it from turning by the use of due care by passengers, the jury should find for defendants, was properly qualified by adding the condition that defendants should not be guilty of negligence in using it, nor otherwise guilty of negligence.—*Id.*

Injuries to passengers — Contributory negligence.

10. An instruction that if plaintiff stepped carelessly or accidentally on or near the edge of the box, and her fall was occasioned thereby, the jury should find for defendants, was properly refused; a proper instruction on contributory negligence having been given.—*Id.*

11. Where it appears that a woman in pregnancy was seriously injured in boarding a train at a regular station; that she was obliged to step from the ground to a height of 80 or 90 inches, no intervening step being provided, as was the custom; and that she used due care, with the means provided,—judgment for damages will not be disturbed on the ground of contributory negligence, though it also appears that she had some assistance from the company's employés, and that other women, and possibly at times she herself, had boarded the train in a similar manner, without injury.—*Missouri Pac. Ry. Co. v. Watson*, (Tex.) 781.

12. Plaintiff flagged a train at a flag station. The train did not stop, though the signal was seen, but, as it passed, the conductor seized a coat that was upon plaintiff's arm, and told him to jump on, in attempting to do which he was injured. Plaintiff testified that he did not know how fast the train was running, but thought he could safely board it. Another witness testified that the train was running six or eight miles an hour. *Held*, that a verdict for plaintiff would not be set aside on appeal, on the ground of contributory negligence.—*Kansas & G. S. L. R. Co. v. Dorough*, (Tex.) 711.*

13. It is not error to refuse to charge that failure to stop at a station "does not justify a person in attempting to board a train in motion," where the jury have already been told that the plaintiff cannot recover if he attempted to board the train while in motion, and when an ordinarily prudent man would not have made the attempt.—*Id.*

Ejection of passengers.

14. A drunken passenger on a train entered the ladies' car, and by violence and indecent language alarmed the passengers, and, when locked out of the car, pulled the bell-rope, stopping the train, and threatened the conductor with an open knife. He was ejected two miles from the nearest station, and two hundred yards from a farm-house, it being a warm night, and not very dark; and was killed by a later train going in the opposite

direction. No negligence by those in charge of the later train was shown. *Held*, that the railroad company was not liable.—*Louisville & N. R. Co. v. Logan*, (Ky.) 655.

15. The fact that deceased was in such condition that he was improperly allowed to board the train as a passenger did not deprive the conductor of the right to eject him, or render the company liable for his death.—*Id.*

Carrying Weapons.

Near voting place, see *Elections and Voters*, 2.

Cattle.

See *Animals*.

Charter.

Of railroad company, see *Railroad Companies*, 1, 2.

CHATTEL MORTGAGES.

See, also, *Fraudulent Conveyances; Mortgages*.

Description of property.

1. A mortgage of "8 bales of cotton, weighing 500 lbs. each, of the crop" which the mortgagor shall raise in a designated locality, is not void for uncertainty, where in fact the mortgagor's whole crop does not amount to 8 bales of the specified weight.—*Watson v. Fugh*, (Ark.) 493.*

Execution—Evidence.

2. Where it is shown by declarations of the mortgagor, who absents himself from the trial though served with process, that the subscribing witness to the mortgage is a non-resident, positive and uncontradicted evidence of two qualified witnesses, as to the mortgagor's signature, is sufficient to admit it in evidence.—*Chaytor v. Brunswick-Balke-Collender Co.*, (Tex.) 350.

Recording.

3. Under Sayles, Rev. St. Tex. art. 3190b, §§ 1, 2, providing that chattel mortgages may be recorded by filing with the county clerk either the original or a copy, but that "a copy can be filed only when the original has been acknowledged," acknowledgment and proof are not required when the original is filed.—*Id.*

4. A chattel mortgage registered in Bowie county, Tex., reciting that the mortgagor is of "Texarkana, Bowie county, Tex.," shows *prima facie* that the mortgagor is a resident of Texas, and that the mortgage is registered in the county of his residence, as required by statute, without proof that the property was in that county.—*Id.*

Lien.

5. One who holds a chattel mortgage on property which is wrongfully appropriated by defendant does not lose his lien by proceeding to judgment on his debt, and to foreclose the mortgage against the mortgagor, without making defendant a party.—*Boydston v. Morris*, (Tex.) 881.

6. The lien of a chattel mortgage is not af-

fect by a prior parol agreement between the mortgagors and third persons, that other mortgages to be executed by the mortgagors shall have priority over it, where it is actually executed and delivered in violation of such agreement, and with intent to give it priority; and it is immaterial whether or not the mortgagors had notice of the prior parol agreement. — *Lazarus v. Henrietta Nat. Bank*, (Tex.) 252.

Foreclosure—Evidence.

7. In an action to foreclose a mortgage against the mortgagor and one having in possession the mortgaged goods, where the notes secured are given for the purchase price, and bear even date with the mortgage, and declarations of the mortgagor that he had sold to his co-defendant are admitted without objection, and both defendants absent themselves from the trial to avoid testifying, the evidence sufficiently shows that the sale to the co-defendant was after the mortgage was executed. — *Chaytor v. Brunswick-Balke-Collender Co.*, (Tex.) 250.*

Disposing of mortgaged property—Indictment.

8. An indictment for fraudulent sale of mortgaged property must allege the name of the person to whom it was sold, or that such name is unknown to the grand jury. — *Alexander v. State*, (Tex.) 764.

9. An indictment for "disposing of" mortgaged property is fatally defective which does not allege the name of the person to whom it was disposed of, nor that he was unknown to the grand jury. — *Smith v. State*, (Tex.) 218.

Circumstantial Evidence.

Instructions, see *Criminal Law*, 38-35.

CLERK OF COURT.

Duties.

1. Code Crim. Proc. Tex. art. 1085, provides that the amount due to jurors and bailiffs for services shall be paid by the county treasurer upon the certificate of the district or county court in which such services were rendered. Article 1086 provides that such certificates shall be transferable by delivery. *Held*, that it was not the duty of the clerk of a district or county court to pass upon the validity of a transfer by a juror or bailiff of such a claim against a county, and that the clerk could not be compelled by *mandamus* to issue to an assignee of such claim the certificate designated in the said statute, although evidencing only the right of the assignor to compensation. — *Pace v. Ortiz*, (Tex.) 541.

Probate clerk.

2. Rev. St. Mo. § 1179, requires a probate judge to act as his own clerk, but gives him power, by an entry of record, to "appoint a separate clerk, who shall be paid by said judge, and shall hold his office at the pleasure of the judge." This clerk is required to give bond to discharge the "duties of his office," and "may discharge all the duties of clerk,

and shall have power to do and perform all acts and duties in vacation which the judge of said court is or may be authorized to perform in vacation." *Held*, that such clerk is an officer of the court, and a proper person before whom to acknowledge deeds. — *Young v. Boardman*, (Mo.) 48.

3. The constitution of Missouri provides for the establishment of probate courts, and that they shall be courts of record. By article 6, §§ 84, 89, certain courts excepted, "the clerk of all other courts of records shall be elective." Section 85 provides that "probate courts shall be uniform in their organization, jurisdiction, duties, and practice, except that a separate clerk may be provided for, or the judge may be required to act *ex officio* as his own clerk." *Held*, that Rev. St. Mo. § 1179, authorizing a probate judge to appoint a clerk, is not unconstitutional. — *Id.*

Collateral Attack.

See *Judgment*, 7.

Colleges and Universities.

Exemption from taxation, see *Taxation*, 6

Color of Title.

See *Adverse Possession*, 8.

Commercial Agencies.

Reports, evidence of partnership, see *Partnership*, 2.

Community Property.

See *Husband and Wife*, 7-11.

Complaint.

See *Pleading*, 1, 2.

Confession.

See *Criminal Law*, 22-24.

CONSTITUTIONAL LAW.

Appointment of officers, see *Clerk of Court*, 3. Due process of law, see *Mechanics' Liens*, 2, 8.

Prohibition of pooling combination, see *Railroad Companies*, 3.

Judicial powers.

1. Rev. St. Mo. § 2194, providing that, "in all cases when any widow entitled to the benefit of election" of a devise in lieu of dower "shall be of unsound mind," her guardian "may elect," is not in conflict with Const. Mo. art. 6, § 1, which declares that the judicial power of the state shall be vested in designated courts. — *Young v. Boardman*, (Mo.) 48.

Titles of laws.

2. Under Const. Tenn. art. 2, § 17, providing that no act shall embrace more than one subject, which shall be expressed in the title, the

title of an amendatory act need only recite the title of the act amended, if the amendment is germane to, and embraced within, the title of the original act.—*State v. Algood* (Tenn.) 310.

3. Under Const. Tenn. art. 3, § 17, providing that every act repealing or amending another shall in its caption or otherwise recite the title or substance of the act to be repealed or amended, Acts Tenn. 1887, c. 85, attempting to amend the mechanic's lien law, but merely reciting "that section 2746 of the Revised Codes shall read as follows," is unconstitutional.—*Burnett v. Turner*, (Tenn.) 194.

Vested rights.

4. Act Tenn. March 9, 1887, releases all druggists liable for taxes under the revenue laws of 1881-82, 1883-84, and 1885-86, making them liquor dealers, and who were not in fact using the druggist license as a blind, but were in good faith selling liquors as medicine, from all liability for those years. *Held*, that druggists who sell liquors for medicinal purposes only are a distinct class, and that therefore the act is not in violation of Const. Tenn. art. 11, § 8, prohibiting the suspension of any general law for the benefit of particular individuals, and prohibiting any law granting to individuals "rights, privileges, immunities, or exemptions other than such as may be by the same law extended to any member of the community who may be able to bring himself within the provisions of such law."—*Demoval v. Davidson County*, (Tenn.) 353.

Retrospective law.

5. That the act applies only to past delinquencies, and has no prospective effect, does not make it retrospective within the inhibition of the constitution.—*Id.*

Regulation of interstate commerce.

6. The provision of Const. Tex. art. 10, § 5, prohibiting railroad corporations from controlling competing or parallel lines, is not void for assuming to regulate interstate commerce when applied to an agreement forming a traffic association between a number of such corporations for the purpose of preventing sudden and extreme changes in Texas rates, though some of the traffic embraced therein is partly without the state; and, some of the parties to the agreement being corporations created under the laws of Texas, the agreement as to them is illegal, and is therefore illegal as to all.—*Gulf, C. & S. F. Ry. Co. v. State*, (Tex.) 81.

7. The Green and Barren rivers being entirely within the state of Kentucky, and there being no interfering act of congress, the grant of a license to make reasonable obstructions to navigation in the repair of railroad bridges spanning the rivers is not invalid as being in conflict with the power of congress to regulate commerce between the states.—*Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, (Ky.) 6.

Taxation—Public improvements.

8. Act Ky. March 6, 1876, authorizing the city of Covington to assess a special tax on lots abutting on property purchased or condemned for opening, extending, or widening a street, "said tax to be used to pay the cost and expense of such purchase or condemna-

tion," is not unconstitutional, as applied to cases where the owners of the abutting lots on which the special tax is assessed also own the lots taken for the street. The owners of the lots taken being entitled to full compensation without deduction on account of supposed benefits to their adjoining lots, the subsequent assessment on the latter is their share of the public burden for improvement; and it is immaterial that such assessment may exceed the value of the lots taken.—*City of Covington v. Worthington*, (Ky.) 790.

Constables.

See *Sheriffs and Constables*.

Constructive Trusts.

See *Trusts*, 3-5.

Contest.

Of wills, see *Wills*, 5-8.

CONTINUANCE.

See, also, *Criminal Law*, 8-12.

Absence of witness, see, also, *Practice in Civil Cases*, 2.

Absence of witnesses.

1. Where, on trial of an appeal from the county court in a probate proceeding, an objection for informality is made, for the first time, to the deposition of an attesting witness whose testimony is vitally important to proponent's case, and the witness is unable from sickness to be present, and the deposition had been taken before a former term, at which a mistrial was had, it is error to deny proponent a continuance.—*Moore's Adm'r v. Smith*, (Ky.) 380.

2. An application for a second continuance on the ground of an absent witness will not be granted where it appears that the deposition of the witness had been taken, and his presence was desired to explain some portions of it; that no effort had been made to again take his deposition; and that the witness was in the employ of the applicant.—*East Line & Red River R. Co. v. Scott*, (Tex.) 298.

3. It was right to refuse a continuance asked because of the absence of one of the defendants, who, as alleged, was a material witness, and was informed that the trial had been set for that day; affiant not knowing the cause of the absence, and no diligence being shown to procure his testimony, though the case was not called till nine months after suit brought, and the absent defendant was a resident of another county.—*Mayer v. Duke*, (Tex.) 565.

4. In an action for the wrongful death of a brakeman by the negligence of the engineer, plaintiffs filed an application for continuance, sworn to on information and belief, stating that the deceased's widow, a plaintiff, whose testimony was material, would be unable to attend the trial, owing to the sickness of her child, a co-plaintiff, but did not state what her testimony would be, further than that, in addi-

tion to her written evidence on a former trial, not set out, she would testify to dissatisfaction among the railroad employees over the engineer's incapacity, and that some, including her husband, had threatened to quit work; also to statements not set out by her husband as to the cause of his death. The application also stated that other witnesses, who had been attached, were absent, but it was not stated what facts they were expected to testify to. *Held*, that it was proper to deny the application.—*Berry v. Texas & N. O. Ry. Co.*, (Tex.) 726.

CONTRACTS.

See, also, *Assignment for Benefit of Creditors; Bonds; Carriers; Chattel Mortgages; Covenants; Deed; Frauds, Statute of; Fraudulent Conveyances; Insurance; Interest; Landlord and Tenant; Negotiable Instruments; Partnership; Principal and Agent; Principal and Surety; Sale; Specific Performance; Vendor and Vendee.*

Between vendor and vendee, see *Vendor and Vendee*, 1, 2.

Breach of, nominal damages, see *Damages*, 1.

Enforcement of, see *Specific Performance*, 2, 3.

Of hiring, see *Master and Servant*, 1-3.

Rescission, see *Equity*, 4-10.

Rights of subcontractors to lien, see *Mechanics' Liens*, 1.

To grade road-bed, see *Railroad Companies*, 5.

With school-teachers, see *Schools and School-Districts*, 1, 2.

Performance.

1. A. and B. were partners engaged in milling, and, being unable to meet their liabilities, A. agreed to convey the mill property to B. in consideration that the latter would pay on the partnership debts, if necessary to discharge them, a stipulated sum. B. went into possession of the property. *Held*, that he could not refuse to perform his part of the agreement because the deed of the mill property was not delivered; it appearing that, although a tender was not made until after suit was brought, A. had always been ready to execute the deed, and B. had never demanded it.—*Buford v. Ashcroft*, (Tex.) 846.*

2. Under a contract providing for the delivery of lumber on the purchaser's order, notice by the seller to the purchaser's attorney, the latter having called for a settlement, that the seller would not deliver on account of failure of title to land given in exchange, is a waiver of a demand for delivery of the goods.—*Fisher v. Dow*, (Tex.) 455.

Contributory Negligence.

See *Negligence*, 2-4.

CONVERSION.

See, also, *Trover and Conversion*.

Realty acquired by administrator.

Rev. St. Mo. 1835, p. 51, § 2, provided that where a deceased had purchased real estate,

and not completed payment, the administrator might complete the payment out of assets in his hands, "and such real estate shall be disposed of as other real estate." *Held*, that where an administrator completed payment under a contract made with the deceased, and took the title "as administrator," the property was not constructively changed to personally, and held for the benefit of the next of kin, but remained realty for the benefit of the heirs; and that non-resident alien heirs, being incompetent to take realty, had no rights therein.—*Harney v. Donohoe*, (Mo.) 191.

Conveyances.

See *Chattel Mortgages; Deed; Fraudulent Conveyances; Mortgages; Sale; Vendor and Vendee.*

CORPORATIONS.

See, also, *Banks and Banking; Insurance, Municipal Corporations; Railroad Companies; Religious Societies; Telegraph Companies.*

Charter and franchises.

1. An association which has filed articles of incorporation for record in the office of the clerk of the county court, as required by Gen. St. Ky. c. 56, may begin business, and its acts are valid, though it has failed to comply with the further requirement to file a copy of its articles with the secretary of state within three months. Such failure is available only in a direct proceeding to annul the franchise.—*Portland & G. Turnpike Co. v. Bobb*, (Ky.) 794.

2. In a suit to enjoin the consolidation of two turnpike companies, under act Ky. Feb. 20, 1884, one provision of which is that, when the agreement between the two companies shall be entered into and ratified by a majority of the stockholders of the two companies, the consolidated company shall have all the powers previously enjoyed by both, where defendant's answer, which was not denied, alleged that the consolidation was made as provided by statute, but failed to allege that this was done with the consent of plaintiffs, thereby showing that a majority consented, and not the whole, the consolidation, not being authorized by the companies' charters, was void.—*Botts v. Simpsonville & B. C. Turnpike Co.*, (Ky.) 184.

3. A clause in a charter that the company, "in matters not expressed in the charter, shall have the rights and privileges granted to the most favored turnpike companies," will not be construed as conferring or implying power to compel a stockholder to consent that the corporation of which he is a member shall be united with another.—*Id.*

Officers.

4. The jury may find that one who has the control and direction of the entire business affairs of a railroad company, and whose duty it is to prepare the case of the company in litigations affecting it, has authority to institute a prosecution for perjury alleged to have

been committed in any such litigation.—*Gulf, C. & S. F. Ry. Co. v. James*, (Tex.) 744.

5. Where a corporation is made party defendant to an action by service on its president, as authorized by statute, and is represented by its attorney, it will be presumed to know what transpires in the action, and that on appeal by it an appeal-bond was executed for it by its president without attaching the corporate seal, and having acquiesced in such execution during the pendency of the appeal, and until suit on the bond, will be held to have ratified it.—*Campbell v. Pope*, (Mo.) 187.

6. Where a sale of corporate property to pay debts, though made by persons who are directors both of the selling and purchasing corporations, realizes more than the value of the property, stockholders in the former have no ground of complaint.—*Manufacturers' Sav. Bank v. O'Reilly*, (Mo.) 865.

7. An allegation that the president of a corporation interfered with plaintiff's trade and calling as a merchant, by telling others that he had no right to sell his goods, etc., does not state a cause of action against the corporation.—*Perkins v. Maysville District Camp-Meeting Ass'n*, (Ky.) 659.

Contracts.

8. Where a conveyance is made to the trustees of a corporate body, without naming them or any of them, the title vests in the corporation named in the deed.—*Keith & Perry Coal Co. v. Bingham*, (Mo.) 82.

Stock and stockholders.

9. A contract with a subscriber to organization stock of a corporation, that for every share subscribed for he shall receive interest-bearing bonds to an equal amount, secured by mortgage on the company's plant, is void, both as to creditors and the corporation.—*Morrow v. Nashville Iron & Steel Co.*, (Tenn.) 495.

10. The bonds agreed to be issued being secured by mortgage on the plant, which could only be obtained by payment of the capital stock, and the subscriber having become a director without receiving his bonds, the agreement to issue bonds is not a condition precedent, and the stock subscription stands absolute, though the agreement be void.—*Id.*

11. Where the action of the boards of directors of two corporations is alleged to be *ultra vires*, stockholders may bring suit to restrain the two corporations from consolidating.—*Botts v. Simpsonville & B. C. Turnpike Co.*, (Ky.) 184.

12. A levy and sale of shares, under execution, against the former owner, after he has transferred them on the books to others as collateral security for a debt unpaid and due at the date of the levy, and greater than the market value of the stock at that time, passes no title, and the purchaser is not liable for unpaid subscription to the stock, at the instance of a creditor of the bank, under Rev. St. Mo. 1879, § 736, authorizing an execution on behalf of such creditor against a stockholder to the amount of the stock owned by him.—*Simmons v. Hill*, (Mo.) 61.

13. The fact that the execution creditor, ignorant of the transfer, bought the stock at the sale to save his debt, but, after learning

that it had been transferred, abandoned all claim to it, would not authorize the persons in whose name it stood to transfer it to him without his knowledge or consent, and such a transfer, unless ratified, would not make him a stockholder, and liable for said unpaid subscription.—*Id.*

Corpus Delicti.

Evidence of, see *Homicide*, 28.

COSTS.

See, also, *Effectment*, 12.

Right to costs.

1. Under act Tenn. 1839, (Mill. & V. Code, § 3922,) providing that no more costs than damages can be recovered in actions for false imprisonment, etc., unless the recovery exceed five dollars, where a jury is waived in an action for false imprisonment and assault and battery, and the judge finds five dollars damages, plaintiff must pay all costs in excess of five dollars.—*Steffer v. Burton*, (Tenn.) 358.

On appeal.

2. Where appellee offers to remit an excess in the judgment, if the judgment is otherwise affirmed, and the fact of the excess was not mentioned below on motion for new trial, and no charge was asked on the subject, appellee is entitled to costs in both courts; the judgment being affirmed, after deducting the excess.—*Mayer v. Duke*, (Tex.) 555.

—In criminal cases.

3. Crim. Code Ky. § 861, provides that "on affirmance of a judgment, if the appeal be taken by the defendant, and on the reversal of the judgment, if the appeal be taken by the commonwealth, a judgment for costs shall be rendered against the defendant." *Held*, that this statute authorizes a judgment for costs against one convicted of a felony.—*Peoples v. Commonwealth*, (Ky.) 642.

COUNTIES.

Action to compel treasurer to replace money in treasury, see *States and State Officers*, 2. Enforcement of treasurer's settlement, jurisdiction of county court, see *Courts*, 6. Notice of election to authorize county indebtedness, see *Elections and Voters*, 1. Treasurer's bond, names of obligees, see *Bonds*, 1.

Officers—Duties and liabilities.

1. Pen. Code Tex. art. 250, imposing a penalty on any county officer who shall become interested "in the purchase or sale of anything made for or on account of such county," renders such officer liable for selling a mule to the county.—*Rigby v. State*, (Tex.) 780.

2. A proceeding by the county against the executrix of a deceased treasurer to enforce a claim due the county, must be instituted in the name of the deceased county treasurer's successor in office, who alone has authority to receive, keep, and disburse the moneys of the

county, under Rev. St. Mo. 1879, § 586.—*Cole County v. Schmidt*, (Mo.) 888.

Removal of officers.

8. Const. Tex. art. 5, § 24, providing that county officers may be removed for incompetency, etc., upon the cause therefor being set forth in writing, does not prevent more than one ground for such removal being included in a petition filed therefor.—*Poe v. State*, (Tex.) 787.

4. Such provision of the constitution, authorizing the district judge to remove a county officer only on the verdict of a jury, does not render a statute unconstitutional authorizing the judge to temporarily suspend a county officer without such verdict, pending proceedings for his removal.—*Id.*

5. Under Rev. St. Tex. tit. 66, c. 2, providing that the trial and all proceedings on a petition for the removal of a county officer for misconduct, etc., shall be conducted, so far as possible, in accordance with the practice in other civil cases, the petition may be amended under rules applying in other cases; and, where the cause of removal alleged is the failure of the officer to pay over money, the petition may be amended so as to charge such delinquency to have been wilful.—*Id.*

6. In such case, where the petition is sworn to before the clerk of the court in which the petition is filed, the fact that he did not attach his seal to the certificate will not be held an objection, where he afterwards readministered the oath to the petition as amended.—*Id.*

7. Where the district judge exercised the power conferred upon him by such statute, of suspending a county officer pending proceedings for his removal, an appeal from a subsequent judgment of removal, and the execution of a *supersedeas* bond, had no effect on the order of suspension.—*Id.*

Accounting by treasurer.

8. Under Rev. St. Mo. 1879, § 5378, requiring that the county treasurer shall settle his accounts with the county court semi-annually, and, if he die, his executor or administrator shall immediately make such settlement, the estate of a deceased treasurer is not in default until notice to make such settlement is served on the executrix; and until such notice the county court has no authority to make the settlement.—*Cole County v. Schmidt*, (Mo.) 888.

9. Section 5378 provides that the county court shall ascertain by actual examination and count the amount of balances and funds in the hands of such treasurer to be accounted for, and to what particular fund it appertained, and cause to be spread on its records, in connection with the entry of settlement, the result of such examination and count. In a proceeding by a county against the estate of its deceased treasurer to recover a claim alleged to be due to the "county interest fund," the evidence showed that the course prescribed by the statute as to what fund the claim belonged was not pursued. *Held*, that the proceeding could not be sustained.—*Id.*

Tax collector—Bond.

10. Under Rev. St. Tex. art. 4738, providing that the commissioners' court may require a tax collector to furnish a new bond, whenever

such a proceeding is deemed advisable by the court, a tax collector may be required to give a new bond without first having been cited to appear and show cause.—*Poe v. State*, (Tex.) 787.

Compensation.

11. *Manaf. Dig.* § 5749, providing that the collector of revenue shall be allowed "for the first ten thousand dollars collected, five per cent. in kind," only means that the commissions shall be paid out of the same fund in which the tax was collected, and does not authorize a further computation of commissions at that rate when the amount of the items collected, upon which the 5 per cent. has been computed, aggregates more than \$10,000.—*Wilson v. State*, (Ark.) 491.

12. By *Manaf. Dig.* § 5851, the county court, when an error is discovered in the account of the revenue collector, may correct it at any time within two years from the settlement. By section 5850, when any balance is found due from the collector, which is not paid within a specified time, the county court may render judgment against him and his sureties. *Held*, that where the county court has approved, through mistake or inadvertence, the collector's account, in which he has credited himself with excessive commissions, it is competent to readjust the account within the two years, and, upon his failure to refund the excess, proceed against him, as provided for in section 5850, for the balance and penalties.—*Id.*

COURTS.

See, also, *Justices of the Peace; Prohibition, Writ of.*

Mandamus, see *Mandamus*, 1, 2.
Trial without jury, see *Trial*, 21-23.

United States circuit court.

1. The United States circuit court has chancery jurisdiction of a proceeding to foreclose a mortgage in Missouri, the statute of that state providing for foreclosure in a court of law not doing away with the right to proceed in equity.—*Keith & Perry Coal Co. v. Bingham*, (Mo.) 83.

Kentucky court of appeals.

2. After the levy of an execution on land, but before sale, the debtor gave a mortgage to indemnify C. and R., his sureties, for another debt. When the land was sold under the execution, it was bid off by C., who paid for it with money furnished by the debtor, and at the request of the latter caused the sheriff to convey the land to his wife. *Held*, that an appeal lies to the court of appeals from a decree holding the right of the wife to be paramount to that of C. and R. under their mortgage, though the amount each was compelled to pay as surety was less than \$100, as the title to land is directly involved.—*Corbett's Ex'rs v. Howell's Adm'x*, (Ky.) 658.

Supreme court of Missouri.

3. An appeal from an order overruling a motion to quash an execution to enforce the lien of a city tax-bill for street improvements, title to real estate not being involved, and the

amount in dispute being below the jurisdiction of the supreme court, is within the jurisdiction of the Kansas City court of appeals.—*Corrigan v. Morris*, (Mo.) 830.

4. To a petition for an injunction by one claiming the exclusive right to operate a ferry between a city in Missouri and one in Illinois, under a license from the former city, against the operators of another ferry, defendants answered, alleging that the ordinance was void as an attempt to regulate commerce between the states in violation of the constitution of the United States, and also as an attempt to create a monopoly in violation of the constitution of the state of Missouri. *Held*, that the record presented a question involving the construction of the constitutions of the United States and of the state, within Const. Mo. art. 6, § 12, conferring jurisdiction in such cases upon the supreme court, and that the St. Louis court of appeals had no jurisdiction to hear and determine an appeal from an order dismissing the petition.—*State v. St. Louis Court of Appeals*, (Mo.) 374.

5. A petition alleged that defendant, a railway company, received and agreed to carry plaintiff's goods to a given point, but lost them; the action being based on common-law liability, and not on Rev. St. Mo. § 598, allowing a recovery against the carrier receiving the goods, if lost by the negligence of a connecting carrier, with a right of action over by the receiving carrier against the latter. The answer alleged the contract to be for the delivery of the goods at the terminus of defendant's line to a connecting railroad, of which it averred performance. The court, trying the case without a jury, rendered judgment for plaintiff for less than \$100, but upon what ground did not appear. No instructions were asked or given referring to any federal question, and the motion for a new trial was made on several grounds, one being that the statute on which the court based its finding was unconstitutional, and interfered with commerce between citizens of different states. *Held*, that no federal question was presented, and that the supreme court had no jurisdiction.—*Nall v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 610.

County court.

6. Under Rev. St. Mo. 1879, §§ 5378, 5380-5385, relating to settlements by the county treasurer with the county courts, and the power of said court to enforce such settlements, the county court has exclusive jurisdiction of a proceeding by the county against the executrix of a deceased treasurer to enforce a claim due to the county, the proceedings not being on the bond; and the probate court has no jurisdiction of such case.—*Cole County v. Schmidt*, (Mo.) 888.

City courts.

7. Const. Ky. art. 4, § 41, providing that certain city courts and "all other police courts established in any city or town, shall remain, unless otherwise directed by law, with their present powers and jurisdictions," applies only to police courts in existence when the constitution was adopted; and the legislature may confer civil jurisdiction upon police

courts afterwards created.—*Louisville & N. R. Co. v. Adams*, (Ky.) 425.

COVENANTS.

Warranty by life-tenant.

Land in which a wife had a life estate, and her children the remainder, was conveyed in fee with general warranty of title, by her and her husband to defendants' grantors. *Held*, that the children could not oust defendants until they had accounted for the value of lands descended to them, or received as gift or advancement from their parents, Gen. St. Ky. c. 63, art. 1, § 18, providing that a claimant for land embraced in such a deed shall be barred to the extent of the value of any estate received by gift, advancement, or descent from the vendor.—*Gudgell v. Tydings*, (Ky.) 466.

CREDITORS' BILL.

Before judgment—Remedy at law.

1. Where two, to whom another is jointly indebted, make a draft on him payable to one of them at a future day, and the payee, who is solvent, gives his note to the president of his co-drawer for the latter's share of the debt, and the president assigns the note for collection and for payment of certain creditors of such co-drawer, of whom plaintiff is one, and both drawers and the assignee are within the jurisdiction, plaintiff, who alleges that the assignment of the note is void for fraud, cannot maintain a suit in equity before judgment to have the draft applied to his debt, his remedy being at law by garnishment, under Rev. St. Mo. § 2541, providing for issues on which the alleged invalidity of the assignment can be adjudged, and section 2540, allowing the garnishment of a debt not due.—*Humphreys v. Atlantic Milling Co.*, (Mo.) 140.

Evidence—Variance.

2. Variances between the allegations that the note was made by the president of the payee, and that the assignee procured its discount, and evidence that it was made by the payee, and no negotiation of it was made by the assignee, are not fatal.—*Id.*

CRIMINAL LAW.

See, also, *Bail; Indictment and Information; Pardon; Witness.*

Carrying weapons near voting place, see *Elections and Voters*, 3.

Costs on appeal, see *Appeal*, 2.

Disposing of mortgaged property, see *Chattel Mortgages*, 8, 9.

Limitation of prosecution, see *Limitation of Actions*, 12.

Particular crimes, see *Adulteration; Burglary; Embellishment; Gaming; Homicide; Intoxicating Liquors; Larceny; Mayhem; Perjury; Rape; Seduction; Threats and Threatening Letters.*

Preliminary examination.

1. The accused, being competent under the Missouri statutes to testify in his own behalf,

is competent to testify on a preliminary examination.—*State v. Kinder*, (Mo.) 77.

Plea.

2. Where the evidence in support of a plea in abatement, that one of the grand jurors was incompetent because he had been convicted of felony, does not show affirmatively that the offense for which the juror was convicted was a felony, the plea is properly overruled, even if the statute authorizes a plea in abatement for such cause.—*Woods v. State*, (Tex.) 108.

3. A conviction for selling a pint of liquor without a license is no bar to an indictment for selling it to a minor without the written consent of his parent or guardian.—*Ruble v. State*, (Ark.) 362.*

4. Where the record on appeal does not show any action taken on a demurrer to defendant's plea of former jeopardy, and the matter is not mentioned by counsel, defendant will be held to have waived the plea.—*Johnson v. State*, (Tex.) 235.

5. A motion to quash an indictment may be entered pending a plea of not guilty, and will not effect a withdrawal of the plea.—*State v. Reeves*, (Mo.) 841.

Venue.

6. Where a letter sent to one threatening to accuse him of a crime is mailed in B. county, the offense of sending such a letter is committed there, and is not triable in C. county, under Code Crim. Proc. Tex. art. 225, providing that offenses shall be prosecuted in the county where committed. *Hurt, J.*, dissenting.—*Landa v. State*, (Tex.) 218.

7. On trial for larceny of mules, testimony of the owner that at the time they were stolen he lived in S. county, that he had been plowing with them, that he took them from the plow and put them into the barn about sundown, and that between that time and 11 o'clock at night they were stolen from the barn, warrants the inference that the barn was in S. county, where the venue was laid.—*State v. Hill*, (Mo.) 28.

Continuance.

8. Where an affidavit for a continuance on account of the absence of witnesses sets out evidence which, if proved, would entitle defendant to an acquittal, the court cannot refuse the continuance because of disbelief in the statements of the affidavit.—*Baker v. Commonwealth*, (Ky.) 386.

9. It is not error to refuse a continuance for absence of witnesses whose testimony is immaterial, incompetent, or contradictory to declarations of defendant, and probably untrue.—*Clore v. State*, (Tex.) 242.

10. Defendant is not entitled to a continuance for absence of a material witness, where before the trial he was confined in the same jail with the witness, and neglected to serve process on him.—*Stonard v. State*, (Tex.) 442.

11. On a murder trial where there is sufficient proof of motive, threats, preparation, and proximity to the scene of murder, and there is evidence that defendant had previously been one of a party to hunt for certain outlaws, a continuance to secure testimony is properly refused, where the testimony v.10s.w.—58

would simply show that the outlaws had been at the scene of the murder a few days before, suspiciously searching for defendant.—*Peace v. State*, (Tex.) 761.

12. Where defendant and another are separately indicted for the same offense, defendant is not entitled to a continuance on an application that the other defendant be first tried, under Code Crim. Proc. Tex. art. 660a, which provides that either of several defendants indicted for an offense growing out of the same transaction, on a proper affidavit, may have the party whose testimony is desired tried first, but that the affidavit shall not, without other sufficient cause operate a continuance as to either.—*Stonard v. State*, (Tex.) 442.

Conduct of trial.

13. When the attorney for the state was concluding, he learned of an important witness near the place of trial, and told the court of his purpose to have him examined. The judge said that when the defendant was through he would determine the question. When the defendant was through, the state offered to examine the witness upon a material point, but the court declined to permit him, on account of laches. *Held* that, while the witness should have been permitted to testify, it was in the discretion of the trial court, and a clear abuse of discretion not appearing, the case would not be reversed therefor.—*Commonwealth v. Green*, (Ky.) 637.

14. The court may interrogate a witness to ascertain whether he understands a question asked him, and has answered it according to his understanding.—*State v. Matthews*, (Mo.) 144.

15. Witnesses saw defendants have knives before and after the wounding. One described a conflict between one defendant and deceased, during which appellant, the other defendant, came in and grabbed at them, and they left the room followed by him. Witness saw a knife in the hand of deceased, but none in appellant's hands. *Held*, that it was error for the judge to ask, "Do you mean to say that you saw these men fighting with knives, and did not interfere?" and to reply, when it was objected that witness did not state that he saw them so fighting, that "the jury will be the judge of that." as the jury might infer that the judge referred to defendants, and was of opinion that they fought with knives.—*Sharp v. State*, (Ark.) 238.

16. Under Rev. St. Mo. § 1919, prohibiting any unfavorable inference to be drawn from the omission of a defendant or of his wife to testify, it is not cause for reversal for the prosecuting attorney on the argument to refer to defendant's omission to call a co-defendant who is not on trial.—*State v. Matthews*, (Mo.) 144.

17. A reversal will not be granted on the ground that the prosecuting attorney read in argument the report of another case, where it does not appear that it was used to oppose the court's charge, and no objection was made at the time.—*Cline v. State*, (Ark.) 225.

Evidence.

18. Evidence on a trial for murder, that a witness who testified before the coroner's in-

quest is a resident of another state, is sufficient to render admissible his testimony before the coroner. — *Johnson v. State*, (Tex.) 285.

19. There is no error in excluding a paper which purports to be a justice's docket entry, but is not a certified copy, and is unaccompanied by any offer to prove its genuineness. — *Moore v. State*, (Ark.) 32.

20. Where the prosecuting attorney has unsuccessfully endeavored to make a witness acknowledge that his son, who saw the shooting, was bribed to leave the state, and has made prominent the fact that witness and his son were employed by a company, of which the defendant, who is alleged to have bribed him, is a member, it is error to exclude evidence that that defendant advised the son not to go. — *Miller v. Commonwealth*, (Ky.) 137.

21. Evidence that defendant and others had previously taken and whipped one killed at the time of the homicide in question, and had taken a witness from the house, is admissible as showing that the crime was one of a system of criminal acts, and that defendant was implicated in that crime as a part of the system. — *State v. Matthews*, (Mo.) 144.

Evidence — Confessions and admissions.

22. On a preliminary examination by the judge to determine whether confessions were made with a degree of freedom to warrant their admission in evidence, it is error to exclude evidence offered by the prisoner to show that they were procured through fear and compulsion, and the error is not cured by the submission of such evidence to the jury. — *State v. Kinder*, (Mo.) 77.

23. Defendant and others were discovered in the act of skinning a stolen cow in a slaughter-house. When officers entered, defendant had left, and the others said: "Arrest [defendant]; he is the guilty one, if anything is wrong." *Held*, that this statement was not admissible against defendant, there being nothing to show that he heard it. — *Brookser v. State*, (Tex.) 219.*

24. Even if a conspiracy were shown, such statement would not be admissible, not being in furtherance of the common design. — *Id.**

Accomplices and co-defendants.

25. Failure of a witness for two days to report what he knew about the murder does not render him an accomplice, when such failure was induced by threats of the accused to kill him if he disclosed. — *Green v. State*, (Ark.) 266.

26. Mansf. Dig. Ark. §§ 1507, 1510, define an accessory after the fact as one who, with knowledge that a crime has been committed, conceals it from the magistrate, or harbors and protects the offenders: "provided, that persons standing to the accused in the relation of * * * husband and wife shall not be deemed accessories after the fact, unless they resist the lawful arrest of such offenders." Defendant was convicted of burglary on the testimony of L., an accomplice, corroborated by the testimony of L.'s wife, who knew that the crime was to be committed, though she protested strenuously against it,

and also knew that defendant and L. had committed it. *Held*, that she was not an accessory before the fact, at common law, and that her concealment of the offense was for the purpose of protecting her husband, within the meaning of the statute, and she was therefore not a statutory accomplice, and hence her corroborating evidence was sufficient to convict. — *Edmonson v. State*, (Ark.) 21.

27. Under Rev. St. Mo. § 1918, providing that no person on trial shall for that reason be incompetent, but such person may testify in his own behalf or in the behalf of a co-defendant, a defendant, on a separate trial, may call as a witness his co-defendant, who is not on trial. — *State v. Matthews*, (Mo.) 144.

28. It is proper to refuse to allow defendant to show that a co-defendant has been suborned by the prosecution, and is in court. — *Id.*

29. A question to a witness, who was a member of the criminal society to which defendant belonged, and was present at a meeting of it before the murder, and who has fully detailed his connection with the case, whether he has employed counsel, is properly excluded as immaterial. — *Id.*

Instructions.

30. It is not error to refuse instructions on a subject on which sufficient instructions have already been given. — *State v. Woods*, (Mo.) 157; *Smith v. State*, (Tex.) 751.

31. A refusal to give instructions is not error where there is no evidence upon which to base them. — *State v. Matthews*, (Mo.) 144.

32. An instruction that "accomplice" means any person aiding, etc., defendant in the killing, and cautioning the jury as to the weight to be given to an accomplice's testimony, is not erroneous as assuming defendant's guilt, where that interpretation cannot fairly be given to it when read in connection with the whole charge. — *Id.*

Circumstantial evidence.

33. Where the evidence is positive that defendant committed the crime, no charge is required as to circumstantial evidence. — *Clore v. State*, (Tex.) 242.

34. Where all the evidence connecting the accused with the theft of a yearling is circumstantial, failure to charge the jury with reference to circumstantial evidence is reversible error. — *Crowley v. State*, (Tex.) 317.

35. A charge that, where "circumstantial evidence is relied upon to sustain a conviction, each fact or circumstance necessary to establish the conclusion of guilt must be proved beyond a doubt, and the facts so proved must be consistent with each other, and with the guilt of the accused, and, when considered together, must be so conclusive as to satisfy you beyond a reasonable doubt that the defendant is guilty as charged," is not sufficiently full. — *Brookser v. State*, (Tex.) 219.

Custody of jury.

36. Acts Tenn. 1887, c. 158, providing that in criminal trials, when the minimum punishment is not above one year in the penitentiary, the judge need not place the jury in charge of an officer, but the jury may, in the court's

discretion, disperse as in other cases, is an unconstitutional delegation of the legislative power to suspend the general law, which requires juries to be kept together in felony cases, and which it does not in terms or by implication repeal.—*King v. State*, (Tenn.) 509.

New trial.

37. On conviction for perjury in testifying to an act of sexual intercourse with the prosecuting witness, she being the only witness who testified to the falsity of the statements, and being only circumstantially corroborated by evidence going to show that defendant could not have been at her house at the time he testified, and that, after giving his testimony, he forthwith left the county, a new trial should be granted to obtain evidence which would explain his reasons for leaving the county, and circumstantially corroborate his statements of his whereabouts at the time in question, while explaining the strongest corroborating testimony for the prosecution, although a continuance to obtain the same testimony was properly denied on account of defendant's lack of diligence.—*Simmons v. State*, (Tex.) 116.

Appeal.

38. The trial court has no jurisdiction to amend a recognizance which has been given to perfect an appeal therefrom.—*Koritz v. State*, (Tex.) 757.

39. Malicious mischief is an offense unknown to Texas law, and a recognizance, on appeal, stating that defendant had been charged and convicted of such offense, will not support the appeal.—*Id.*

40. A bill of exceptions taken generally to the charge of the court, specifying no particular error, will not be considered; but the charge will be examined with reference only to fundamental errors.—*Peace v. State*, (Tex.) 761.

41. In a misdemeanor case, it is no ground for reversal that the record fails to show that the jury, which was of the regular panel, was specially sworn, since it is presumed that the general oath of the term was administered to them, and the special oath may be waived by defendant's failure to object at the time.—*Ruble v. State*, (Ark.) 23.

42. Under *Mansf. Dig. Ark. § 2468*, providing that the supreme court shall reverse no judgment in misdemeanor cases, except for errors apparent on the record to the prejudice of appellant, it is no ground for reversal that the record fails to show that a plea was entered by defendant, defendant having submitted to a trial as under a plea of not guilty.—*Moore v. State*, (Ark.) 22.

43. The court cannot say that there was error in sustaining a demurrer to the plea, when the plea is not in the record.—*Id.*

44. Hearsay evidence admitted without objection, and afterwards withdrawn on defendant's motion, cannot be assigned as error.—*Hanlon v. State*, (Ark.) 265.

45. Where no objection or exception is taken to testimony in response to an unobjectionable question, and no reason for excluding it is stated, error is not well assigned to its admis-

sion. *SHERWOOD, J.*, dissenting.—*State v. Matthews*, (Mo.) 144.

46. Where no exceptions were taken except to the instructions, which were full and proper as to the offense, the verdict will be sustained.—*Stricklin v. Commonwealth*, (Ky.) 465.

47. When there is nothing to indicate on appeal that requested instructions were refused, it will be presumed they were given.—*Smith v. State*, (Tex.) 751.

48. In cases of misdemeanor, where no special instructions are requested, and no exceptions reserved to the charge, apparent errors therein will not be revised on appeal, unless they are of a fundamental character.—*Comer v. State*, (Tex.) 106.

Cruelty.

As ground for divorce, see *Divorce*, 1.

Custom and Usage.

Marriage by Indian custom, see *Marriage*, 2.

DAMAGES.

Damnum absque injuria, see *Navigable Waters*, 2.

Excessive, see *Malicious Prosecution*, 4.

For delay in transmitting telegram, see *Telegraph Companies*, 9-11.

In condemnation proceedings, see *Eminent Domain*, 11-13.

Ejection, see *Ejectment*, 12.

Measure, for tort, see *Death by Wrongful Act*, 3, 4.

On wrongful attachment, see *Attachment*, 6-8.

Use and occupation, see *Use and Occupation*.

Nominal damages.

1. Where plaintiff, having made a contract to saw a lot of timber for defendant, purchased a saw-mill for that purpose, and defendant subsequently refused to let plaintiff perform the contract, but it appeared that, during all the time that the mill was owned by the latter, it was employed in sawing for others at prices equal to what plaintiff would have received under his contract with defendant, the plaintiff was entitled to only nominal damages.—*Frazer v. Clark*, (Ky.) 806.

Exemplary damages.

2. An instruction that the jury should "award damages in their discretion, not exceeding in all five thousand dollars," etc., is proper as an instruction on punitive damages.—*Louisville & N. R. Co. v. Ballard*, (Ky.) 420.

3. Allegations that plaintiff had a contract with defendant to construct its railroad; that defendant wrongfully and forcibly seized and converted his property while he was using it in such construction, and instigated an unlawful levy of attachment upon his property while he was so using it, for the purpose of making it impossible to perform his contract,—state a cause of action in tort authorizing exemplary damages, though such allegations are connected with others charging breach of

the contract, for which actual damages are sought.—*Shirley v. Waco Tap R. Co.*, (Tex.) 543.

4. In an action against a railroad company for personal injuries to a passenger, it is error to charge that exemplary damages are "given as a kind of punishment," leaving the jury to infer that defendant would be liable to such damages if, with knowledge of the general bad condition of the road prior to the accident, it allowed it to remain so, regardless of whether plaintiff's injury resulted from that known general bad condition.—*Missouri Pac. Ry. Co. v. Brazil*, (Tex.) 408.

5. In an action against a railroad company for injuries to a passenger, a charge on the question of exemplary damages that gross negligence is a total want of ordinary care, and ordinary care is that degree of care that a person would use under like circumstances, is erroneous, as authorizing the jury to believe that exemplary damages may be awarded where the degree of care exercised is but slightly below ordinary care.—*Missouri Pac. Ry. Co. v. Shuford*, (Tex.) 408.

6. The further charge that if the road had been out of repair for a long time, to the company's knowledge, or if the general bad condition was so notorious that the company, by exercise of ordinary care, should have known of it, but failed to repair it, the question of exemplary damages may be considered, is erroneous, as authorizing exemplary damages, though the road, where the injuries occurred, was but slightly defective, and as authorizing them for the general bad condition of the road, regardless of whether plaintiff's injuries resulted therefrom.—*Id.**

7. A charge that, if the injuries received were due to the gross negligence of defendant, the jury should consider the question of exemplary damages; that gross negligence was a total want of ordinary care; and that ordinary care was that degree of care which an ordinary person would use under like circumstances,—is erroneous, as inducing the belief that the exercise of care but slightly less than ordinary care would render defendant liable in exemplary damages.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 411.

8. An instruction that a railroad company is liable to exemplary damages if it knew of the defects in its track, and operated the road indifferent to the passengers, is erroneous, in not limiting such damages to cases where acts of gross negligence contributed to the accident.—*Missouri Pac. R. Co. v. Johnson*, (Tex.) 825.

Proximate and remote cause.

9. Plaintiffs sued defendant for delay in transmitting a telegram sent to them by a bank holding notes for collection for plaintiffs against a falling debtor. Through failure to deliver the message promptly, other creditors attached the property of the debtors before plaintiffs received the message; and the property, when sold by the sheriff, brought less than the amount of their attachment liens. *Held*, that the fact that the estimated value of the real estate sold by the sheriff was greater than the amount realized at the sale, and sufficient to pay plaintiffs' claim, did not impose

on the plaintiffs the duty of buying the same and discharging the prior liens, in the absence of evidence that plaintiffs were able to do so, and that it was their duty as ordinarily prudent men to do so.—*Western Union Tel. Co. v. Sheffield*, (Tex.) 752.

Measure for tort.

10. In such case the measure of damages is the value of the notes held by plaintiffs against the debtor, the cost of the message, with 8 per cent. interest to day of trial.—*Id.**

11. In an action for injuries sustained by plaintiff by being run over at a railroad crossing, it is error for the jury, in assessing plaintiff's damages, to make separate assessments for "pain and suffering," "mental anguish," and "peril and fright," as the first item was broad enough to cover the last two.—*Galveston, H. & S. A. Ry. Co. v. Porfert*, (Tex.) 207.

12. In an action for personal injuries to plaintiff's wife, plaintiff is entitled to recover for mental suffering, the injuries including a broken leg and dislocated arm, without direct proof that mental suffering ensued.—*Brown v. Sullivan*, (Tex.) 238.

13. In an action for negligently overflowing lands, whereby sand was deposited on them, an instruction that the measure of damages is the difference between the market value of the land before and after the damage is erroneous, as authorizing the jury to consider the value of the land at any time, instead of immediately before and after the injury.—*Trinity & S. Ry. Co. v. Schofield*, (Tex.) 575.

14. A charge that if the cost of removing the sand exceed the market value of the land before the same was washed on it the measure of damages is the market value of the land at the time of the deposit is erroneous, as disregarding the questions whether the sand injured the land, or whether the value of the land was totally destroyed.—*Id.*

15. In an action for death caused by negligence, the death being caused by defendant's train negligently striking plaintiff's intestate, who was a track repairer in defendant's employ, while walking on the track, it is error to direct the jury that if they find for plaintiff, they should assess his damages at \$5,000.—*Schlereth v. Missouri Pac. Ry. Co.*, (Mo.) 66.

Excessive damages.

16. In an action for personal injuries, it appeared that plaintiff was confined in a hospital for 145 days; that dead bone was at the time of the trial (21 months after the accident) still working out of the wound, which was still open; one leg was partially stiffened, and somewhat shorter than the other; and he was disabled for life; his leg had been broken; large pieces of skin were torn from the flesh; and he was bruised in many places. *Held*, that a verdict of \$14,167 was not excessive.—*Galveston, H. & S. A. Ry. Co. v. Porfert*, (Tex.) 207.*

17. A verdict for \$4,000 actual damages is not excessive, where there is evidence that, in addition to temporary injuries, plaintiff received a spinal injury which will probably be permanent.—*Missouri Pac. Ry. Co. v. Shuford*, (Tex.) 408.

18. A verdict of \$5,000 for personal injuries to a woman is not so excessive as to warrant

a reversal, where it appears that two or three months after the injury she could not attend to ordinary household duties, and that nervous prostration ensued, which was likely to continue as long as she lived.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 411.

19. A verdict will not be set aside as excessive where it appears that the injured woman's arm was dislocated, her leg broken, and her back and shoulder injured, and that her sufferings had been great, though it was so large that the trial court might have set it aside in its discretion, when there is nothing to show that the jury was actuated by passion or prejudice.—*Brown v. Sullivan*, (Tex.) 288.

Pleading.

20. In an action for damages for maintaining a bawdy-house adjoining plaintiff's premises, allegations that, on account thereof, plaintiff had been damaged by difficulty in renting his property as well as by depreciation in its value, and that his aggregate damages were a stated sum, are sufficient, in the absence of special exceptions, to warrant a recovery for loss of rents.—*Bisso v. Southworth*, (Tex.) 528.

21. In an action for personal injuries to a wife, it was averred that she had received heavy and serious blows; that her lower limbs were bruised and wrenched, and her nervous system shocked and permanently impaired; and that she had suffered great physical and mental pain from the injury. *Held*, that evidence was admissible of a threatened miscarriage.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 411.

Evidence.

22. In an action for negligently causing an overflow of plaintiff's lands, by means of which sand was deposited thereon, evidence of the cost of removing the sand is admissible.—*Trinity & S. Ry. Co. v. Schofield*, (Tex.) 575.

Physical examination of plaintiff.

23. It is not error to refuse to compel plaintiff to submit to physical examination by a physician to whom he objects, though not for lack of competency or integrity.—*Missouri Pac. R. Co. v. Johnson*, (Tex.) 325.

Dangerous Premises.

See *Negligence*, 1.

Death.

Of appellee, see *Appeal*, 12.

party, see *Abatement and Revival*, 1, 2.

DEATH BY WRONGFUL ACT.

Pleading.

1. In an action against a railway company for negligence, whereby plaintiff's intestate was killed, an instruction defining the law of negligence applicable is erroneous if it does not limit the acts of negligence for which plaintiff may recover to such as are charged

in the petition.—*Schlereth v. Missouri Pac. Ry. Co.*, (Mo.) 66.

2. A petition which sets out particularly the circumstances attending the killing, and alleges that the death of plaintiff's intestate was occasioned by the negligence of defendant's servants, while running, conducting, and managing a train of cars, is good, as against an objection to the introduction of evidence, that it fails to state any specific act of negligence.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo.) 852.*

Damages.

3. Rev. St. Mo. § 2121, provides that "whenever any person shall die from any injury resulting from or occasioned by the negligence * * * of any servant or employé," while running a train of cars, his representatives may recover \$5,000 damages, provided the person would have had a cause of action had death not resulted. A subsequent clause provides for damages when any passenger shall be injured by any defect or insufficiency in machinery, etc. *Held*, that the first clause is not limited to passengers, but also includes the case of an employé whose death is not occasioned by a fellow-servant.—*Id.*

4. Where an action for causing death is brought by deceased's minor children, the measure of damages is a fair and reasonable compensation to them for the loss of their father's services as a means of support during their minority.—*McPherson v. St. Louis, L. M. & S. Ry. Co.*, (Mo.) 846.

Declarations.

See *Evidence*, 5-8.

DEDICATION.

Acceptance.

1. A map referred to in all the deeds under which a party claims is sufficient evidence that the streets and alleys marked thereon were dedicated and accepted by the city.—*Smith v. City of Navasota*, (Tex.) 414.

Effect.

2. A parol dedication of land to the use of a school-district by survey, and describing the boundaries by marked corners, and acceptance by building a school-house thereon, and using it for school purposes, are effectual to vest the title in the trustees as against subsequent grantees.—*Singleton v. School-Dist. No. 84*, (Ky.) 798.

Evidence.

3. Declarations by former owners, made after their title had ceased, are not competent evidence of the dedication of streets and alleys.—*Smith v. City of Navasota*, (Tex.) 414.

DEED.

See, also, *Covenants; Fraudulent Conveyances; Vendor and Vendee*.

Absolute deed, when mortgage, see *Mortgages*, 1.

Acknowledgment, see, also, *Clerk of Court*, 2.
By co-tenant, see *Tenancy in Common and Joint Tenancy*.

Estoppel by, see *Estoppel*, 1, 2.

Execution, under power, see *Powers*.

Reformation of, see *Equity*, 3.

Sheriff's deed, see *Execution*, 11-14; *Judicial Sales*, 3.

Tax-deed, see *Taxation*, 30.

To trustees of corporation, see *Corporations*, 8.

Description.

1. A sheriff's deed, though in itself too indefinite in its description of the land conveyed, but which refers for more specific description to a recorded deed to the same land made by the execution debtor to another person, and to a deed of reconveyance by the latter's executrix to said debtor, when supplemented by the testimony of a surveyor, who has run the lines according to said deeds, and found apparent monuments of the boundaries therein described, is sufficient.—*Wright v. Lassiter*, (Tex.) 295.

2. A deed described "all my right * * * for and of one certain half league of land, * * * situated * * * in the county of Jefferson," etc., bounded: "By lands granted to the [grantor] as a colonist by the government of Coahuila and Texas to the north; to the west by land granted to the Williams; to the south by lands belonging to A. Horton; and to the east by the Neches marsh,—having a front on the marsh of 1,250 *varas*, and running back 6,000 *varas* for quantity; * * * containing one-half league; * * * said land was granted by the government of Texas and Coahuila to the colonist James W. Bullock, and by said Bullock sold to" the grantor. Horton was claiming the south half of the league, and had conveyed it. It was more than 1,250 *varas* from the north line of the league to the north line of the south half, and more than 6,000 to the west line. There was no land on the west granted to "the Williams," but there was a league granted to Charles Williams. *Held*, that the record of the deed was constructive notice to a subsequent grantee that the land conveyed was the north half of the league, and that the intention was clearly expressed to convey the entire north half.—*Folk v. Chaison*, (Tex.) 581.

Delivery.

3. A father consulted W. and D. as to whether he could legally convey all the land he owned, saying that he desired to give it to defendant, his minor son. W. informed him that he could legally do so, but suggested that he make a will; but this he declined to do, saying that he wanted "to give it to him now, before his death." The deed was accordingly signed and handed to D., the grantor saying, "You take that deed and file it for record." D. then suggested that it might be prudent not to have it recorded just then, as the grantor might need to sell some portion of the land in order to support himself. The grantor then said, "You take that deed, and keep it safely." D. kept the deed until the grantor's death, when he filed it for record. *Held*, an absolute delivery to D. for the benefit of defendant, consummated as of the date of the first delivery,

by filing for record.—*Standiford v. Standiford*, (Mo.) 836.

Construction.

4. An express reservation in the *habendum* of a deed of a portion of the land included within the description will prevail over the granting clause, containing no such reservation.—*Singleton v. School-Dist. No. 34*, (Ky.) 793.

5. A purchaser of a life-estate at execution sale agreed with the debtor's wife to hold the same in trust for her and her children, and to convey to her and the children on reimbursement of expenses. After payment he conveyed by deed to the debtor and his wife, "representing themselves and their children," but the children were not named as parties in the deed. *Held*, that the wife held a life-estate in the life-estate of her husband, with remainder to her children.—*Morriwether v. Merriwether*, (Ky.) 272.

6. The granting and *habendum* clauses of a deed provided that "the parties of the first part, in consideration of the sum of \$3,500, * * * payment of same having been made by C. M. Clay [the grantee's father] for the grantee herein, have granted, bargained, and sold * * * to the party of the second part the lots or parcels of land situated," etc., "to have and to hold said lots of ground to the said [grantee,] and the children of his body lawfully begotten; but, in case of his death without children or their descendants, then to revert to and descend at his death to the said C. M. Clay, and his heirs and assigns, in fee forever." *Held*, that under Gen. St. Ky. c. 63, art. 1, § 10, providing that "if any estate shall be given by deed or will to any person for his life, and after his death to his heirs, or the heirs of his body, or his issue or descendants," he shall take only an estate for life, with remainder in fee to his heirs, etc., the grantee took only a life-estate.—*Clay v. Chensault*, (Ky.) 650.

Default.

Setting aside judgment, see *Judgment*, 2.

Delivery.

Of deed, see *Deed*, 3.

DEPOSITION.

When taken.

1. Gen. St. Ky. c. 113, § 31, providing that when a will is offered for probate, and an attesting witness is out of the state or unable to attend, the court may cause a commission to issue annexed to the will, authorizing a deposition, does not apply to proceedings in the circuit court on appeal from the county court in probate proceedings, and depositions in the circuit court may be taken in such a case as in any other civil proceeding.—*Moore's Adm'rs v. Smith*, (Ky.) 380.

2. The Missouri statutes relating to depositions provide that the facts authorizing the reading of a deposition may be established by the testimony of the deposing witness, or the certificate of the officer taking the same, and in some instances it is not necessary that the

witness should reside out of the county where the trial is had. *Held* that, where the officer's certificate is not preserved on the record, the appellate court cannot review an objection that there is nothing to show that the witnesses were not within the jurisdiction of the court.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo.) 852.

Formal objections.

3. An objection that no summons had issued previous to the taking of the deposition pursuant to Gen. St. Ky. c. 113, § 81, should be overruled, under Code Civil Proc. Ky. § 587, which provides that any objection to a deposition other than for the incompetency or irrelevancy of the testimony must be noted on the record during the first term after the deposition is filed.—*Moore's Adm'rs v. Smith*, (Ky.) 880.

Use of adversary's deposition.

4. Under Rev. St. Tex. art. 2383, providing that when cross-interrogatories have been filed and answered either party has the right to use the depositions on the trial, a party who has not filed cross-interrogatories cannot use depositions taken by his adversary over the latter's objection.—*San Antonio & A. P. Ry. Co. v. Harrison*, (Tex.) 556.

Descent and Distribution.

See *Executors and Administrators; Wills*. Rights and liabilities of heirs, see *Covenants*.

Devise and Legacy.

See *Wills*.

Dismissal.

Of Appeal, see *Appeal*, 52-54.

Dissolution.

Of partnership, see *Partnership*, 6-8.

DIVORCE.

Grounds—Cruelty.

1. It is not a ground for divorce that the wife has falsely and repeatedly charged the husband with adultery, and that on one occasion she came near involving him in a personal difficulty by making such a charge, thus causing him disgrace and mortification, in the absence of any showing that by reason of the temperament, character, or occupation of the husband, or other circumstances, the effect of the charges was to produce a greater degree of mental suffering than would usually result therefrom, as without some such facts, such charges, when made against the husband, do not amount to cruelty.—*McAlister v. McAlister*, (Tex.) 294.*

Subsequent marriage of party in fault.

2. Under Code Tenn. Mill. & V. § 3832, prohibiting a marriage between the guilty husband or wife, after a divorce for adultery, and

his or her paramour, during the life of the former consort, such a marriage between parties domiciled in Tennessee, celebrated in Alabama, whither the parties go solely to evade the statute, returning at once to Tennessee, is void in the latter state, though valid in Alabama.—*Pennegar v. State*, (Tenn.) 305.*

DOWER.

Election of devise by guardian, see *Constitutional Law*, 1.

Waiver.

1. Plaintiff, a widow, resided with her daughter on land which had been conveyed to the daughter by plaintiff's husband by deed, in which plaintiff did not join. In an action for allotment of dower against a purchaser from the daughter, *held*, that statements by plaintiff before defendant's purchase, while she resided on the land, to the effect that she claimed no interest in it; that it belonged to the daughter; and that plaintiff "had given her up the land," such statements being testified to by defendant and another, and denied by plaintiff, and the deed being of record at the time they were made, are not sufficient to estop plaintiff.—*Davis v. Cornelius*, (Ky.) 471.

Devise in lieu.

2. A will devising all testator's property to a trustee, to be sold and the proceeds distributed among the legatees, but providing that the family residence and furniture shall be retained for the use of his widow during her life, passes to the widow real estate within the meaning of Rev. St. Mo. § 2190, by which, if the testator shall "by will pass any real estate to his wife, such devise shall be in lieu of dower," unless otherwise declared, or she elects, under section 2200, not to accept its provisions; and this is so although the homestead is exempt from devise, as the rights under a homestead exemption and life-estate are different.—*Young v. Boardman*, (Mo.) 48.

3. Under Rev. St. Mo. § 8960, providing that "every male person * * * may by last will devise all his estate, * * * saving the widow her dower," the widow, on renouncing the provisions of the will, is not confined in her election to dower, but may take the absolute interest provided in lieu thereof in certain cases.—*Id.*

— Election by insane widow.

4. A widow who is insane cannot renounce the provisions of her husband's will, and elect to take dower or the statutory provision in lieu thereof.—*Id.*

5. Under Rev. St. Mo. § 2194, providing that, "in all cases when any widow entitled to the benefit of election under this chapter shall be of unsound mind," her guardian "may elect" for her, such guardian may, by writing, "not accept the provisions made for her" by her husband's will in lieu of dower, within the meaning of section 2200, as well as elect between dower and the statutory provision in lieu thereof, as provided for in sections 2190 and 2192.—*Id.*

6. The guardian being by the above act given power to elect "in the same manner and

with like effect as said ward might do were she capable," it is not necessary for him to procure an order of court directing him to make the election.—Id.

Allotment—Homestead.

7. Under Rev. St. Mo. § 3694, providing that the commissioners appointed to set out homestead shall also set out dower, but that the amount of the dower shall be diminished by the amount of the widow's interest in the homestead, an action for the recovery of dower and homestead may be joined in one count, but the widow cannot seek in one count the recovery of homestead, and in a second count the recovery of dower.—*Bryan v. Rhoades*, (Mo.) 53.

Druggists.

Illegal sales of liquor, see *Intoxicating Liquors*, 8.

Taxation, for selling liquor, see *Constitutional Law*, 4.

Drunkenness.

As defense to homicide, see *Homicide*, 37.
Ejection of drunken passenger, see *Carriers*, 14, 15.

Dying Declarations.

See *Homicide*, 29.

EASEMENTS.

See, also, *Dedication*.

Water easements, see *Waters and Water-Courses*.

Obstructions.

1. In an action to compel the removal of obstructions from a private passway from plaintiff's land over the land of defendant, where it appears that the passway was plain at the time both parties bought their lands, and that it had been in use more than 50 years, and was the only passway from plaintiff's land, the presumption is that its use was under claim of right, and the burden is on defendant to show that the use was merely permissive.—*O'Daniel v. O'Daniel*, (Ky.) 638.

2. Dismissal without prejudice, before judgment, of a proceeding in the county court by plaintiff to condemn the route as a private passway, is no bar to his action to compel the removal of the obstructions.—Id.

3. The fact that plaintiff's vendor had allowed other passways appurtenant to his land, but leading in another direction, to be closed, is no evidence of an abandonment of the way in question.—Id.

EJECTIONMENT.

See, also, *Adverse Possession*; *Trespass to Try Title*.

Title to support.

1. Trustees of a school-district, in an action in which they allege that they are the owners of the land and entitled to possession, may

prove either a dedication or adverse possession, or both.—*Singleton v. School-Dist. No. 34*, (Ky.) 798.

2. It is error to instruct to find for plaintiff if defendant has entered upon a tract which had been recovered of defendant in another action by a person under whom plaintiff does not claim, as plaintiff can only recover on the strength of his own title.—*Bailey v. Tygart Val. Iron Co.*, (Ky.) 234.

3. In an action by the children of R.'s first wife, to recover from the children of his second wife certain land which they alleged R. held as tenant by the curtesy in the right of his first wife, it appeared that R. entered on the land under a title-bond from said wife's father, who had no title, purchased the elder grant, and took a conveyance to himself; that the land, when he entered, was worth little, and that he paid as much or more than that little to acquire title; that R. conveyed the land to defendants as an advancement, having already made advancements to plaintiffs. Held, that a judgment for defendants was proper.—*Woolfolk v. Richardson*, (Ky.) 330.

Defenses.

4. After land has been sold under a deed of trust to secure the purchase money, and repurchased by the vendor, the vendee, having retained possession of the land, cannot defend ejection by the vendor on the ground of fraudulent misrepresentations by the vendor inducing the first sale, as, upon discovery of the fraud, he should have repudiated the purchase, and surrendered possession of the land.—*Crumb v. Wright*, (Mo.) 74.

5. In such an action, before the defendant can introduce evidence of the falsity of plaintiff's statements, he must prove the invalidity of plaintiff's title, which should be done by documentary evidence, or its equivalent, showing in whom the legal title is.—Id.

Possession.

6. Where defendant proves continuous adverse possession for 16 years under a title-bond, and 15 years under a deed, from his vendor, it is error to assume in an instruction that plaintiff has made out a perfect title from the commonwealth, and to charge that, if defendant has entered on the tract covered by plaintiff's patent, the verdict should be for plaintiff, without instructing as to the effect of such possession.—*Bailey v. Tygart Val. Iron Co.*, (Ky.) 234.

7. The question of champerty by plaintiff being raised by the pleadings, and there being evidence that plaintiff's title was acquired during defendant's adverse possession, an instruction on that theory should be given, if requested.—Id.

8. Neither party proved title from the state, though claiming under a common source. Plaintiff showed possession. Defendant proved no prior possession, unless a lease executed by his predecessor included the land, as to which the evidence was conflicting. At plaintiff's instance, an instruction was given as to the possessory title necessary to a recovery, which did not define the effect of possession under said lease, if it included the disputed land. Other instructions stated that plaintiff could recover unless defendant, or

those under whom he claimed, had held actual possession by entry previous to plaintiff's, and that, if defendant or his privies had held actual possession to a well-defined boundary, including the land in controversy, by such previous entry, they should find for him. *Held*, that all the instructions together were equivalent to a direction to find for defendant if the lease referred to included the land in controversy, and the omission so to charge in the first instruction was harmless.—*Ratcliff v. Belfont Iron-Works Co.*, (Ky.) 365.

Pleading—General denial.

9. In ejectment by one claiming under the purchase of an adverse claim to his wife's lands by a husband, the defense that the husband's purchase inured to the wife's benefit is available under a general denial.—*Hickman v. Link*, (Mo.) 600.

Evidence.

10. In ejectment, it is not error to exclude from evidence an intervening petition, and the proceedings on issues thereon, to which plaintiff is not a party, and the issues in which are still pending.—*Atkinson v. Dixon*, (Mo.) 163.

11. Where both parties claim under the same patent, plaintiff having showed possession, and defendant having introduced evidence of an earlier possession by a lessee of his predecessor, plaintiff need not show adverse possession for 15 years in order to recover.—*Ratcliff v. Belfont Iron-Works Co.*, (Ky.) 365.

Judgment—Damages and costs.

12. Judgment in ejectment for possession, damages, and costs, against one who, or whose wife, was never in possession, and never received any of the rents, though the wife was a tenant in common with the person in possession, is erroneous.—*La Riviere v. La Riviere*, (Mo.) 840.

Improvements.

13. Constructive notice of title, such as is implied from the registry of a deed, is not alone sufficient to preclude an occupant from the benefits of the betterment act.—*Shepherd v. Jernigan*, (Ark.) 765.

ELECTIONS AND VOTERS.

Notice—Purpose of election.

1. Under Const. Mo. art. 10, § 12, providing that any county incurring any indebtedness requiring the assent of two-thirds of the voters shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest thereon as it falls due, and also to constitute a sinking fund for payment of the principal; and under Rev. St. Mo. § 6809, and act 1888, amending sections 6808 and 6810, referring to notice of the election, and of the amount of the debt,—it is essential to the validity of the proceedings that the order or notice of election, or the ballots, shall specify, for the information of voters, the amount of the proposed indebtedness.—*St. Louis & S. F. Ry. Co. v. Epperson*, (Mo.) 478.

Offenses—Carrying weapons.

2. Where defendant is charged with carrying arms within half a mile of a voting place on election day, the presumption is that the election is legal, and the burden is on the accused to show the contrary.—*Cooper v. State*, (Tex.) 216; *Harrell v. Same*, (Tex.) 217.

EMBEZZLEMENT.

Intent.

1. An instruction that, if defendant converted the money, the jury would be authorized to infer the criminal intent, is proper.—*Dotson v. State*, (Ark.) 18.

Indictment.

2. One who is intrusted with a horse to sell, with the intention that he shall give the money received to the owner, is a bailee, within the statute of Arkansas; Mansf. Dig. § 1640, providing that, if any carrier or other bailee shall embezzle or convert to his own use any money, etc., which shall have come into his possession or been placed in his care, he shall be deemed guilty of larceny, although he shall not break, etc.; but, the proof being that he received a check which he collected entirely in paper currency, an indictment charging him with the conversion of certain paper currency and certain pieces of gold, and in another count with the conversion of the check, does not sufficiently describe the money converted, and, there being no embezzlement of the check, no conviction can be had.—*Id.*

EMINENT DOMAIN.

Jurisdiction.

1. Since Rev. St. Tex. art. 4182 et seq., provide for condemnation proceedings by railroad companies in the county court, the district court has no jurisdiction to award condemnation in a suit by the land-owner against the railroad company for use and occupation.—*Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co.*, (Tex.) 537.

Procedure.

2. Under act Ky. April 11, 1882, §§ 1, 10, providing that when a turnpike company shall be unable to contract with the owner for the purchase of land necessary for its use it shall file a description thereof, and may apply for the appointment of commissioners, the statement filed at the commencement of the proceeding must not only contain a description of the land, but must aver that the land is necessary for the company's use, and that it has been unable to contract with the owner for it, and such averments are jurisdictional.—*Portland & G. Turnpike Co. v. Bobb*, (Ky.) 794.

3. Such averments not being contained in the statement presented to the county court, which is vested with original jurisdiction thereof, the proceeding cannot be aided by amendment in the circuit court on appeal, though it is there tried *de novo*.—*Id.*

4. But it is not necessary to file a formal petition according to the Code of Practice.—*Id.*

5. In proceedings to condemn land for railway purposes, the right of trial by jury as to

the amount of compensation, guaranteed by Const. Mo. art. 12, § 4, is not waived by the appearance of the owner before the judge in vacation pursuant to notice, and the appointment of commissioners at his request; and a demand for a jury, after their report is filed and he has excepted thereto, is in time.—*Kansas City, C. & S. R. Co. v. Story, (Mo.) 203.*

6. Whether under Rev. St. Mo. art. 6, c. 21, § 896, provision is only made for a jury trial when a new appraisal is ordered, is immaterial, as the constitutional right to a jury trial is not lost by the lack of legislation prescribing the mode of its exercise.—*Id.*

7. Under Rev. St. Mo. art. 6, c. 21, § 894, requiring a report of commissioners to contain "a specific description of the property for which damages are assessed," a report referring to the road as "located over, through, or upon" the land in question, and accompanied by a plat, which, with the plat and profile filed under the statute in the county clerk's office, fully shows the location, is sufficiently definite. *SHERWOOD, J., dissenting.—Id.*

Right to compensation.

8. Proceedings having been instituted by a city to extend a street through lands of plaintiff railroad company, the damages were agreed on, and a decree entered by consent, which, after condemning the land for street purposes as prayed for, provided that plaintiff "shall have the right to keep and maintain its present tracks and switches upon said land, and shall have the right to construct such other tracks, switches, and turnouts upon said land, and across said street, when opened, as it may deem necessary for the transaction of its business." *Held*, that this privilege was not exclusive, but was equivalent merely to the ordinary permission given to railroad companies to occupy streets with their tracks, and that plaintiff was not entitled to compensation, either under such privilege or as abutting owner, for the incidental injury by delay which would result from the construction and operation of defendant's proposed track along the street and across plaintiff's tracks.—*Kansas City, St. J. & C. B. R. Co. v. St. Joseph Terminal R. Co., (Mo.) 826.*

9. Such delay, caused by the occasional occupation by defendant's trains of the space in the street where the tracks of the two companies cross, at the same time when such space is needed by plaintiff for its trains, is not a taking or damaging of private property, inasmuch as both have an equal right to use the highway.—*Id.*

10. The fact that a part of the consideration for the agreement by which plaintiff consented to the decree condemning its land for the street was the compromise of a claim against it by the city for breach of contract to build a depot within the city limits, is immaterial, as it can afford no light in interpreting the decree.—*Id.*

Damages.

11. Damages should not be "lumped," or estimated arbitrarily, as by doubling the value of the land actually taken.—*Kansas City, C. & S. R. Co. v. Story, (Mo.) 203.*

12. Injury to a subdivision, through which the road does not pass, but which constitutes

part of the same farm, should be estimated as part of the damages, though not mentioned in the petition.—*Id.**

13. Cuts and fills necessary to be made in the construction of the road ought also to be considered as enhancing the damages.—*Id.**

EQUITY.

See, also, *Creditors' Bill; Fraudulent Conveyances; Injunction; Mortgages; Partnership; Receivers; Specific Performance; Trusts.*

Relief against judgment, see *Judgment*, 10.

Jurisdiction.

1. Notwithstanding the provisions of a will devising an income by a wife to her husband on condition of his releasing his estate by the curtesy, the income is subject to the claims of the husband's creditors, and though a judgment creditor of the husband may sell under execution the husband's estate by the curtesy, yet, as the release will remain a cloud on the title, the removal of which will require a decree in equity, and as the case is one of fraud and of trust, and as the creditor may go to a court of equity for a construction of the provision of the will for the husband, he may properly resort to a court of equity for relief in the first instance, at his election.—*Bank of Commerce v. Chambers, (Mo.) 88.*

2. Where plaintiff has an adequate remedy at law, it need not be pleaded, in order to oust a court of equity of jurisdiction.—*Humphreys v. Atlantic Milling Co., (Mo.) 140.*

Reformation of deed.

3. Plaintiff and defendant having agreed to divide a lot owned by them jointly, the legal title to which was in plaintiff, a fence dividing it longitudinally was built, and plaintiff's vendee of one of the parts erected a building thereon. Defendant examined the premises while the vendee was building, to ascertain whether she was encroaching on his land, and made no objection. Ten years after the division, it was found that plaintiff's deed to defendant for his part of the lot divided it transversely, and, thus divided, the building would stand on defendant's land. Plaintiff testified that he had refused to sign a deed dividing the land transversely, and instructed the draughtsman to draw another, and the latter testified that he must have given plaintiff the first deed to sign instead of the one drawn later. Defendant had offered to sell his lot according to the longitudinal division. *Held*, that plaintiff was entitled to a reformation.—*Miller v. Small, (Ky.) 810.**

Rescission of contract.

4. Where plaintiff seeks to recover the proceeds of lands which he alleges he owned and quitclaimed, by mistake as to his ownership, to defendant, and which defendant afterwards sold, the value of plaintiff's title is immaterial, until the deed is disposed of. If the deed was fairly obtained without mistake or fraud, plaintiff cannot vacate it; especially where the parties cannot be restored to their former positions.—*Taylor v. Cayce, (Mo.) 832.*

5. Plaintiff having alleged that he had owned the land for many years before making the deed, his knowledge of his rights in it will be inferred.—*Id.*

6. A. executed a deed to B., providing that, if at any time the premises conveyed should cease to be used for milling purposes, they should revert to A. B. conveyed to C., and the latter to the defendant; C. assigning to defendant a title-bond which he had received from B., and by which B. covenanted to execute a general warranty deed according to the deed given by A. C. represented to the defendant that the title was perfect in B. *Held* that, though the deed from A. was of record, the defendant had a right to rely on the representations of C., and that, as the land was liable to revert to A., the defendant was entitled to have the contract between him and C. rescinded.—*Morton v. Clack, (Ky.) 796.*

7. On a purchase of land by a wife, the deed by mistake of the scrivener was made to the husband, who was afterwards made intoxicated, and induced to sell the land at much less than its real value to one who had notice of the wife's title. Another, who was made joint grantee, alleged that he bought a half interest of his co-grantee, relying upon his statements as to the title. The deed to the husband had not been recorded, and during the negotiations the husband declared that he had abandoned his wife, then in possession of the land, and that she claimed to own it. *Held*, that it was error in a decree canceling the deed from the husband to make the amount paid by the alleged purchaser from the fraudulent grantee a lien on the land.—*Kyle v. Powell, (Mo.) 166.*

8. Where the testimony of plaintiff, in an action to rescind a purchase of land, made out a case of fraud, and her testimony was contradicted by that of defendant, plaintiff was sufficiently corroborated by evidence that she was dull, ignorant, and easily influenced, and felt herself under obligation to defendant, who was a shrewd business man, and that defendant represented that the land was worth the price paid, (\$300,) while its actual value did not exceed \$200. Following *Hunter v. Owen, 9 S. W. Rep. 719.*—*Hunter v. Owen, (Ky.) 876.*

9. The price paid by defendant for the land is admissible to repel the presumption of fraud from his demanding an exorbitant price, but is not evidence of value.—*Id.*

10. Evidence that after negotiations were completed, and arrangements for payment had been made, defendant, in the presence of a witness who was not present at the negotiations, stated to plaintiff that if she was not satisfied she need not take the land, and that plaintiff expressed her satisfaction, is not necessarily corroborative of defendant's evidence.—*Id.*

Marshaling assets.

11. As one who gives a mortgage waiving homestead retains his homestead rights in the surplus, the equitable doctrine of marshaling assets will not be enforced so as to require the mortgagee on foreclosure to first resort to that portion of the proceeds representing the homestead, so as to allow other creditors

to satisfy their claims out of the residue.—*White v. Fulghum, (Tenn.) 501.*

Accounting.

12. Where the subject of controversy is a complicated, disputed, mutual account current, covering a period of 18 years, the transfer of the case to equity is properly made.—*Rogers v. Yarnell, (Ark.) 623.*

13. Husband and wife conveyed to defendant's grantor in fee with general warranty lands in which the wife had a life-estate, and the children the remainder. In ejectment by the children, defendants alleged that the price had been invested in other lands, in trust for the wife and children, and prayed for discovery of property afterwards purchased. Plaintiffs set forth conveyances in trust, but alleged that the purchases were made with the proceeds of other property belonging to their mother, and that they never consented to any investments. *Held* that, whether the investments were made from the proceeds of the land in question or not, the pleadings were sufficient to require the plaintiffs to account under the covenant for what they had received by descent or gift from their parents.—*Gudgell v. Tydings, (Ky.) 466.*

Decree.

14. Plaintiff's grantee gave a declaration stating that he held 80 acres in trust for six persons, including plaintiff, each of whom was entitled to a sixth. The owners, each of whom also owned a twelfth interest in other lands, formed a corporation, and stock was issued to them representing their interests, including a twelfth of the whole to plaintiff, who refused to accept it, but who received various payments from the corporation. Plaintiff was not an incorporator or officer of the corporation, but afterwards, for the purpose of settlement, stipulated to acquiesce therein, upon payment of the amount due him, upon which the land should be appraised, and he should be allowed to draw out his one-twelfth interest. The referee found that plaintiff was entitled to a sixth of the 80 acres, and the parties stipulated to divide it according to such finding. *Held*, that plaintiff had a sixth interest in such 80 acres.—*Stark v. Pierce City Real Estate Co., (Mo.) 877.*

15. Plaintiff is not entitled to a money judgment for his interest in lands sold, for which notes were taken in good faith, and of which sales he claims the benefit, but the judgment should determine his interest in the notes, and direct its payment, when collected, and invest him with his interest in the unsold lots.—*Id.*

ERROR, WRIT OF.

See, also, *Appeal; Exceptions, Bill of; New Trial.*

Time of taking.

A writ of error is not barred by the lapse of more than two years since the rendition of the judgment, when one of the plaintiffs in error is a married woman, with whom her husband is joined as a party.—*Harvey v. Carroll, (Tex.) 334.*

Estates.

See *Dower*; *Easements*; *Homestead*; *Tenancy in Common* and *Joint Tenancy*.

Creation by deed, see *Deed*, 5, 6.

Nature of estate devised, see *Wills*, 11-14.

Warranty deed by life-tenant, rights of remainder-men, see *Covenants*.

ESTOPPEL.

In *pais*, by license, see *License*.

— declarations, see *Dower*, 1.

To claim under mortgage, see *Mortgages*, 2.

By deed.

1. On foreclosure of a mortgage, where defendant alleges fraud on the part of plaintiff in procuring defendant's signature to the mortgage of his homestead, a recital in the mortgage that the agreement was between defendant, "party of the first part, of the city of L.," etc., does not estop him from saying that he was at that time living on his homestead in M., (the tract in question).—*Evans v. English*, (Ky.) 636.

2. A defendant in ejectment, who introduces conveyances from plaintiff's ancestor to his predecessor in title, is not thereby estopped from disputing such ancestor's title to all the lands, especially where he has been long in possession. But he cannot claim part of the lands under, and part against, the same title.—*Cummings v. Powell*, (Mo.) 819.

By record.

3. E. and W., partners, purchased land from six owners, no part of the price being paid, and gave six notes for the price each secured, by a lien on an undivided sixth. E. gave a mortgage, which purported to "convey" the tract, and which stated that his interest was the undivided half, and that the mortgage was intended only to cover that. E. afterwards purchased W.'s interest. The vendor's liens were afterwards foreclosed on the undivided five-sixths; the decrees reciting that the note for the other sixth had been paid by E., and the vendor's lien thereon discharged. *Held*, that E., and consequently one purchasing at execution sale against his executors, with notice of the decrees foreclosing the liens and mortgage, were estopped to deny that the purchaser under those decrees acquired an undivided five-sixths under the decree on the liens, and acquired under the decree on the mortgage an undivided half to the extent of E.'s interest, free from prior liens at the time of its entry.—*Willis v. Smith*, (Tex.) 683.

In pais.

4. The fact that defendants took possession of property after purchasing it, and made payments on their notes given for the price, without objection as to alleged misrepresentations of the quantity and value of the property, would not estop them from alleging the same in an action on the notes, such conduct not having induced plaintiff to any action.—*Merrill v. Taylor*, (Tex.) 533.

5. Under an agreement between partners that the payment by B. on the firm debts of a

stipulated sum for the property was to relieve him from any further obligation on such debts, and that, if such sum was not needed to pay such debts, the balance should be paid to A., B. could not acquire title to the property by purchase at a foreclosure sale under a judgment entered at the time of the agreement, unless prior to such purchase he had paid out on the firm debts the amount stipulated.—*Buford v. Ashcroft*, (Tex.) 346.

6. One who, being asked by an intending purchaser of land if he has any claim thereto, replies that he has none, in reliance on which statement the land is purchased, is estopped from afterwards setting up his claim against the grantee of the purchaser.—*Ratcliff v. Belfont Iron-Works Co.* (Ky.) 365.

7. A plea in ejectment that plaintiff was attorney for the creditor in an attachment suit against P.; that defendant claims under one S., and has acquired all of his rights in the premises; that S. was the purchaser at the sale under the attachment proceedings, and purchased relying upon the acts of the creditor in attaching and selling the property, as a declaration that P. was, and that the creditor was not the owner of the property; and that plaintiff acquired his deed from the creditor with notice, etc.,—does not contain a single element of an estoppel *in pais*.—*Blodgett v. Perry*, (Mo.) 891.

8. Evidence to support such plea, which shows that S. bought at the sale, relying not upon the act of the creditor in having the sale made, but upon the advice of his own counsel that his purchase would be good, as the sale under that execution would bar and estop the creditor from asserting title under any former deed, is equally foreign to the notion of an estoppel.—*Id.*

9. Defendants, to procure a loan on the wife's land, on which they were not then residing, made sworn application stating that it was not their homestead, which they claimed in another lot. This latter lot was deeded to them and designated as a homestead the day before the loan was obtained, but on the following day was reconveyed to their grantor. The wife, during the negotiations, was sick of a fever, then in child-bed, then watching her sick infant until its death, and alleged that the application and mortgages were fraudulently obtained from her, and that she did not know, and was not in condition to know, the purpose of the papers signed by her. An alleged agent of the loan company participated in obtaining and designating the new homestead, but the mortgage trustees testified that he alone was its agent, and knew nothing of that transaction. *Held*, error to refuse a charge that the wife was estopped if plaintiffs advanced the money on faith of the statement that the land was not a homestead.—*Equitable Mortgage Co. v. Norton*, (Tex.) 301.

EVIDENCE.

See, also, *Deposition*; *Witness*.

Admissibility, see *Creditors' Bill*, 2; *Ejectment*, 10, 11; *Trespass*, 2-5; *Trespass to Try Title*, 6, 7.

Burden of proof, ratification of agency, see *Principal and Agent*, 1.

Competency, see *Payment*, 2.

Declarations of former owner, see *Dedication*, 3.

In action to foreclose mortgage, see *Chattel Mortgages*, 7.

criminal prosecutions, see *Adulteration*, 2, 3; *Criminal Law*, 18-29; *Homicide*, 28-32; *Seduction*, 1.

Materiality, see *Libel and Slander*, 5; *Notable Instruments*, 4.

Objections to, see *Trial*, 5, 6.

Of adverse possession, see *Adverse Possession*, 4.

damages, see *Damages*, 23.

defectiveness of road, see *Turnpikes and Toll-Roads*, 2.

execution of mortgage, see *Chattel Mortgages*, 2.

Title to support ejectment, see *Ejectment*, 3.

Reception of, see *Trial*, 2-4.

Relevancy, character of plaintiff, see *False Imprisonment*, 2.

Weight and sufficiency, review on appeal, see *Appeal*, 30-37.

Judicial notice.

1. The court has judicial knowledge of the fact that the G., C. & S. F., and the H. & T. C., and others of the defendant railroads touch the same points, and are practically parallel, and necessarily competing, lines.—*Gulf, C. & S. F. Ry. Co. v. State*, (Tex.) 81.

Best and secondary.

2. 2 *Sayles*, Rev. St. Tex. art. 3190b, § 8, provides that a copy of a chattel mortgage, duly filed for registration, "shall be received in evidence of the fact that such instrument * * * was received and filed according to the indorsement of the clerk thereon; but of no other fact." *Held*, that a copy was not admissible to show the execution of a chattel mortgage, where the absence of the original instrument was not accounted for.—*Boydston v. Morris*, (Tex.) 831.

Hearsay.

3. Where evidence is the result of voluminous facts, or of the inspection of many books and papers, the inspection of which cannot conveniently take place in court, or where a witness has inspected the accounts of parties, though not allowed to give evidence of their particular contents, he will be allowed to speak of the general balance or result of such examination, and such statement is not hearsay.—*Masonic Mut. Ben. Soc. v. Lackland*, (Mo.) 895.

4. Where plaintiff in trespass to try title claims through a deed from defendant's ancestor, which defendant alleges to be a forgery, and to have been procured by fraud, evidence of conversations with such ancestor and the grantee in such deed, concerning the circumstances of the execution of the deed after the grantee had parted with his title, is inadmissible.—*Bullock v. Smith*, (Tex.) 687.

Declarations and admissions.

5. In an action for the death of a boy, caused by injuries received under a horse car, his

declarations as to how he got under the car, made at the scene of the accident, and when first picked up, are admissible in evidence, but his declarations made after he had been removed, and the persons connected with the accident have separated, and in answer to questions as to how he got injured, are inadmissible, though made only a short time after the accident.—*Leahy v. Cass Ave. & F. G. Ry. Co.*, (Mo.) 55.*

6. In such case evidence that a disinterested bystander shouted "Murder!" after the accident, is inadmissible.—*Id.*

7. The issues being as to the existence of a deed alleged to have been made by J. to B., a married woman, as her separate estate, the inventory of J.'s estate, filed and sworn to by B. and her husband, J.'s administrators, in which is included as property of the estate the same property conveyed by the alleged deed, is competent as a declaration against interest, but not conclusive as to B.'s claim.—*Clapp v. Ingledow*, (Tex.) 462.

8. Testimony as to the contents of a letter written by one member of a firm to another, showing the purpose for which a pretended purchase from a failing debtor was made, is, in a contest between the firm and other creditors as to the validity of such purchase, competent as an admission, though at the time of giving the testimony the witness, to whom the letter was written, has ceased to be a member of the firm.—*Wills Point Bank v. Bates*, (Tex.) 348.

Opinion evidence.

9. A farmer, who has lived within 200 or 300 feet of a railroad culvert all his life, and who has, without objection, described it, and testified that it was too small for the amount of water that had to pass through it, may testify concerning the result of an examination made by him as to its capacity to carry away waters accumulated in time of freshet, though he has no knowledge of engineering.—*McPherson v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 846.

10. The defense in a suit against the railroad for causing the death of an engineer of the road being that the wash-out was caused by an extraordinary rain-storm, it is proper to ask the same witness, "Did the traces of this storm, which were found next morning, show to you that it was anything greater than storms that you have seen before?" and his negative answer is admissible.—*Id.*

Documents.

11. Though the entries against a depositor in his bank pass-book may be admissible in a controversy between him and the bank, they are not admissible as against a third person, inasmuch as they are not original entries.—*Wills Point Bank v. Bates*, (Tex.) 348.

12. Where all the deeds under which a party claims refer to a certain map, the copy of a map so designated, from the record of deeds, is competent evidence, when no other map can be found on record, and said map is indexed four times for the same book and page, and has been recognized as correct by the city and others for many years.—*Smith v. City of Navasota*, (Tex.) 414.

Ancient instrument.

13. Testimony of an attorney that he and the clerk have searched the records with diligence, and cannot find the papers under which a sheriff's deed was executed 40 years before, together with evidence that they were withdrawn by a firm of lawyers, one of whom moved away years ago, and the other disclaims all knowledge of them, warrants the court to whose records the papers belong in admitting the sheriff's deed, as an ancient instrument, without further proof of the sheriff's authority to make it.—*Ruby v. Von Volk-enberg*, (Tex.) 514.*

Parol evidence.

14. A parol agreement forming part of the compromise of an action may be proved, though in fulfillment of the compromise a judgment is entered also, the judgment not embodying or mentioning the parol agreement.—*East Line & R. R. Co. v. Scott*, (Tex.) 99.

Evidence at former trial.

15. The testimony of a deceased witness on a former trial cannot be shown by the statement of facts, prepared for the purposes of an appeal, signed by the attorneys, and approved by the presiding judge, none of whom recollect it.—*Dwyer v. Rippey*, (Tex.) 668.

Competency and relevancy.

16. In an action by an assignee of time-checks and due-bills given to laborers employed in the construction of a railroad, a witness may testify to statements made by an agent of the railroad company to the effect that the company owed the contractor \$2,000,000, and that the checks sued on were all right, and were a lien on the road; such evidence being drawn out on cross-examination by defendants themselves, and there being nothing to show that it was not responsive to questions asked.—*San Antonio & A. P. Ry. Co. v. Cockvill*, (Tex.) 702.

17. When a judgment has been reversed on appeal, in a subsequent suit, as against a defendant who was not a party when the judgment was rendered, it is *res inter alios acta*, and inadmissible in evidence.—*Atkison v. Dixon*, (Mo.) 163.

18. Where defendant alleges fraudulent misrepresentations of the value of land and personal property purchased by him, evidence of the value of adjoining lands is properly excluded.—*Merrill v. Taylor*, (Tex.) 532.

Evidence made competent by that of adversary.

19. Where plaintiff charges defendant with fraud in obtaining property of which defendant is in possession under a sale under a deed of trust, and plaintiff offers the deed of trust in evidence for a limited purpose, defendant may introduce the same in evidence to explain his possession and to disprove fraud.—*Willis v. Smith*, (Tex.) 633.

EXCEPTIONS, BILL OF.

See, also, *Appeal*; *Error*; *Writ of*; *New Trial*.

Signing.

1. A certificate reciting that the foregoing bill is presented on the first day of the term, pursuant to an order entered last term, by counsel for defendant, and that "no counsel appearing for the plaintiffs, I am unable to remember the testimony as given upon the hearing, but I have no reason to doubt it is correctly set forth," and therefore said bill is signed, will not admit of the consideration of questions arising on the evidence.—*Kansas City, S. & M. R. Co. v. Oyler*, (Ark.) 705.

2. A bill of exceptions signed and filed as a part of the record during term-time will not be disregarded where objection is made for the first time after the cause has been submitted in the supreme court that the signature of the judge was obtained by undue practice, and where the affidavit of the latter shows that he knew the contents of the bill.—*East Line & R. R. Co. v. Culberson*, (Tex.) 706.

Excessive Damages.

See *Damages*, 16-19.

EXECUTION.

See, also, *Attachment*; *Judicial Sales*.

Sale.

1. An execution sale in mortgage foreclosure, made at the April term, 1863, on an execution issued in February, 1864, to April term, 1864, and turned over by the then sheriff to his successor, is valid: as no term was held in the county from September, 1863, to April, 1865, and act March 23, 1863, provided that an execution and the lien of the levy should remain in full force until a term of court in the county where the property could be sold. An actual levy of such execution was not necessary.—*Tierney v. Spiva*, (Mo.) 433.

2. A sale by a United States marshal under an execution from a United States court, made before the door of the United States court-house, instead of the door of the court-house of the county in which the land is situated, is void, and incapable of ratification, and may be collaterally attacked.—*Moody's Heirs v. Moeller*, (Tex.) 737.

3. A mistake of a sheriff by which he sells land for more than the debt, interest, and costs, is waived by the execution debtor refusing to receive the excess, and directing its repayment to the purchaser.—*Thomas' Adm'r v. Thomas' Adm'r*, (Ky.) 282.

4. Where the proceeds of land sold under order of court to satisfy a vendor's lien, and which brings less than two-thirds of its appraised value, are insufficient to satisfy such lien, the vendor may have a decree for the sale of the equity of redemption of the vendee, the rights of third parties not having intervened, under Gen. St. Ky. p. 973, § 4, providing that if a judgment, in pursuance of which a sale is made, is not satisfied by such sale, the right of redemption given in such cases may be sold in satisfaction of the residue of such judgment.—*Crittenden v. Beck*, (Ky.) 806.

5. Judgment was rendered on a bail-bond in

favor of the state without notice to the sureties. No levy was pointed out by the county attorney. The sureties did not know of the judgment. No demand was made on them for payment or a levy. They had personal property more than sufficient to pay the costs. Land valued at about \$7,000 was sold at execution sale for \$10. *Held*, that a verdict holding the sale invalid for irregularities and inadequacy of price will be affirmed.—*Weaver v. Nugent*, (Tex.) 458.

6. In an action to set aside an execution sale for irregularities and inadequacy of price, a charge that if the inadequacy was caused by any act of the execution debtors, or by their direction, it would be no ground for setting aside the sale, and that the irregularities must be shown, and also that they caused the inadequacy, and were not caused by the debtors, was proper.—*Id.*

7. In the absence of notice to the plaintiff in execution, or the purchaser at a sale thereunder, that part of the land purchased was covered by an unrecorded title-bond, the levy and sale pass title to the land, the legal title thereto being in the execution defendant.—*Wright v. Lassiter*, (Tex.) 295.

Return of writ.

8. Under Rev. St. Mo. 1879, § 2338, an execution may issue returnable, at plaintiff's option, either to the first or second term after its issuance; and, in the absence of a showing to the contrary, it will be presumed that the sheriff who sold under the execution complied with the law.—*Blodgett v. Perry*, (Mo.) 891.

9. Under Rev. St. Tex. art. 177, requiring the sheriff's return to "describe the property attached with sufficient certainty to identify it," a levy describing two tracts of land each as a certain tract containing 150 acres, more or less, on which is located the new town of M., in L. county, state of Texas, along the line of the said S. A. & A. P. Ry., including all of the right, title, and interest of said railway company in and to any and all town lots and blocks heretofore laid off upon said tract, said interest being such as has been deeded, sold, released, or contracted to said railway company, or to any person as trustee for them, by S. B. M., of F. county, Tex., less such portions as have been heretofore legally disposed of by them, and donated and set apart for right of way and depot purposes, is insufficient, since, if it intended to describe a survey, it should have pointed out what survey was meant, or, if not, it should have described each lot and block intended. As it stands, it would compel a sale in mass.—*San Antonio & A. P. Ry. Co. v. Harrison*, (Tex.) 554.

Redemption.

10. Where land is, after the time for redemption expires, sold by the purchaser to the widow and administratrix of the debtor, who has died since the sale, in the absence of evidence that the purchase was made for the debtor's benefit, or that the administratrix had funds of the estate with which to redeem, her purchase will not redound to the benefit of the debtor's heirs and creditors.—*Thomas' Adm'r v. Thomas' Adm'r*, (Ky.) 282.

Sheriff's deed.

11. The successor of a sheriff who has sold land under execution can convey to the purchaser without a certificate from his predecessor that the purchase money has been paid, as Rev. St. Ky. c. 36, art. 13, § 10, unlike act Ky. Feb. 11, 1809, does not require such certificate.—*Id.*

12. Land sold at sheriff's sale, in the debtor's life-time, may be conveyed after his death, when the statutory time for redemption has expired.—*Id.*

13. A sheriff's deed, duly executed and recorded, which properly recites a judgment ordering the sale of the land described in plaintiff's petition, and describes the land by adjoiners, with the number of *acres* and acres, sufficiently describes the land, and, at a distance in time of 40 years, will be presumed to cover the proper land, the petition being lost.—*Ruby v. Von Volkenberg*, (Tex.) 514.

14. In ejectment, defendant claimed under S., who had purchased at an attachment sale. Many years after the death of S., who had never received a deed from the sheriff for the land purchased by him at the sale, defendant instituted an *ex parte* proceeding against the sheriff, and without any notice to plaintiff, who claimed under an earlier conveyance, obtained an order directing the sheriff to execute a deed to defendant as assignee of S. *Held*, that the deed so executed was of no force whatever, as against plaintiff.—*Blodgett v. Perry*, (Mo.) 891.

EXECUTORS AND ADMINISTRATORS.

See, also, *Wills*.

Actions against, see *Limitation of Actions*, 9.

Allowance of claims.

1. It is not essential that a claim by the administrator of a deceased wife against her husband's estate for money advanced by her to him in their life-times be presented to the executor before it can be audited and allowed in a suit to sell realty to pay debts of the testator.—*Orr's Adm'r v. Orr's Ex'r*, (Ky.) 640.

2. The assignees of a judgment for money, and foreclosing a vendor's lien therefor, after defendant had died, in ignorance that the judgment had become dormant, filed an affidavit of the death, and obtained an order of sale against the administrator, as allowed by Rev. St. Tex. art. 2276, and the land was sold, and they became purchasers. Article 2036 provides that no judgment shall be rendered on a claim for money against an estate, which has not been legally presented to the administrator, and rejected; and article 2275, that, where a sole defendant dies after judgment, execution shall not issue, but the judgment shall be proved up and paid in due course of administration. *Held*, that the assignees could not petition the district court to revive the judgment, set aside the sale, and enforce the lien, without having first presented the judgment as a claim.—*Jenkins v. Cain*, (Tex.) 891.

8. It having been shown that the commissioner, in making distribution of the assets of a deceased partner's estate, converted into money, had paid more to the other creditors in proportion to their demands than to the firm, of whose funds deceased had used large sums for private purposes, the court ordered the commissioner to first make the firm equal in the *pro rata* distribution of any other assets collected. *Held*, that this was not such a final order as would preclude the firm, upon ascertaining that the undistributed assets were insufficient to make it equal, from compelling the other creditors to refund.—*Masonic Sav. Bank v. Bangs' Adm'r*, (Ky.) 633.

Accounting.

4. The administrator having made a partial settlement, it was error, in the reference to the master, to direct him to take as the basis of the accounting the inventory and account of sales, and to credit the account by such claims as were shown not to have been lost by neglect, and by such disbursements as were properly made, as the partial settlement was *prima facie* evidence in favor of the administrator.—*Alvis v. Oglesby's Ex'rs*, (Tenn.) 813.

5. It was error to direct the master to disallow credits for debts paid after they had become barred by limitations, which were allowed the administrator in the partial settlement, there being no evidence of the circumstances causing the delay.—*Id.*

6. Code Tenn. § 2776, which provides that actions against executors and administrators on their bonds, "and all other cases not expressly provided for," shall be barred if not brought within 10 years, applies to a bill in equity by distributees to surcharge and falsify an administrator's account, and to recover distributive shares; the statute of limitations under the Code being made to operate on the cause, and not on the form, of the action. *SNODGRASS, J.*, dissents.—*Id.*

7. The right of action as to the distributees accrued, as to the assets then in his hands, at the time he was by law required to make distribution.—*Id.*

8. There being no statutory limitation of the time within which an administrator may be cited to an account of his trust, the lapse of more than 16 years since the appointment of an administrator *c. t. a.*, during which no account has been filed or proceedings taken, will not bar a motion for an account by the legatees, the eldest of whom is 25 and the youngest 19 years old, when the answer of the administrator shows that he still has personality of the estate in his hands, and that he had until the year previous collected rents from the realty of his testator.—*Main v. Browne*, (Tex.) 571.

Sale of land.

9. Under Code Tenn. §§ 3105, 3106, giving the chancery and circuit courts jurisdiction of a bill for sale of a decedent's land in case of deficiency of personality, and section 4980, subsec. 6, and sections 5005, 5045, giving the county court jurisdiction to sell property of insolvent estates, and the circuit court concurrent jurisdiction with the chancery and county courts to sell decedent's lands to pay

debts where the personal assets are insufficient, and the chancery court concurrent jurisdiction with the circuit and county courts for that purpose, the county court has jurisdiction of a bill for the sale of a decedent's realty for payment of debts when the personal estate is insufficient, though there is no suggestion that the estate is insolvent.—*Davis v. Davis*, (Tenn.) 303.

10. An executor sold land of his testator, the validity of the sale depending on the existence of debts due from the estate. The taxes of the estate amounted annually to about \$800, and at least part of one year's taxes were due at testator's death, which, with part of the taxes for another year, were paid during the executor's continuance in office. Another sum was probably paid by the executor. The executor, on the day before the taxes first mentioned were paid, borrowed money for that purpose, mortgaging land of the estate. The administratrix, who succeeded the executor at his death, reported that the estate owed a considerable sum when she became administratrix, all which she had paid except some taxes accruing since her appointment. *Held* sufficient evidence to justify a verdict that the estate was indebted at the time of the sale.—*Blanton v. Mayes*, (Tex.) 452.

11. Such a sale would be valid if debts existed, whether the executor properly used the proceeds or not.—*Id.*

12. Whether the purchaser bought the land in good faith, believing it to be sold for the payment of debts, is immaterial, when the jury have found that debts actually existed; and instructions given and evidence admitted on that issue, if improper, are not ground for reversal.—*Id.*

Actions against—Judgment.

13. The failure of an executor to plead the general statute of limitations will not invalidate a judgment against him.—*Postlethwaite v. Ghiselin*, (Mo.) 482.

Exemplary Damages.

See *Damages*, 2-8.

EXEMPTIONS.

From taxation, see *Taxation*, 4-6.

Who entitled to.

1. A housekeeper who has determined to remove from the state, whose family have already gone, but who still remains at his home for business reasons, intending soon to follow his family, is entitled to the exemption mentioned.—*Stirman v. Smith*, (Ky.) 181.

Property exempt.

2. Under Gen. St. Ky. 1833, p. 431, exempting from levy two cows and calves belonging to a *bona fide* housekeeper with a family, a levy on the only cow and calf of such a housekeeper is illegal, though he has heifers not exempt primarily, and does not offer to deliver them or any other property to the officer, in lieu of the cow and calf, before the sale.—*Id.*

3. Gen. St. Ky. 1833, p. 931, providing that if a

debtor select a horse worth more than \$100, or a cow and calf worth more than \$60, the same shall be appraised, and sold if appraised at more than that sum, and that amount paid to the debtor, does not apply where a debtor owns only two cows and calves, as they are exempt regardless of their value, and no selection is required of the debtor.—Id.

Experts.

See *Evidence*, 9, 10.

Factors and Brokers.

Option deals, see *Gaming*, 2, 3.

FALSE IMPRISONMENT.

What constitutes.

1. Charles F. Moore was arrested on a *captas* from another county for the arrest of Charley Moore, for theft. Plaintiff testified that he protested his innocence, and warned the sheriff that he should seek redress. When taken to the other county he was not identified as the person desired. *Held* sufficient to sustain a judgment for false imprisonment.—*Ryburn v. Moore*, (Tex.) 898.

Evidence.

2. Defendant cannot, to show good faith and the extent of damages, ask a witness whether plaintiff was not at and before the time of the arrest regarded by the community as a dead-beat, a violator of law, and a fugitive from justice, and whether he had not been frequently confined in jail.—Id.

Fees.

Of attorneys, see *Attorney and Client*, 2.
secretary of state, see *States and State Officers*, 3.

Foreclosure.

Of mortgages, see *Chattel Mortgages*, 7;
Mortgages, 5-10.

Former Jeopardy.

See *Criminal Law*, 4.

Fraud.

See *Fraudulent Conveyances*.

In sale of goods, see *Sale*, 2-4.
Of assignor, before assignment, see *Assignment for Benefit of Creditors*, 2.
Setting aside deed, see *Equity*, 6, 7.

FRAUDS, STATUTE OF.

Agreement to settle boundaries, see *Boundaries*, 2.

Enforcement of oral contract for sale of land, see *Specific Performance*, 3.

Promise to answer for debt of another.

1. The president and cashier borrowed of their bank money which they loaned to a v.10s.w.—59

falling debtor of the bank, and of the president. A mortgage was given by the debtor, and the mortgaged property turned over to the mortgagees with authority to sell. The president, who had charge of the property and of the proceeds, promised that the debt to the bank would be paid, and relying thereon the directors made no effort to collect it otherwise. *Held*, that the right of the bank to recover of the president rested on his express or implied promise as its officer to secure the debt to the bank, and to obtain its payment out of the property acquired by him, and not on his promise to answer for the debt of another, and the statute of frauds was unavailing.—*Apperson's Ex'x v. Exchange Bank*, (Ky.) 601.

Contracts to be performed in a year.

2. As an agreement to employ, whether for an indefinite period, to be fixed by the promisee, or for life, may be performed within a year, it is not within the statute of frauds.—*East Line & R. R. Co. v. Scott*, (Tex.) 90.*

FRAUDULENT CONVEYANCES.

See, also, *Chattel Mortgages; Creditors' Bill*.

What constitutes.

1. Where the debtors testify as to the honesty of their intentions in making the sale, the question of fraud is properly left to the jury.—*Weaver v. Nugent*, (Tex.) 458.

2. Where defendants testified that the sale of their land to their brother, taking notes in payment, was to pay their debts, an instruction that if the brother knew of a judgment against his sisters, and that it was unsatisfied, and that the purchase left his sisters insolvent, the sale was fraudulent in law, is not correct.—Id.

3. A voluntary conveyance in fraud of existing creditors, recorded on the day of its execution, is not void as to future creditors because the grantor afterwards engages in extensive speculations, and soon becomes insolvent; *Rev. St. Tex. art. 2466*, providing that a voluntary conveyance, void as to prior creditors, shall not on that account merely be void as to subsequent creditors.—*Lewis v. Simon*, (Tex.) 554.*

Consideration.

4. A negotiable promissory note is a valuable consideration for a deed, especially where the insolvency of the maker is not shown.—*Weaver v. Nugent*, (Tex.) 458.

5. A husband being insolvent, and having only certain land, his wife's brother advanced him various sums to pay his debts and educate his children, in consideration of which the husband conveyed the land to the brother in trust for the wife. *Held*, that the deed was supported by a valid consideration.—*Dixon v. Lyne*, (Ky.) 469.

To debtor's wife.

6. As against the husband's creditors, it will be presumed that land purchased by the wife is paid for with money to which the husband is entitled, and is liable for his debts, in

the absence of allegation and proof that the money with which she paid for the land was her separate estate.—*Treadway v. Turner*, (Ky.) 816.

7. Defendant conveyed to his wife two tracts of land, on which his father had a lien to secure payment of a debt owing to plaintiff. The father soon after released the lien. Another tract was purchased, as alleged, by defendant's son, who had it conveyed to his mother, and another tract was purchased, to be conveyed in the same manner. The negotiations for the purchases were conducted by defendant, who made or had the money. The son worked on the home farm, and had no means outside the products of his labor. Not a greater sum was made in any year than was sufficient to clothe the family. *Held*, that the conveyances to the wife were in fraud of creditors, except to the extent of the homestead rights of the wife.—*McAdams v. Mitchell*, (Ky.) 813.

8. A voluntary conveyance by a husband to his wife cannot be held fraudulent as to creditors, where both testify, by deposition, that at the time he had ample means to pay all his debts, and they are not cross-examined or contradicted, and where they asked, and, on objection, were refused, a postponement of the trial, that they might appear and testify more fully.—*Dixon v. Sanderson*, (Tex.) 535.

Rights of creditors.

9. Accommodation indorsers may, on assuming the payment of the note, take in satisfaction of their liability, at its fair value, property of the principal debtor, who is insolvent, as they are to be regarded as creditors, and not as mere purchasers.—*State v. Mason*, (Mo.) 179.

10. Though lands of a judgment debtor which have been conveyed in fraud of creditors, and which have since passed to purchasers for value without notice, cannot be reached by the creditors, yet lands held by the fraudulent vendees, into which the proceeds of the former lands have passed, may be so reached.—*Treadway v. Turner*, (Ky.) 816.

Action to set aside.

11. A creditor cannot sue in equity to set aside as fraudulent a conveyance by his debtor, or one made by a third party at his instance, of property belonging to the debtor, until after judgment against the debtor, and a return of *nulla bona*, or after a proceeding against the property by attachment.—*Kyle v. O'Neill*, (Ky.) 275.

12. Where more than a year has elapsed since the death of a judgment debtor who is alleged to have conveyed land in fraud of creditors, and administration has not been granted on his estate, the creditor need not obtain a return of *nulla bona* before resorting to such land.—*Treadway v. Turner*, (Ky.) 816.

13. A petition in an action to set aside a conveyance to a wife of land by her husband, as made with intent to defraud creditors, need not aver actual fraud on the part of the wife; such a conveyance of property, obtained with her husband's means, being constructively fraudulent.—*Jordan v. Buschmeyer*, (Mo.) 616.

14. On such petition and answer, alleging

that the land was purchased with the separate estate of the wife, if justified by the evidence, a decree for the relief prayed may be rendered on a general finding that plaintiff is entitled to the relief sought.—*Id.*

GAMING.

In public places.

1. Pen. Code Tex. art. 856, relating to gaming, provides that "a private room in an inn or tavern is not within the meaning of public places, unless such room is commonly used for gaming." *Held*, that a room in an inn, provided for the accommodation of guests, which is engaged temporarily for the purpose of private gaming, and not for a guest's habitation or abode, is not a "private room;" particularly where the person who so engages it has other apartments in the same inn, which he occupies as his abode.—*Comer v. State*, (Tex.) 106.

Options—Recovery of profits.

2. Though a contract for the future delivery of wheat, intended only as a speculation on the probable difference in price, no actual delivery being contemplated, is illegal, yet a sum representing the margins deposited and the profits realized in the deal, paid over by one of the parties to the broker who negotiated the transaction, to be by him paid to the other, can be recovered in an action by the latter against the broker.—*Floyd v. Patterson*, (Tex.) 526.*

3. Plaintiff sued L. and F. & Co., for margins on a sale of wheat, alleging that, while L. was nominally agent for F. & Co. in making the contract, he was in fact a partner, and that they were brokers for the real party to the transaction. The evidence of defendants was they were not partners, and that F. & Co. dealt as principals, though there was sufficient proof that they allowed L. to represent them to be brokers. There was no evidence that any other person was connected with the transaction, or that defendants had received any sum representing the profits of the deal from any one. *Held*, that a verdict for plaintiff against all of the defendants should be set aside for insufficient evidence to charge F. & Co. as brokers.—*Id.*

Garnishment.

Remedy by, instead of creditors' bill, see *Creditors' Bill*, 1.

GIFTS.

Inter vivos.

1. A parol gift, by an infant heir, of his interest in a Texas head-right certificate, is invalid.—*Harvey v. Carroll*, (Tex.) 834.

2. A claim was filed by an administrator of a deceased wife against her husband's estate, for money advanced by her to him in their life-times. It was alleged that in 1853 she allowed him to use her money in the erection of a house on his land, under the agreement that it should belong to her, and descend to her heirs. When her husband died, in 1880, he devised no part of his estate to the claimant,

who was his wife's only heir, she having died in 1878. There was evidence that testator, about the time the house was built, stated that he received the money under the agreement as alleged. No demand was made for the money until the claim was filed. *Held* that, in view of the long period of acquiescence by the wife and her representative, the evidence was insufficient to rebut the legal presumption that the money was a gift, and not a loan.—*Orr's Adm'r v. Orr's Ex'r*, (Ky.) 440.

Grand Jury.

Incompetency of member, plea in abatement, see *Criminal Law*, 2.

Guaranty.

Promise to answer for debt of another, see *Frauds, Statute of*, 1.

GUARDIAN AND WARD.

Bond—Trust companies.

Under 2 Acts Ky. 1833-34, p. 230, providing that the capital of the Louisville Safety Vault & Trust Company shall be taken and considered as the surety required by law for the faithful performance of its duties, and other security shall not be required upon its appointment to any of the offices or duties to be assumed by it, in a proceeding by it as guardian of infants for sale of their land and reinvestment, if the bond required by statute in such cases is necessary, one given by the company in the name of the president is sufficient.—*Phalan v. Louisville Safety Vault & Trust Co.*, (Ky.) 10.

HABEAS CORPUS.

Hearing and determination.

Where defendant pleaded guilty, and the court assessed his punishment, and remanded him to await sentence, but on the next day, concluding that the indictment charged only a misdemeanor, caused the plea to be withdrawn, the indictment quashed, and the cause held for the action of the grand jury, no inquiry can be had under the writ of *habeas corpus* as to whether or not the court erred in its action.—*In re Barnett*, (Ark.) 492.

Harmless Error.

See *Appeal*, 42-51.

Hearsay Evidence.

See *Evidence*, 3, 4.

HIGHWAYS.

Work on road—Notice.

1. In a prosecution under Mansf. Dig. Ark. § 5907, for neglecting to attend at the time and place designated by the road overseer to work on a public road, in obedience to the overseer's warning, without having furnished a substi-

tute or paid a money consideration, it was error to charge that defendant was entitled to three days' notice of such time and place, but that he might waive his right by attending in obedience to a shorter notice, since, if there was not three days' notice, or if defendant attended, he was innocent of the crime charged.—*Ford v. State*, (Ark.) 14.

Injury from defects.

2. A traveler on a public highway who falls into an excavation cannot recover for the injuries thereby sustained, if he was lacking in ordinary care and prudence, although such excavation was left unguarded.—*Schonhoff v. Jackson Branch R. Co.*, (Mo.) 618.*

HOMESTEAD.

Allotment to widow, see *Dower*, 7.

Mortgage, see *Estoppel*, 1, 9.

Partition during minority of children, see *Partition*, 1.

Acquisition.

1. Rev. St. Tex. arts. 2343-2366, inclusive, relating to homesteads, and providing that a homestead, not being within a town or city, included in a larger tract, may be set apart by filing for record in the office of the clerk of the county court an instrument of writing containing a description of the part claimed as exempt, has no application to city lots: and such a paper, designating an unimproved city lot, on which the family never resided, will not destroy the right of exemption as to other property actually used as a homestead, as against a mortgagee having knowledge that it was being so used.—*Pellat v. Decker*, (Tex.) 696.

2. In 1880 and 1881 M. resided on a lot which he claimed as the property of another, in which he had an interest. He had an indeterminate purpose to occupy it as a home at some future time, if it were freed from litigation. In 1882 he lived at a mill which he was operating, his family living elsewhere. In December, 1882, or January, 1883, he began the erection of another mill and dwelling, stating his intention to occupy the place as a homestead, and actually doing so in May or June, 1883, followed by his wife in August. *Held*, that this property was not subject to the lien of a judgment rendered in May, 1883; M.'s intention to occupy having been *bona fide*.—*Van Ratcliff v. Call*, (Tex.) 578.

3. Judgment was obtained against M. and his father as surety, and execution was levied on the latter's realty. During the existence of the execution lien the father died, and his estate was partitioned among M. and other heirs. *Held*, that the lien having attached to M.'s portion before it descended to him, he cannot, as against such lien, assert a homestead right.—*Meador v. Meador*, (Ky.) 651.

Conveyance.

4. Under Code Tenn. § 2114c, providing that a homestead shall not be alienated without the joint consent of husband and wife, evidenced by conveyance executed as required for married women, conveyance by the husband alone, to which the wife assents verbally, will not

deprive her of her homestead right.—*Collins v. Baytt*, (Tenn.) 512.*

5. A foreclosure sale under a mortgage waiving homestead does not extinguish the right of homestead in the surplus.—*White v. Fulghum*, (Tenn.) 501.

Abandonment.

6. The removal of the wife with her husband from the homestead, after a conveyance by the husband, to which she verbally assented, is not an abandonment of her right. Overruling *Levison v. Abrahams*, 14 Lea, 836.—*Collins v. Baytt*, (Tenn.) 512.*

7. Testimony that a homestead was rented for a year, on account of the ill health of the wife; that there was no intention to leave the state, but always an intention to return to the homestead at the expiration of the lease,—is sufficient, though contradicted as to intention, to sustain a finding that there was no abandonment.—*C. B. Carter Lumber Co. v. Clay*, (Tex.) 298.*

8. A debtor made an assignment, and afterwards filed a petition to be allowed to share in the proceeds of a house and lot sold under a judgment, claiming to have a homestead right, which he had never conveyed or relinquished, though he admitted that at the date of the assignment he was temporarily absent from such property. The answer alleged that the debtor had before the assignment permanently abandoned the property, and purchased other property to which he had removed as his home. In his reply the debtor denied that he had purchased other property as a residence, but did not deny that he resided permanently elsewhere. *Held* that, on the pleadings, the debtor's right to a homestead must be regarded as having been abandoned.—*Marshall v. Applegate*, (Ky.) 805.

HOMICIDE.

Ballable offense, see *Bail*.

Murder.

1. One who willfully and unlawfully inflicts a wound not in itself mortal, but from which, and the erroneous treatment by a physician, the wounded person dies, is guilty of murder.—*Sharp v. State*, (Ark.) 228.

2. Evidence that defendants and others banded together to take deceased from his room and whip him; that one night they forcibly carried him from his sleeping room, and beat him; and that on the next day his dead body, lacerated with switches, was found wrapped in a quilt, with the skull fractured, three ribs, the collar bone, and an arm broken, and with switches and sticks lying near by,—is sufficient to sustain a verdict of murder, although it does not appear by whom the fatal blow was struck.—*Green v. State*, (Ark.) 266.

3. An instruction that an intentional killing is murder in the first degree, without any qualifications as to malice or deliberation, is erroneous.—*State v. Herrell*, (Mo.) 387.

4. Defendant and deceased engaged in a fight, were separated, and defendant went into a neighboring store, remaining there 10 minutes. On emerging, defendant said he could "lick any s— of a b— over there,"

pointing towards the place where deceased was; and, on being told by his companion to go home, said, "Give me the knife, and I will," and also said, "I will go over there and kill the d— s— of a b—." Defendant was handed something by his companion, and, after moving away, returned to the building where deceased was, and insisted on entering, saying he had lost a button in it. Deceased then appeared, and struck defendant with a board. Defendant grappled with and fatally stabbed him. The fight had occurred outside. *Held*, that a verdict of murder in the second degree was warranted.—*State v. Woods*, (Mo.) 157.

5. A witness, whom the evidence showed to be at least an accomplice, and who lived at the house of deceased, with defendant, who was deceased's son, testified that he was approaching the house, when he heard the report of a gun, and saw defendant standing near the house, with a gun in his hand, and his mother running towards the house; that defendant then went to the spot where the body was afterwards found, pointed the gun down, and fired again; that witness was induced by threats and offers to promise "not to tell it." Deceased's gun was found, containing the shell of a recently discharged cartridge, and near the body was a shell exactly similar. The gun was kept in the house, and equally accessible to witness and defendant. A daughter testified that her mother was with her, a mile from the place, at the time. There was no motive for the killing. *Held*, that the accomplice was not sufficiently corroborated to warrant a conviction.—*Stonard v. State*, (Tex.) 442.*

6. Defendant and another went, armed with rifles, to a place where deceased was at work, and shot him, and then fled precipitately. There was no evidence of motive. It was not known what transpired at the time of the killing; and some of the chambers in a pistol with which deceased was armed were found empty. *Held*, that failure of the court to charge on murder in the second degree warranted the reversal of a conviction of murder in the first degree.—*Blocker v. State*, (Tex.) 439.

Intent.

7. Instructions that defendant is guilty of murder if he inflicted the wounds charged "with the intent formed in the mind at the time of the injuries to take deceased's life," and that "an unlawful act coupled with malice, and resulting in death, will not of itself constitute murder in the first degree, but 'the killing must have been intentional, after deliberation and premeditation,' are correct as to the intent.—*Green v. State*, (Ark.) 266.

8. An instruction that the quality of the homicidal act is the same, whether perpetrated with or without felonious intent, provided the perpetrator "brought on the difficulty or voluntarily entered into the same," is error.—*State v. Herrell*, (Mo.) 387.*

Manslaughter.

9. On trial for murder, the evidence showed that defendant and deceased had a quarrel, and that deceased was advancing on defendant in a threatening manner, with a stone in his hand, when defendant shot him. *Held*, that

an instruction on manslaughter in the second degree, based on the theory that the killing was without design to effect death, "but in a cruel or unusual manner," was improper, but that an instruction on manslaughter in the fourth degree should have been given.—*State v. Stilts*, (Mo.) 614.

10. Shortly before the killing defendant and deceased quarreled and cursed, but who began it, or for what cause, did not appear. No blows were struck until defendant stabbed deceased, saying, "I will not take it any longer." Defendant, when arrested, had knife cuts in his coat, which he said he did not know were there until the morning after the killing, and did not know when they were made. *Held*, that the homicide was not reduced to manslaughter on account of sudden passion, under Pen. Code Tex. arts. 598, 596, providing that insulting words or gestures are not adequate causes for sudden passion.—*Clore v. State*, (Tex.) 242.

Justifiable homicide.

11. Under Pen. Code Tex. art. 570, making homicide to prevent theft at night justifiable, it is error to omit to instruct the jury as to the meaning of the word "night," where the evidence shows that the killing occurred at or after sunset.—*Laws v. State*, (Tex.) 220.

12. It is not error to instruct the jury that if defendant killed deceased in the execution of a previously formed intent, and not to prevent the theft, such killing would not be justified, though done in the night-time, and while deceased was committing a theft.—*Id.*

13. A charge, on a murder trial, that adequate cause means "such as would commonly produce a degree of anger, rage, resentment, or terror, in a person of ordinary temper, sufficient to render the mind incapable of cool reflection;" that insulting words or gestures, or an assault so slight as to show no intention to inflict pain or injury, are not adequate causes; and that an assault causing pain and bloodshed, a serious personal conflict, in which deceased used weapons, etc., though defendant was the aggressor, provided such aggression was not for the purpose of killing, or insulting words or conduct towards defendant's wife, are adequate causes,—is correct.—*Miller v. State*, (Tex.) 445.

14. A charge in the language of Rev. Code Tex. arts. 569 et seq., that "homicide is justifiable, also, in the protection of the person against any other unlawful and violent attack besides those mentioned; * * * and in such cases all other means must be resorted to for the prevention of the injury; and the killing must take place while the person killed is in the very act of making such unlawful and violent attack,"—is correct.—*Id.*

15. On indictment for murder, there being evidence that defendant, as an officer, attempted to arrest a person committing a breach of the peace, when he was resisted and assaulted by deceased, whom, in the resulting fight, he shot, it is error in the charge to limit defendant's right to use a deadly weapon to an occasion of self defense, as it is the duty of an officer when resisted by force in his lawful attempt to make an arrest to use force sufficient, not only to protect himself,

but to overcome resistance and effect his purpose.—*State v. Dierberger*, (Mo.) 168.

16. Evidence of adulterous intercourse for a long time between deceased and defendant's mother, of which defendant was fully cognizant, is inadmissible, and the fact constitutes no justification.—*State v. Herrell*, (Mo.) 387.

— Self-defense.

17. It is error to refuse to instruct that under Pen. Code Tex. art. 570, killing would be justifiable if done to prevent maiming, and that the homicide may take place at any time while the offender is mistreating with violence the person injured, though he may have completed the offense; it being a question for the jury whether deceased was still mistreating defendant with violence when the shot was fired.—*High v. State*, (Tex.) 238.

18. Where the evidence warrants the hypothetical case stated, that, prior to the shooting, the deceased forcibly seized defendant's money, or that which defendant fairly and reasonably believed was his, and refused to return such money, and that when defendant returned to where deceased was, he returned only for the purpose of making a quiet and peaceable demand for the money, and did make such demand, not contemplating that it would result in a difficulty causing death or serious bodily injury, and afterwards shot and killed the deceased, a charge that it would be "either murder in the second degree, or manslaughter, or justifiable homicide," according as the jury should find other facts, is erroneous, such facts showing a case of justifiable homicide.—*Johnson v. State*, (Tex.) 235.

19. It is error to refuse to charge that if defendant returned with an honest intention to demand of deceased the return of money which defendant honestly believed deceased had wrongfully taken from him, and that deceased in refusing such demand unlawfully attacked defendant, so as to cause the latter reasonably to believe that he was in danger of serious bodily harm, and that, acting on such belief, he fired the fatal shot, he would be justified, where the evidence warrants the hypothetical case stated.—*Id.*

20. It is error to refuse to charge that if defendant re-entered the room where deceased was, intending to renew or provoke a difficulty with deceased in order to get a pretext to kill him, and, after entering, declined the combat and retreated, he would have a right to defend himself against any attack thereafter made on him, when there is some evidence on which to base such an instruction.—*Id.*

21. Defendant, a depot officer, acting within his authority, ordered deceased off the platform, and put his hand against him to push him. They cursed each other, and deceased shook his fist in defendant's face, and, as defendant pushed it away, struck him in the mouth, knocking out a tooth, and sending him staggering several feet against a car. As soon as defendant recovered, he drew a pistol and shot deceased, who was within a few feet, with his fist doubled up, and arm drawn back as if to strike again. *Held*, that the jury should have been instructed that if de-

fendant had received serious bodily injury, and, believing that the danger of receiving additional bodily injury was threatening and imminent, shot and killed deceased, the killing was justifiable, under Pen. Code Tex. art. 570, permitting homicide in self-defense to prevent murder, maiming, or serious bodily injury.—*High v. State*, (Tex.) 238.*

23. A refusal to charge that "if the homicide was committed in protection of the person against an attack which produced a reasonable expectation or fear of death, or some serious bodily injury, then it would not be necessary for the party so attacked to resort to any other means before killing his assailant," is proper, in the absence of evidence as to self-defense.—*Miller v. State*, (Tex.) 445.*

23. The evidence showed that defendant and deceased had had a quarrel, and that deceased was advancing on defendant in a threatening manner, with a stone in his hand, when defendant shot him. *Held*, that an instruction that if defendant brought on the difficulty terminating in the homicide by his own willful and unlawful act, or of his own free will and inclination, he could not set up the plea of self-defense, no matter how imminent his peril, is erroneous. *RAY*, C. J., dissenting.—*State v. Stiltz*, (Mo.) 614.*

24. An instruction that if defendant at the time purposely sought deceased, in order to bring on, and did voluntarily enter into, a combat with him, with the intent to kill him, or do him great bodily harm, then the law of self-defense could not be pleaded in defendant's behalf, is correct.—*State v. Herrell*, (Mo.) 387.*

Indictment.

25. An indictment is insufficient which fails to charge that the killing was done feloniously, deliberately, etc., and such failure is not supplied by the allegation that the assault was made feloniously, nor by the concluding words, that defendant "feloniously, deliberately," etc., "did kill and murder," etc.—*Id.*

Insanity as defense.

26. Evidence of insanity having been introduced and withdrawn by defendant, it is proper to charge that there is no evidence of insanity on which the jury can acquit.—*State v. Stevens*, (Mo.) 172.

Intoxication as defense.

27. Under Pen. Code Tex. art. 40a, providing that intoxication shall not constitute any excuse for, nor mitigate the degree or penalty of, crime, but that temporary insanity, produced by use of ardent spirits, may be given in evidence to determine the degree of murder, defendant cannot complain of an instruction that intoxication, produced by recent voluntary use of ardent spirits, is no excuse for crime, nor does intoxication mitigate either the degree or penalty of crime, the jury being further told that they could consider defendant's mental condition in determining the degree of murder, if they found defendant guilty.—*Clore v. State*, (Tex.) 342.*

Evidence—Corpus delicti.

28. After the shooting of deceased by defendant, deceased having been attended by

physicians, and having died at a physician's office on the following day, the proof of the *corpus delicti* is insufficient, where no one who attended him or was present at his death was called to testify as to the wound; the only evidence being that of two companions of deceased, who testified to the shooting and that deceased was dead.—*High v. State*, (Tex.) 238.

Dying declarations.

29. On the day after deceased was mortally wounded by a pistol-shot in the bowels, he suffered great pain, and said that he was bleeding internally. When asked if he knew that he was going to die, he said: "Aunt, I am bound to die." *Held*, a sufficient predicate to warrant the admission as a dying declaration of a statement by deceased after he was shot.—*Miller v. State*, (Tex.) 445.*

Threats.

30. Where there is a conflict of evidence as to whether deceased was approaching defendant with an open knife when the fatal shot was fired, evidence of a threat made by deceased to kill defendant, though not communicated to him, is admissible, as tending to show who was the aggressor.—*Miller v. Commonwealth*, (Ky.) 137.*

31. Where defendant on a murder trial introduces evidence of previous threats against him by deceased, the state may show that about a year before the homicide defendant had said that the threats of deceased did not amount to more than those of an old woman.—*Miller v. State*, (Tex.) 445.

Sufficiency.

32. Testimony of a single witness that defendant asked him if he would go with others to rob or kill deceased, and on witness refusing, and asking the names of the others, that defendant said he had told him too much already; also that defendant said his own part would be to find deceased and see that it was thoroughly done; also that, after the deed was done, defendant told him that he would be killed if he told of the conversation,—is not sufficient to convict defendant as accomplice in the murder.—*Dugger v. State*, (Tex.) 763.

Instructions.

33. As, under a plea of not guilty, any number of defenses may be made, whether consistent or not, on a trial for murder, evidence of previous threats made by deceased against defendant should be admitted, and instructions covering the law of self-defense given, though defendant has testified that the homicide was accidental, and that while he feared deceased, who was advancing on him at the time, he did not shoot him for that reason, and had no cause to shoot him. *SHERWOOD*, J., dissenting.—*State v. Stevens*, (Mo.) 172.

34. Instructions stating that "deliberately" means in cool blood, and not in passion caused by just provocation; that premeditated killing, with malice aforethought, without deliberation, is murder in the second degree; and that if defendant killed deceased while under such a passion, caused by insulting language used by deceased to him, he was unable rightly to judge the nature and consequences of his

act, the homicide was not deliberate,—contain no error of which defendant can complain.—*Id.*

85. When there is evidence that defendant, as an officer, attempted to arrest a person committing a breach of the peace, when he was resisted and assaulted by deceased, whom, in the resulting fight, he killed, and, the real issue being whether defendant resorted to extreme or unnecessary measures in effecting the arrest, an instruction that in the absence of evidence to the contrary the law presumed homicide to be murder in the second degree, though abstractly correct, should not be given. *NORTON, C. J., dissenting.—State v. Dierberger, (Mo.) 168.*

86. When the evidence shows that defendant and deceased had engaged in a fight about 10 or 15 minutes before the murder, and the court has charged that the instant killing, in a violent passion engendered by the previous occurrence, is not murder in the first degree, it is not error to refuse to charge that the space of 10 or 15 minutes is not deemed sufficient for the passion to subside.—*State v. Woods, (Mo.) 157.*

87. Where defendant is charged as accomplice in a murder, the court should distinctly instruct that, in order to convict, the jury must believe that defendant was not present at the commission of the murder, and that it was committed by a person or persons who had been advised, commanded, or encouraged by defendant to commit it.—*Dugger v. State, (Tex.) 768.*

88. Where a charge giving the abstract law of manslaughter is not objected to at the time, a conviction will not be set aside unless it appears or seems probable that defendant was injured.—*Miller v. State, (Tex.) 445.*

89. The murder was shown to have been committed with a gun belonging to a witness for the state. The gun was found under a brush-pile, which was pointed out by the witness to the officers making search, though there were a number of such piles in the neighborhood; and a statement by the witness that, before finding the right pile, he had examined several others, was shown to be false. The witness stated that the defendant had told him that the gun would be found under one of the brush piles, but did not claim that he had pointed out the particular pile. *Held*, that there was sufficient evidence that such witness was an accomplice in the crime charged to require a charge on the weight of accomplice testimony.—*Hines v. State, (Tex.) 448.*

40. A refusal to give such instruction is error, where one of the witnesses for the state was shown to have had knowledge of the whereabouts of the deceased at the time of the killing, where his tracks were found going to and from the body, and he had been seen going with a gun in the direction of the scene of the killing shortly before; and where he had told some one before the body was found that the deceased had been killed, and related the manner of the killing.—*Id.*

— Harmless error.

41. Where the fact of the killing is admitted, and attempted to be justified, an instruction

that, "in considering whether the defendant was justified in taking the life of the deceased," etc., if erroneous as assuming the existence of the fact, is harmless.—*Cline v. State, (Ark.) 226.*

42. Where two are jointly tried for murder, and it appears that appellant gave no active aid in inflicting the wound, but prevented his co-defendant from giving a second blow, and was implicated, if at all, by facts preceding the conflict, the refusal of an instruction as to the right of a weaker man to defend himself with a knife, when attacked by a stronger, need not be reviewed after the death of the co-defendant by whom the wound was inflicted.—*Sharp v. State, (Ark.) 228.*

HUSBAND AND WIFE.

See, also, *Divorce; Dower; Homestead.*

Actions, time for bringing error, see *Error, Writ of.*

Conveyances between, see *Fraudulent Conveyances, 6-8.*

Disability of wife to sue, see *Limitation of Actions, 10.*

Wife's antenuptial debts.

1. Under Gen. St. Ky. c. 52, art. 2, § 4, declaring that the husband shall not be liable for antenuptial debts of the wife, except to the amount of whatever he may receive from her independent of realty, a husband is liable for his wife's antenuptial debts to the extent of property received by him from her, though such property before and after the marriage was exempt from seizure. *PRYOR, J., dissenting.—Clark v. Miller, (Ky.) 277.*

Wife's separate property.

2. Under Rev. St. Mo. 1879, § 8295, providing that the rents, etc., and proceeds of, and the husband's interest in, the wife's realty, shall be exempt from seizure for his debts, except debts for family necessities, and that no conveyance thereof by the husband shall be valid unless the wife joins, the husband's interest in the wife's land does not pass by a sale under a judgment in a suit for taxes, to which the husband, but not the wife, is a party; and, as against the purchaser at such sale, the wife is entitled to the surplus arising from a subsequent tax-sale of the land. Following *Gitchell v. Messmer, 87 Mo. 131.—Mason v. Gitchell, (Mo.) 608.*

3. The purchase by a husband of an adverse claim to his wife's lands, inures primarily to the benefit of her title, and to his benefit only so far as his marital interests are concerned.—*Hickman v. Link, (Mo.) 600.*

4. A sale of land which has been conveyed to a wife at the husband's instance, he furnishing the purchase money, and the investment of the proceeds in other land in the wife's name, gives the husband no interest therein, subject to his debts, under the Missouri married woman's act, though he receives such proceeds, and places them in bank in his own name, pending the purchase of the other land.—*Gilliland v. Gilliland, (Mo.) 139.*

5. The proceeds of the wife's land were paid to the husband with her consent, it being

agreed that they should be reinvested in a home. He used part in his business, and afterwards purchased a mill, but with what funds did not positively appear. The wife acquiesced for several years in his holding the title to the mill, and united in a mortgage of it. He afterwards sold the property, and assigned the notes for the price to the wife. *Held*, that she could not hold the notes as against the husband's creditors, whose debts were contracted while he held the property, though Gen. St. Ky. c. 52, art. 2, § 3, provides that the proceeds of the wife's lands shall be hers unless otherwise provided in the conveyance or obligation of the purchaser.—*Meade v. Stairs*, (Ky.) 272.*

6. Where the proceeds of land held by the wife subject to the claims of her husband's creditors are invested in other land, the title to which is alleged to have been taken by another in trust for the wife, a denial that the entire payment on the land was made with the money of the wife is not a denial of the trust, and the allegation must be taken as true, in an action by the husband's creditors to reach the land.—*Treadway v. Turner*, (Ky.) 816.

Community property.

7. Money received as a prize on a lottery ticket purchased with the separate money of the wife is community property; Rev. St. Tex. art. 2853, providing that all property acquired by either husband or wife during marriage, except that acquired by gift, devise, or descent, shall be deemed the common property of both.—*Dixon v. Sanderson*, (Tex.) 585.

8. Where a wife contributes from her separate property to the original capital stock of a firm engaged in selling merchandise, and the stock is replenished from time to time, purchases being made for cash and on credit, the interest in the partnership held in the name of the wife becomes community property.—*Middlebrook v. Zapp*, (Tex.) 732.

9. Where the wife sues for damages to her separate property on account of a wrongful levy upon the partnership effects, and the husband is joined only as a nominal party, the variance will be held fatal.—*Id.*

10. A voluntary conveyance by a husband to his wife of community property vests the property in the wife separately.—*Lewis v. Simon*, (Tex.) 554.

11. One who assumes, by virtue of a power of attorney, to convey land deeded to his wife during the marriage, estops himself and his heirs to claim the land, since, though the power of attorney is of no effect, the land is, under Rev. St. Tex. art. 2853, community property, which during the marriage may be conveyed by the husband alone.—*Dooley v. Montgomery*, (Tex.) 451.

Improvements.

By defendant in ejectment, see *Ejectment*, 13.—trespass to try title, see *Trespass to Try Title*, 8-12.

lessee, removal, see *Landlord and Tenant*, 3.

tenant by the curtesy, see *Partition*, 7-9.

Public, see *Municipal Corporations*, 5-7.

Indians.

Marriage, customs, see *Marriage*, 2.

INDICTMENT AND INFORMATION.

Description of property, see *Embezzlement*, 2. Disposing of mortgaged property, see *Chattel Mortgages*, 8, 9.

Particular crimes, see *Adulteration*, 1; *Larceny*, 1, 2; *Perjury*, 1, 2, *Threats and Threatening Letters*.

Sufficiency, see *Homicide*, 25.

Unlawfully acting as insurance agent, see *Insurance*, 5.

Filing information—Complaint.

1. Code Crim. Proc. Tex. art. 431, forbids the presentation of an information till oath has been made, charging the offense. Article 86 requires that this oath, called a "complaint," be filed with the information. *Held*, that a trial under an information cannot be proved by introducing in evidence the information alone, but the complaint is also essential.—*Wilson v. State*, (Tex.) 749.

Description of person.

2. Code Crim. Proc. Tex. arts. 420-425, requiring the name of the accused to be alleged in the indictment, if known, or, if unknown, that a reasonably accurate description be given, do not require, where the accused is charged as accomplice, that the names or a description of the principals be set out.—*Dugger v. State*, (Tex.) 768.

Description of property.

3. An indictment describing property stolen as "two ten-dollar bills of United States currency," is fatally vague and uncertain.—*State v. Oakley*, (Ark.) 17.*

Joinder of offenses.

4. Where several offenses are embraced in the same general definition, and are punishable in the same manner, (as gaming in a tavern or inn, and gaming in a room in and attached to said tavern or inn,) they are not distinct offenses, and may be charged conjunctively in the same count. *Willson, Crim. St. Tex.* § 1989.—*Comer v. State*, (Tex.) 106.

Indorsement.

See *Negotiable Instruments*, 1, 2.

INFANCY.

See, also, *Guardian and Ward*.

Infants as parties in partition, see *Partition*, 8, 4.

Running of statute of limitations, see *Limitation of Actions*, 11.

Unexecuted gift by infant, see *Gifts*, 1.

Affidavit for appointment of guardian ad litem.

An affidavit for the appointment of a guardian ad litem for an infant defendant may be made either by the plaintiff or his attorney,

under Code Civil Proc. Ky. § 88; and therefore section 550, authorizing an attorney to make any affidavit required by the Code to be made by his client, if the latter is absent from the county, has no application to the affidavit mentioned.—*James v. Cox*, (Ky.) 814.

INJUNCTION.

Of sale under deed of trust, see *Mortgages*, 9.

When granted.

1. An injunction against the opening of streets and alleys should not be granted on evidence of mere naked possession.—*Smith v. City of Navasota*, (Tex.) 414.

2. A threatened prosecution for a violation of a law defining and prescribing the punishment for a crime furnishes no ground for granting an injunction.—*Chisholm v. Adams*, (Tex.) 386.

3. The enforcement of an agreement forming a traffic association between a number of railroad companies, contrary to Const. Tex. art. 10, § 5, which prohibits railroad corporations from controlling competing or parallel lines, may be restrained, though no charges in excess of the rates permitted by law have yet been made, as the illegality is in the agreement itself.—*Gulf, C. & S. F. Ry. Co. v. State*, (Tex.) 81.

Dissolution — Assessment of damages.

4. After an injunction *pendente lite* has been dissolved at the final hearing, a motion for an assessment of damages caused by the injunction, made at a subsequent term, without notice to the adverse party, should be denied.—*Hoffelmann v. Franke*, (Mo.) 45.

INSANITY.

As defense to crime, see *Homicide*, 26.

Election of devise in lieu of dower, for insane widow, see *Constitutional Law*, 1.

Of releasor, see *Release and Discharge*, 1-8.
Renunciation of devise in lieu of dower by insane widow, see *Dower*, 4-6.

Evidence.

In civil cases, only a preponderance of evidence is necessary to establish insanity.—*Missouri Pac. Ry. Co. v. Brazil*, (Tex.) 408.

Insolvency.

See *Assignment for Benefit of Creditors; Bankruptcy*.

Instructions.

See *Criminal Law*, 30-35; *Trial*, 8-19.

INSURANCE.

Proofs of loss—Waiver.

1. The company was promptly notified of the loss, sent its adjuster to visit the policyholders, and, at the adjuster's request, furnished a contractor to estimate the cost of re-

building, but he declined to make the estimates, and the adjuster then procured another contractor, who made the estimates, and the adjuster offered to settle on the basis of the estimates so made, but plaintiffs declined. Plaintiffs afterwards sent formal, verified "proofs of loss" to the company, according to their understanding of the policy, and in substantial compliance therewith, but the company returned them, saying that they were incomplete, and not in accordance with the policy, and also that they required full specifications and plans of the building, and an estimate of the cost of repairing it, by a competent contractor, and that, if there was over-insurance, the policy was void. The policy required preliminary proofs to be furnished without request, but plans and specifications were to be furnished "if requested." *Held*, that further proofs of loss and specifications had been waived.—*Ligon v. Equitable Fire Ins. Co.*, (Tenn.) 768.

To whom payable.

2. A wife who, by marriage contract, has waived all her rights of dower and homestead, and in lieu thereof is to have a life-estate, from the death of her husband, in a tract of land, with a dwelling thereon, is not entitled, on a loss occurring after his death, to the insurance under a policy issued to the husband, payable to himself, his executors or administrators, and to be void in case of any change in title or possession, except by succession by reason of the death of the assured. Her title is not by succession, but by purchase.—*Quarles v. Clayton*, (Tenn.) 505.

3. Nor, in the absence of covenant by the husband to insure for the wife's benefit, has she any equitable interest in a life-estate in the insurance money, by reason of her right to occupy the house during her life.—*Id.*

4. That the insurer had the option to rebuild does not give her any rights on account of its election to pay instead.—*Id.*

Agents.

5. Under act Tex. July 9, 1879, prohibiting any person from acting as agent of an insurance company which has not complied with the laws of that state, an information charging that defendant did "solicit insurance on behalf of the Kentucky Mutual Security Fund Company of Louisville, Ky.," and transmit "an application for insurance from said company," etc., is insufficient on motion in arrest of judgment, in not alleging that the company named was an insurance company.—*Brown v. State*, (Tex.) 112.

Action on policy.

6. Where a policy requires suit to be brought within 12 months after a fire occurs, and the last day of such 12 months falls on Sunday, suit brought on the following Monday is in time.—*Owen v. Howard Ins. Co.*, (Ky.) 119.

7. An action on an insurance contract, made in the county in which the assured resides and the property is located, but in which the company, whose principal office is in another state, has no agent, may be brought in another county in which the company has a local agent; Code Ky. §§ 71, 72, providing that an action against an insurance company may

be brought in the county in which its principal office is situated, or, if it arise out of a transaction with an agent, in the county in which the transaction took place, and that, except in those actions, an action against a corporation which has an office in this state must be brought in the county in which such office is situated, or such officer resides, or, if upon a contract, in the above named county, or the county in which the contract is made or to be performed.—Id.

Intent.

What constitutes murder, see *Homicide*, 7, 8.

INTEREST.

When allowed.

1. On the death of a partner insolvent, who had used large sums of the firm's money for private purposes, the surviving members presented a statement of the amounts so used, as shown by the accounts, including charges of interest. The claims, especially the interest, being disputed, a sum was agreed on, with the stipulation that no additional sum should be allowed, unless presented within 30 days. Afterwards additional claims were presented. *Held*, that interest should be allowed on the additional claims as on all other claims against the decedent's estate of the same character.—*Masonic Sav. Bank v. Bangs' Adm'r*, (Ky.) 633.

2. The rule that interest should not be allowed on partnership accounts until after a balance is struck, on a settlement between the partners, has no application where a partner has withdrawn greatly more than he was entitled to from the firm assets, applying it to his own use, to the detriment of his co-partners.—Id.

3. Defendant kept his office in plaintiffs' counting-room, and was engaged in money-lending and farming. His tenants drew their supplies from plaintiffs' store, on defendant's credit. The latter also kept a private account with plaintiffs, and plaintiffs borrowed money from him from time to time. The crops raised on defendant's lands or by his tenants were turned over to plaintiffs year after year on account while defendant sometimes got advances of cash from plaintiffs. The items of debit and credit were entered from 1871 as one continuous account, without rest or balance, until closed in 1884. *Held*, that the account should be regarded as unsettled, and no interest should be computed on the items thereof.—*Rogers v. Yarnell*, (Ark.) 623.

4. But interest was payable on a note given by plaintiffs to defendant for money loaned in the course of their mutual dealings, which, by its terms, bore interest.—Id.

INTOXICATING LIQUORS.

Petition for prohibition under Arkansas "three-mile law," see *Appeal*, 1.

Local option.

1. A petitioner for putting in operation the "three-mile law," which the county court is

required to do on being petitioned by a majority of the inhabitants, (Dig. Ark. § 4524,) cannot withdraw from the petition after it has been acted upon by the county court, and while an appeal is pending in the circuit court, though in the latter court the issues are tried anew, the petition and action of the county court in such case being in the nature of an election in which the votes have been cast and returns made.—In re McCullough, (Ark.) 259.

2. The allegations of a remonstrance that certain signatures to the petition were unduly obtained are not evidence thereof.—Id.

Licenses.

3. Under Gen. St. Ky. c. 106, art. 4, § 1, providing that the privilege to sell spirituous liquors shall not be implied or embraced in a license to keep a tavern or other place of entertainment, unless the county court, or the trustees or other authority of any town or city, "shall deem it expedient so to do," *mandamus* will not lie to compel a county judge to grant a license to sell liquor.—*Hebllich v. Judge of Hancock County Court*, (Ky.) 465.

4. Under Acts Ark. 1833, p. 193, providing that one who sells liquor in territory where sales are prohibited may be convicted for a violation of the license law or of the local option law, the penalties of the license act are in force in prohibition districts.—*Manzia v. State*, (Ark.) 267.

5. Revenue act Ark. 1833, imposing a license on the business of a liquor seller, amended by implication the general license law, and became a part thereof; and one carrying on such business in a prohibition district is liable to the penalty of the revenue act by virtue of act 1833, p. 193, authorizing a conviction for violation of the license law in prohibition districts.—Id.

Illegal sales.

6. A merchant who, without a license to sell liquor, keeps a stock of brandy cherries in pint and quart bottles, which he sells to customers, furnishing glasses with which they can drink the brandy, is properly convicted of selling liquor without a license.—*Musick v. State*, (Ark.) 235.

7. A contract to sell a quantity of liquor, accompanied by payment, made within three miles of a church, the vendor having no liquor within that distance, but having a stock at a neighboring town, where he was a licensed dealer, it being agreed that he should take the liquor from his stock, and deliver it to the express company, to be carried to the vendee at the place where the contract was made, the latter to pay the charges, is not within Mansf. Dig. Ark. § 4524, prohibiting the sale of liquor within three miles from a church.—*Herron v. State*, (Ark.) 25.

8. Act Ark. March 21, 1881, § 1, provides that when the county court on a prescribed petition has prohibited sales of liquor within a radius of three miles from a designated point, it shall be unlawful for any person to vend or give away liquors of any kind. Section 3 provides that the act shall not prevent the prescribing or furnishing of alcoholic stimulants by a regular practicing physician to the sick under his charge, when he may deem it nec-

cessary; but before he shall be authorized to do so, "in order to protect himself from the penalty of this act," he shall file an affidavit, etc. *Held*, that the legislature intended to intrust no one in the prohibited districts with the right to furnish liquors but the physician who has complied with the law; and a druggist who supplies liquor on the prescription of such a physician, violates the law.—*Battle v. State*, (Ark.) 12.

9. An instruction that the fact that officials allowed defendant to carry on the business of a liquor seller, and collected money from him for the privilege, was no justification, is not erroneous, as being without evidence to support it, where a police sergeant testified that he collected money of defendant without explanation as to the purpose of the collection, but with a statement that he was instructed by his superior to collect that amount from each liquor dealer in the city.—*Hanlon v. State*, (Ark.) 265.

10. Evidence that, during the time defendant is charged with having carried on the business, freight and transfer agents received and delivered large quantities of intoxicating liquors consigned to him, is competent.—*Id.*

Intoxication.

As defense in homicide case, see *Homicide*, 37. Ejection of drunken passenger, see *Carriers*, 14, 15.

Joinder.

Of offenses, see *Indictment and Information*, 4. parties, see *Parties*, 2.

Judge.

See, also, *Courts; Justices of the Peace*. County judge, approval of contract with school teacher, see *Schools and School Districts*, 1, 2.

JUDGMENT.

Against executors, when binding, see *Executors and Administrators*, 18. Decree in equity, see *Equity*, 14, 15. In ejectment, see *Ejectment*, 12. Lien on earnings of railroad in hands of receiver, see *Receivers*, 4. *Res adjudicata*, see, also, *Its Pendens*, 1. Revival against executors, etc., see *Executors and Administrators*, 2.

Re-entry.

1. Gen. St. Ky. c. 72, § 1, provides that when an unexecuted judgment, and the record thereof, have been lost, etc., any person, on 10 days' notice in writing to the adverse party, may move for a re-entry, which shall be allowed on satisfactory proof of the loss, etc. Though the notice was not given, defendant had notice that the records had been destroyed, and that plaintiff had moved for re-entry, and he was in court when the order was made. The judgment was by default, and an appeal was barred by limitation. *Held*,

that the court properly ordered a re-entry on satisfactory proof.—*Haney v. McClure*, (Ky.) 427.

Res adjudicata.

2. A judgment which has been reversed on appeal, and thereby rendered a nullity, is properly excluded from evidence in a subsequent suit between the same parties.—*Atkinson v. Dixon*, (Mo.) 168.

3. A judgment entered in conformity to an oral agreement of the parties not made in open court is binding, though one party was not in court at its rendition, and had no notice thereof until after expiration of the period allowed for appeal.—*King v. Ohio Val. R. Co.* (Ky.) 681.

4. Where a judgment on a verdict against one and in favor of the other defendants, who are jointly and severally sued, is set aside, and a new trial granted on the motion of the former, such judgment is not *res adjudicata* as to the latter defendants.—*Gulf, C. & S. F. Ry. Co. v. James*, (Tex.) 744.

5. In a suit to enjoin a sale of property for taxes, plaintiff alleging its exemption, because used for school purposes, a judgment, in a suit brought by plaintiff's ancestors, involving a tax of a previous year, that the property was not then used exclusively for school purposes, is not a bar.—*Red v. Morris*, (Tex.) 681.

6. In trespass to try title, defendant claimed under a sale on foreclosure of a vendor's lien. Plaintiff acquired title pending the appeal in the foreclosure suit. The court charged that plaintiff was bound by the judgment rendered therein as if he had been a party thereto. *Held* not improper to refuse to modify it by charging that the doctrine of *lis pendens* would not be enforced against one who purchased without actual knowledge of the suit, or, having knowledge of the suit, reasonably believed the debt had been paid, where there had been unreasonable delay in the prosecution of the suit.—*Dwyer v. Rippetoe*, (Tex.) 668.

Collateral attack.

7. Though more than the three regular terms of court allowed by law for the revival of causes against the personal representatives of deceased defendants elapse after the suggestion of defendant's death, before steps are taken to revive the action, but the executor appears and pleads to the merits without objecting because of the delay, a judgment rendered against the latter is not void, so as to be liable to collateral attack.—*Postlethwaite v. Ghiselin*, (Mo.) 482.

Setting aside.

8. Where, owing to a misunderstanding between defendant and her attorney, attributable to the negligence of a third person, the real defense is not interposed, and she does not discover the fact until after judgment against her, it is no abuse of discretion to set aside the judgment.—*Dixon v. Lyne*, (Ky.) 469.

Default.

9. Where counsel for defendant was compelled to leave the city on the day of the trial, and gave his answer to another attorney, who was employed in the case, to file, and the lat-

ter was sick during the week when the case was heard, a judgment by default against defendant was properly set aside, and a new trial granted.—*Reinke v. Morse*, (Ky.) 468.

Equitable relief.

10. Where judgment is rendered subjecting land of a wife to the payment of a note signed by her and her husband, the wife cannot have the judgment set aside on the ground that the note was obtained by fraud, and its recitals of consideration false; the reason assigned for not making such defense in the original action being her ignorance of the nature of the proceeding, and of the recitals of the note.—*Fox v. Mt. Sterling Nat. Bank*, (Ky.) 868.

Assignment.

11. The charter of St. Louis, § 9, requires the joinder, in an action against the city for negligence, of all parties jointly liable, and that the execution shall be first collected of the other defendants, and only from the city when the other defendants are insolvent. *Held*, that a judgment recovered in such an action, of which the city took an assignment on payment, was not satisfied, and could be enforced by the city against its co-defendants.—*Campbell v. Pope*, (Mo.) 187.

Judicial Notice.

See *Evidence*, 1.

Judicial Powers.

See *Constitutional Law*, 1.

JUDICIAL SALES.

By executors, etc., see *Executors and Administrators*, 9-12.

Of trust property, see *Trusts*, 6.

On attachment, see *Attachment*, 4, 5.

execution, see *Execution*, 1-7.

Tax-sales, see *Taxation*, 22-29.

Commissioner's report.

1. A commissioner's report which does not show for what price the land sold, or that he offered to sell less than the whole tract to pay the debts for which it was liable, will be set aside.—*Haney v. McClure*, (Ky.) 427

Bond for price.

2. The court may order a purchaser at commissioner's sale under a decree in equity to execute a bond for the price, the purchaser having been summoned to show cause why such rule should not issue, and having failed to present any excuse or defense.—*Brassfield v. Burgess*, (Ky.) 122.

Sheriff's deed.

3. In trespass to try title, defendant claimed under a sale on foreclosure of a vendor's lien. The decree was for the foreclosure of the lien on all the lands sold by the vendor to the vendee. The sheriff's deed conveyed to the purchaser such interest as the vendee and a third person, to whom he had sold a part, had on the day the decree was entered. The third person never had any interest in the lot in

controversy, and the vendee had parted with all his interest before the date of the decree. *Held*, that plaintiff was not entitled to a verdict, because neither of the persons mentioned in the deed had any interest in the land at the time named, as the purchaser acquired all the title conveyed by the original vendor.—*Dwyer v. Rippetoe*, (Tex.) 668.

Jurisdiction.

In equity, see *Courts; Equity*, 1, 2.

Of railroad condemnation proceedings, see *Eminent Domain*, 1.

Over Mississippi river, see *States and State Officers*, 1.

To decree sale of decedent's land, see *Executors and Administrators*, 9.

JURY.

Affidavits of jury, to explain verdict, see *New Trial*, 3.

Custody in felony cases, see *Criminal Law*, 86.

Right to jury trial, see *Eminent Domain*, 5, 6.

Competency.

1. It is not ground of objection to a juror that he was summoned on a previous panel ordered by the regular judge, who did not try the case because of prejudice subsequently alleged against him; nor that he was summoned on the trial of a co-defendant, and was then challenged peremptorily. *Shawwood, J.*, dissenting.—*State v. Matthews*, (Mo.) 30.

Summoning.

2. On motion for the appointment of elisors in a criminal case, the defendant's affidavit, alleging prejudice in the sheriff and coroner, is not conclusive, and the denial of the motion is not ground for reversal, in the absence of abuse of discretion; Rev. St. Mo. § 3994, providing that, when it shall appear that the sheriff is prejudiced, the coroner shall execute the process. Following *State v. Leabo*, 1 S. W. Rep. 288.—*Id.*

3. Under Rev. St. Tex. art. 8056, providing that a sheriff, when necessary to summon talesmen as jurors, shall be sworn to summon impartial and sensible men, etc., an oath once taken during the term is sufficient.—*Blanton v. Mayes*, (Tex.) 453.

JUSTICES OF THE PEACE.

Terms of court.

Rev. St. Tex. art. 1547, providing that justices residing at the county-seats "shall hold the regular term of their courts on the last Monday of each month," was amended by providing that justices should hold regular terms at such times as might be prescribed by the commissioners' court of the county. *Held*, that a term of court held by a justice at a county-seat after the amended article went into effect, but on the day prescribed by the old statute, the commissioners not having taken any action as to the time of holding court, was not without authority of law, and

that a judgment rendered at such term was valid.—*Stone v. Hill*, (Tex.) 665.

Justifiable Homicide.

See *Homicide*, 11-24.

LANDLORD AND TENANT.

When relation exists.

1. B. executed to S. a bond to convey land when the price should be paid. S. took possession, and made a small payment. After the last installment became due, B. conveyed his interest and transferred the notes to defendant. Defendant notified S. that he had purchased the land, and would enter into a new contract. None was made, but S. held the land for several years after the conveyance, and was not required to pay rent, and was assessed for the land, and paid the taxes. Subsequently defendant took a note from S., specifying that it was for rent of the land. It was for twice as much as the land would rent for, and S. testified that he understood that when paid it was to be credited on his purchase. *Held*, that the contract had not been rescinded, and that defendant and S. were not landlord and tenant.—*Watson v. Pugh*, (Ark.) 498.

Surrender.

2. There being evidence that one of plaintiff's tenants surrendered possession to defendant, without plaintiff's consent, an instruction that such surrender was void, and did not divest plaintiff of its possession, is warranted by Gen. St. Ky. c. 63, art. 1, § 16, providing that the attornment of a tenant to a stranger shall be void unless with the landlord's consent, or pursuant to the judgment of a court.—*Ratcliff v. Belfont Iron-Works Co.*, (Ky.) 865.

Lessee's improvements.

3. Where, by the terms of a lease, the lessee is permitted to erect houses on the leased lot, with privilege of removal, the mere fact that the houses are suffered to remain after the expiration of the lease, and pending litigation between the parties as to right of possession of the lot, does not work a forfeiture of the houses.—*Atkinson v. Dixon*, (Mo.) 162.

LARCENY.

See, also, *Embezzlement*.

Indictment.

1. On conviction for theft under an indictment alleging that the article stolen was the property of some person to the grand jurors unknown, a new trial will be granted where it does not appear that reasonable diligence was used to discover the name of the owner, and the defendant offers newly-discovered evidence corroborative of the evidence of ownership given on the trial.—*Langham v. State*, (Tex.) 118.

2. An indictment for larceny connected A., B., and C. with the ownership and possession of the property, two of whom were special

owners. The court charged that the jury should convict if they believed, etc., that the taking was without the consent of A., B., or C., "or either of them." *Held* error, as authorizing conviction if any one of the three failed to consent.—*Woods v. State*, (Tex.) 108.

Sufficiency of evidence.

3. Evidence that defendant was found with others in possession of the stolen horses the next morning, when he immediately explained by a statement that one of the other accused persons loaned him the horse, saying that it was his own, which is not disproved, but is corroborated by proof of admissions of the person stated to have loaned the horse, made while defendant had the horse, and before the arrest, will not support a conviction for larceny, in the absence of other inculpatory proof.—*Arispe v. State*, (Tex.) 111.*

4. In such case, after instructing the jury that if a reasonable account of his possession of the horse, consistent with his innocence, was given by defendant when first charged with the theft, the burden was upon the state to show the falsity of the explanation, it is error to add that, if defendant did not reasonably account for his possession of the horse when so accused, the jury should find him guilty.—*Id.*

5. A horse was shown to have been stolen, and to have been in possession of defendant, who proved by one witness, partly corroborated by another, that he obtained the horse from one M. by trading a brown horse. Several witnesses testified in rebuttal that defendant did not have a brown horse, and others testified that he had casually stated that he obtained the horse alleged to have been stolen "from a man over the river," and "from his uncle." The latter statement was proved untrue. *Held*, that a conviction should be set aside.—*Reveal v. State*, (Tex.) 759.

6. The witnesses differed in minor particulars as to the correspondence in description of the mules stolen and those which defendant sold, but they all agreed as to a very peculiarly shaped brand which was on one of the mules stolen, and also on one of those sold. *Held*, that an instruction was warranted submitting the question of identity to the jury under a caution as to reasonable doubt.—*State v. Hill*, (Mo.) 28.

Legacy.

See *Wills*.

Legislative Powers.

Delegation, see *Criminal Law*, 36.

Levy.

Of taxes by county court, see *Taxation*, 10.

LIBEL AND SLANDER.

Privileged communications.

1. Stockholders of a corporation filed a petition in a court having jurisdiction of the cause against the corporation, alleging that

the president, with the approval of the directors, had been fraudulently conducting the management of the company, detailing the acts alleged to show a concerted scheme to reduce the value of the company's stock, and buy it in, and control the company's affairs, and thus destroy the plaintiffs' interests, and asked for the appointment of a receiver. *Held* that, as proceedings in courts are absolutely privileged, a director of the company, though not a party to the suit, could not maintain an action for alleged defamatory matter contained in the petition, though it was false and malicious, and made under color and pretense of a suit without right.—*Runge v. Franklin*, (Tex.) 731.*

2. The plaintiff also alleged that, after he had filed an affidavit denying the charges, the defendants caused the same to be published in a newspaper, "repeating through [its] columns the said libelous matter," and attached the newspaper article as an exhibit to its petition. The article contained a report of the suit, its object, the charges made, some of which were not declared on. The libelous matter relied on was not pointed out, except by declaring it to be a repetition of the matter contained in the petition, but the article contained much more matter, and the language was different. *Held* that, if an independent cause of action can be set up by borrowing from former allegations, the language relied on as libelous must be set out *in hæc verba*, and the damages alleged to result therefrom be specified.—*Id.*

Justification.

3. In a civil action for libel, where defendant pleads truth in justification of a charge imputing a crime to plaintiff, it is error to instruct that defendant must prove the charge "beyond a reasonable doubt;" a preponderance of the evidence being sufficient. Overruling *Polston v. See*, 54 Mo. 291.—*Edwards v. George Knapp & Co.*, (Mo.) 54.

4. A plea in justification, alleging that plaintiff had had sexual intercourse with her brother, is sufficient to cover a charge that she had had such intercourse, and was pregnant thereby.—*Id.*

Evidence.

5. In an action for slander for charging plaintiff with perjury in giving testimony in a certain action, evidence that plaintiff was sworn in such action and gave testimony, and that defendant charged him with having committed perjury therein, is material.—*Davis v. Davis*, (Tenn.) 368.

LICENSE.

To sell liquor, see *Intoxicating Liquors*, 8-5.

Revocation.

Plaintiff, the grantee of land situated on a creek; authorized defendant, in 1877, to erect a dam across the creek, and utilize the water; the license to continue at plaintiff's pleasure. In 1880, defendant, with plaintiff's knowledge and active assistance, made numerous contracts to supply water from the creek by means of his dam, the contracts to continue

five years. To carry out these contracts defendant erected a new and expensive dam, plaintiff furnishing the material, and expended money for pipes, etc. In 1884, defendant, with plaintiff's knowledge and assistance, as before, made new contracts for five years longer. *Held*, that plaintiff was estopped to revoke the license before the expiration of the latter contracts.—*Risien v. Brown*, (Tex.) 661.

LIENS.

Mortgage liens, see *Chattel Mortgages*, 5, 6; *Mortgages*, 2, 8.

Of attorney, see *Attorney and Client*, 2.

mechanic, see *Mechanics' Liens*.

vendor, see *Vendor and Vendee*, 4, 8.

Equitable—Priorities.

Land was purchased by A. under an execution against J. for much less than its value, and conveyed by A. to H. in consideration of the payment by H. of certain named debts; among them, a debt to G., for which A. was liable as surety for J. H. gave his note for the debt to G., but, becoming bankrupt, never paid it. After commencement of a suit to enforce the lien of G.'s debt, H. conveyed the land back to J., who was also bankrupt, in consideration of payment by him of certain named debts owing by H., among which was the debt to G.; the deed reciting that a lien is retained to secure compliance with the conditions by J., "but it is not intended to give a lien to any one but" H. *Held*, that G. was entitled to a lien prior to the debts of H. mentioned in the last conveyance.—*Williams v. Gaitskill's Adm'r*, (Ky.) 628.

Life Insurance.

See *Insurance*.

LIMITATION OF ACTIONS.

Action on insurance policy, see *Insurance*, 6.—to surcharge executors,' etc., accounts, see *Executors and Administrators*, 6-8.

—to try tax-title, see *Taxation*, 31-33.

Exceptions, coverture, see *Error, Writ of*.

Running of the statute.

1. Where an administrator completes payment under a contract for the purchase of real estate made by deceased, and takes the title "as administrator," and makes final settlement, and receives his discharge, and thereafter continues to occupy the land under claim of title, the statute of limitations begins to run in his favor from the date of his discharge.—*Harney v. Donohoe*, (Mo.) 191.

2. The statute does not begin to run as to land before the title thereto emanates from the United States.—*Cummings v. Powell*, (Mo.) 819.

3. Plaintiff in ejectment claimed under a New Madrid certificate under act Cong. Feb. 17, 1815, authorizing the owners of lands in New Madrid county, Mo., injured by an earthquake, to locate a like quantity on any public lands the sale of which was authorized; and defendant's allegation that the lands were a

part of the common-field lots, under act Cong. June 13, 1812, confirming to the inhabitants of St. Louis, etc., town lots, common fields, etc., inhabited, cultivated, or possessed prior to December 20, 1803, and reserving part of the common fields not claimed by individuals for school purposes, was not conceded. *Held*, that an instruction assuming that the statute began to run before the title emanated from the United States, defendant having been in possession for 40 years, requires a reversal of a judgment for defendant.—*Id*.

4. Land conveyed to a husband in trust for his wife for life, with remainder to her children, was conveyed in fee by the husband and wife to defendants' grantors. *Held*, that the grantors took but a life-estate, and, having entered under the deed, the statute did not begin to run against the children until the death of the wife.—*Gudgell v. Tydings*, (Ky.) 466.

Amendment of pleadings.

5. The petition in an action by a husband and wife for injuries to the wife stated facts on which both the husband and wife sought a recovery, and contained nothing indicating that the action was to recover in the separate right of the wife. On demurrer for misjoinder of parties, the name of the wife was dropped by amendment. *Held*, that the action having been brought in proper time, the husband could carry it on, though the limitation had expired when the wife's name was dropped.—*Missouri Pac. Ry. Co. v. Watson*, (Tex.) 731.

6. Plaintiff, by pleading filed in 1878, alleged that defendant conveyed land, in 1874, to a co-defendant, in fraud of plaintiff's rights. Subsequently he expressly abandoned these allegations, and went on trial on other issues, but renewed them in 1881, the action being still pending. *Held*, that the effect of the abandonment was to set the statute in motion as from the date of the conveyance.—*Shirley v. Waco Tap R. Co.*, (Tex.) 648.

7. Where an action is begun before the statute has run, the amending of the complaint by adding a necessary party after the statute has run does not set up a new cause of action so as to make the statute a defense.—*East Line & R. R. Co. v. Culberson*, (Tex.) 706.

8. Where the action was not brought for the benefit of the party subsequently joined, and the right of the latter to recover is presented for the first time by the amendment, the statute may be pleaded as to such party.—*Id*.

Disabilities.

9. A period of two months, between the death of the maker of a note and the granting of administration on his estate, comes within Code Tenn. (Mill. & V.) § 8454, enacting that "the time between the death of a person and the grant of * * * administration on his estate, not exceeding six months, * * * is not to be taken as a part of the time limited for commencing actions which lie against the personal representative."—*Bright v. Moore*, (Tenn.) 856.

10. Plaintiff's right of action for the recovery of her interest in land, which she claims by inheritance, accrues when a vendee to whom she has joined with her husband in con-

veying the title in fee-simple enters into possession, claiming title, and her recovery is barred by Gen. St. Ky. c. 71, art. 1, § 4, limiting, even to persons laboring under disability, the right to sue for recovery of real property to 30 years, when such adverse holding is continued for nearly 40 years, notwithstanding plaintiff was under the disability of coverture during the entire period.—*Bradley v. Burgess*, (Ky.) 5.

11. It is no defense to a bill to surcharge and falsify an administrator's account, by one who has just attained majority, that an action by his guardian is barred.—*Alvis v. Oglesby's Ex'rs*, (Tenn.) 818.

In criminal cases.

12. Under Rev. St. Mo. § 1259, making the offense of seduction punishable either by confinement in the penitentiary or by fine and imprisonment in the county jail, and section 1678, defining a "felony" as any offense liable to be punished by confinement in the penitentiary or death, such offense is a felony, and not within the statute of limitations.—*State v. Reeves*, (Mo.) 841.

LIS PENDENS.

Adverse possession.

1. Where, at the time of suing M. for land, it had been in the adverse possession of S. for 13 years, and afterwards, and after a sufficient time had elapsed for the title of S. to mature, he conveyed to M., who conveyed to plaintiff pending the action, and neither S. nor plaintiff was a party to the action, or had notice of it, and continuous possession had been held by S., M., and plaintiff for over 30 years, a judgment rendered against M. 23 years after said action was brought could not defeat the rights of plaintiff as a *bona fide* purchaser.—*Wallace v. Marquett*, (Ky.) 874.

2. An action of ejectment is not *lis pendens* as to one not a party, and who is in possession under a bond for deed from the defendant in ejectment, and such possession may ripen into an adverse title, so as to defeat a writ of possession issued on the judgment therein. Following *Wallace v. Marquett*, 10 S. W. 874.—*Wallace v. Arnold*, (Ky.) 647.

Local Option.

See *Intoxicating Liquors*, 1, 2.

Lunatic.

See *Insanity*.

Magistrates.

See *Justices of the Peace*.

Maiming.

See *Mayhem*.

MALICIOUS PROSECUTION.

Want of probable cause.

1. Where the evidence on the issue of probable cause is conflicting, the court is not re-

quired to state the evidence which, if true, would establish a want of probable cause, and instruct that, if such evidence is believed, there was not probable cause; or to state that which, if true, would establish probable cause, and instruct that, if that is believed, there was probable cause.—*Gulf, C. & S. F. Ry. Co. v. James, (Tex.) 744.*

Advice of counsel.

2. That defendant acted under advice of counsel is not conclusive of probable cause.—*Id.*

Malice.

3. The alleged malicious prosecution was for perjury in testifying that a passenger coach of defendant corporation had a loose wheel before it was wrecked. There was evidence that soon after the accident a telegram between defendant's agents contained the words, "loose wheel;" that its general manager said, "Of course, we understand it, but the world does not;" and the general manager had heard that in a previous proceeding another witness had testified that the wreck was caused by a loose wheel. *Held*, that the jury were authorized to find a want of probable cause, and from that to infer malice, and that, a verdict for exemplary damages being therefore authorized, a verdict for actual damages only would not be set aside.—*Id.*

Excessive damages.

4. In an action against a corporation and its agents for malicious prosecution, in which \$15,000 actual and \$15,000 exemplary damages were demanded, the court charged that a corporation and its agents are jointly and severally liable for the willful acts of the agents within their authority or ratified, done with malice, and without probable cause. There was evidence that the prosecution prevented plaintiff from obtaining employment, or made it necessary to do labor he was not accustomed to, and estranged him from his associates. *Held*, that a verdict for \$3,000 actual damages against the corporation alone did not appear to be the result of improper influences, or contrary to law, so as to require a reversal.—*Id.*

MANDAMUS.

To county judge to issue liquor license, see *Intoxicating Liquors, 3.*

When lies.

1. Section 6 of an amendment to Const. Mo., "concerning the judicial department," provides that when any one of certain courts shall "render a decision which any one of the judges therein sitting shall deem contrary to any previous decision * * * of the supreme court," the said court "must, of its own motion, pending the same term, and not afterwards," certify the cause to the supreme court. *Held*, that if it had been the duty of a court during a term to transfer a cause, and it had failed, *mandamus* would lie to compel the transfer, after the term expired, though the court could not then transfer the cause of its own motion.—*State v. Phillips, (Mo.) 182.*

2. The supreme court of Missouri has no appellate jurisdiction over the Kansas City court

of appeals, but the constitution (amend. 1864, § 8) gives it "superintending control over the courts of appeals by *mandamus*, prohibition, and *certiorari*." *Held*, that *mandamus* will lie to compel the Kansas City court of appeals to reinstate and hear an appeal wrongfully dismissed.—*State v. Kansas City Court of Appeals, (Mo.) 855.*

Mandate.

From appellate court, see *Appeal, 57.*

Manslaughter.

See *Homicide, 9, 10.*

MARRIAGE.

See, also, *Divorce; Husband and Wife.*

Of person divorced for adultery, see *Divorce, 3.*

Revocation of will, see *Wills, 2, 3.*

Cohabitation between slaves.

1. Defendant and K., who were once slaves, lived together as husband and wife for some time after emancipation, representing themselves and being regarded in the community as husband and wife, but they were never married according to the forms of law. During such cohabitation land was purchased by K. with money earned by defendant, the deed being executed to K. Afterwards K. was married according to forms of law to plaintiff. *Held*, in trespass to try title after K.'s death, that defendant was entitled to the land, whether she was to be regarded as K.'s lawful wife or not; if not, a trust resulted in her favor, K. having no right then to her earnings.—*Kinlow v. Kinlow, (Tex.) 729.*

Solemnization—Indians.

2. A marriage contracted according to the customs of an Indian tribe need not be contracted in the territory of the tribe in order to be valid.—*La Riviere v. La Riviere, (Mo.) 840.*

Marshaling Assets.

See *Equity, 11.*

MASTER AND SERVANT.

Agreement to employ, to be performed in a year, see *Frauds, Statute of, 2.*

Contract of hiring.

1. An agreement by one to accept employment is not necessary to the validity of a promise by another to employ him, made as a part of the compromise of an action.—*East Line & R. R. Co. v. Scott, (Tex.) 99.*

2. Neither is it necessary that a fixed period of service be agreed upon, the promises in such case having the right to fix it, but to complete the contract he must fix the period on demanding employment.—*Id.*

3. The promisee having been disabled at the time of the promise by reason of injuries for which the action compromised was brought, a demand for employment, made as

soon as he is able to discharge the duties of it, is in time, though made more than two years after the promise.—*Id.*

Torts of servant.

4. It was not error to charge that if defendant by his agents could, by ordinary care, have avoided the consequences of the negligence of the person injured, or if it by direct act of its agents caused the act which produced the injury, defendant is liable.—*Brown v. Sullivan*, (Tex.) 288.

5. In an action for personal injuries received on defendant's railroad, under a general denial, defendant may show that the employees operating the road were not its servants, but the servants of a receiver operating the road under decree of court.—*Kansas & G. S. L. R. Co. v. Dorough*, (Tex.) 711.

6. The exclusion of the decree appointing the receiver, and the decree showing his final discharge, cannot be assigned as error, in that the decrees showed that at the time of the injury the road was in the hands of a receiver, where the last decree showed that prior to the accident another decree had been rendered taking the road from the control of the receiver.—*Id.*

Negligence of master.

7. Acts Mo. 1881, p. 165, requires the owner, etc., of every coal mine operated by shaft to "provide safe means of hoisting and lowering persons in a cage covered with boiler-iron, so as to keep safe * * * persons descending into and ascending out of said shaft," etc., and gives any one injured by willful failure to comply therewith a right of action. *Held*, that one employed at the bottom of a shaft, injured by a lump of coal falling from a car, which would not have fallen had the car been covered as provided by the statute, could recover therefor.—*Durrant v. Lexington Coal Min. Co.*, (Mo.) 484.

8. In an action against a railroad company for injuries received by an employé, plaintiff should be considered as being "on duty" while asleep upon a car provided for the purpose by the company, and under his contract subject to be called out for duty at any moment.—*St. Louis, A. & T. Ry. Co. v. Welch*, (Tex.) 529.

9. One employed as conductor by a railroad company operating as lessee, without authority of statute, a railroad belonging to another corporation, cannot recover of the latter corporation for injuries sustained on account of a defect in an engine owned and controlled by the lessee.—*East Line & R. R. R. Co. v. Culbertson*, (Tex.) 706.

10. Plaintiff, a fireman and watchman, was requested by the engineer, who had been taken sick, to run the engine to a place where piles were to be driven. Plaintiff did so, and was injured by the explosion of the boiler of an engine used to operate the pile-driving machine. It appeared that plaintiff was not actually engaged in any work at the time of the accident, and that there was a rule of the company forbidding an engineer to place his engine in the control of another, but there was testimony that this rule was not intended to be enforced in case of the sickness of the engineer. *Held*, that plaintiff could recover

for injuries received.—*East Line & R. R. R. Co. v. Scott*, (Tex.) 298.

Negligence of vice-principal.

11. In an action for an injury occasioned by the moving of the trains in a yard used by defendant railroad company exclusively for the storage of cars and making up trains, allegations that another servant superior to plaintiff's intestate, for the killing of whom the action was brought, was incompetent and unskillful, and that cars were moved in a careless and negligent manner, thus causing the injury, state a cause of action.—*Grube v. Missouri Pac. Ry. Co.*, (Mo.) 185.

12. A charge that, if the servant was ignorant of the defects causing the accident after having used such care as one in his position ought to use, the company could not relieve itself from liability because a servant had neglected a duty imposed by the company to see that its car and track were in good order, is not erroneous.—*Missouri Pac. Ry. Co. v. James*, (Tex.) 332.

13. It was proper to charge that the temporary absence of the section-master would not relieve the company from liability for an injury occurring in executing instructions to servants, where the evidence showed that the servant was working under the instructions of the section-master in his absence, until ordered by the road-master to do the work which he was on his way to do when the accident occurred.—*Id.*

Negligence of fellow-servant.

14. A foreman of a bridge gang on a railroad and servants operating a train on the road are "fellow-servants," as to injuries to the former resulting from the latter's negligence.—*St. Louis, A. & T. Ry. Co. v. Welch*, (Tex.) 529.*

15. The engineer and fireman in charge of a passenger train are not fellow-servants of a section hand who is struck by the train.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo.) 852.*

16. When the injured person, plaintiff's wife, was working for her husband, who was boarding the men of defendant company under an agreement that the company should retain their board, and pay it to plaintiff, the wife and the engineer were not fellow-servants.—*Brown v. Sullivan*, (Tex.) 288.*

17. Where the regulations of a company provide that, in case a train becomes divided, the front brakeman shall go to the rear of the front portion, and signal the engineer which way to move, etc., and that the engineer shall obey the signals, and also that, in case the conductor is cut off from the train, the right to command shall devolve on the engineer, the engineer and brakeman are only fellow-servants, in case of the breaking of a train, when the engineer does not assume the command, and both are acting in the line of their separate duties.—*Louisville & N. R. Co. v. Martin*, (Tenn.) 772.

18. An instruction, in such case, that being subject to the orders of the engineer is the same, in effect, as acting under his orders, so as to render the company liable for an injury to the brakeman from the engineer's negligence, is erroneous.—*Id.*

19. In an action by a servant for injuries al-

leged to have been caused by the incompetency of a fellow-servant, where several facts are presented as bearing on the question of competency, it is not error to refuse a charge that plaintiff could not recover by showing a single act of negligence.—*East Line & R. R. Co. v. Scott*, (Tex.) 298.

Contributory negligence.

20. A miner's knowledge that the owner of the mine has failed to obey act Mo. March 23, 1881, requiring cages covered with boiler-iron to be used for persons ascending and descending shafts, does not defeat his action for injuries received, which such neglect made possible.—*Durrant v. Lexington Coal Min. Co.*, (Mo.) 484.

21. A section hand, directed to go after some tools, got on the tender of a train, and rode down the track for that purpose, and when the train stopped got off, and either in going away from the tender, or in attempting to get on again, was run over. The train was moving slowly at the time. It was not shown that the place was such as required signals that the train was in motion, or that the engineer was incompetent, and there was evidence that the employé was so close to the tender that he could not be seen by the engineer. *Held*, that he could not recover.—*Trinity & S. Ry. Co. v. Mitchell*, (Tex.) 698.

22. A track hand, while standing on the track watching some men loading cars with a steam-shovel, was struck by the locomotive of a passenger train, which came around a curve, on a down grade, at the rate of from 20 to 85 miles per hour. He could have seen the locomotive, and been seen by the train-men, for about 200 yards. A witness for plaintiff, who saw the locomotive distant about 150 yards, testified that no signal was given or effort made to stop the locomotive until deceased was struck. The fireman, who saw deceased at a distance of 100 yards, and the engineer, who saw him at 50 yards, testified to signals and efforts to stop the locomotive. They also knew that men were working at this point on the road. *Held*, that it was proper to refuse to charge that plaintiff could not recover.—*Sullivan v. Missouri Pac. Ry. Co.*, (Mo.) 852.

MAYHEM.

What constitutes.

1. Under Pen. Code Tex. art. 507, making it mayhem "to willfully and maliciously cut off or otherwise deprive a person of the hand, arm, finger, toe, foot, leg, nose, or ear, to put out an eye, or in any way to deprive the person of any other member of his body," it is mayhem to knock out a front tooth.—*High v. State*, (Tex.) 288.

2. The evidence being that a "corner tooth" was knocked out, it is a question for the jury whether the "corner tooth" was a "front tooth."—*Id.*

MECHANICS' LIENS.

Rights of subcontractors.

1. Rev. St. Me. 1879, § 8172, provides that every mechanic or other person who shall

perform any labor on, or furnish any materials for, any buildings or improvements on land, under any contract with the owner or his contractor, on complying with the provisions of this article, shall have for his labor or materials a lien on such building or improvements, and on the land belonging to such owner, on which the same are situated, to secure payment. *Held*, that a lien exists in favor of subcontractors and others, notwithstanding prior payment of the full contract price, in good faith, by the owner to his contractor; also that such liens are not limited to the amount agreed to be paid by the owner to his contractor.—*Henry & Coatsworth Co. v. Evans*, (Mo.) 868.

Constitutional law.

2. Such construction of the statute does not give it an unconstitutional force and effect, as depriving the owner of property "without due process of law."—*Id.*

3. Nor does it conflict with section 4 of the Missouri bill of rights, securing to all "the enjoyment of the gains of their own industry."—*Id.*

Mesne Process.

See *Attachment*.

Mesne Profits.

See *Ejectment*, 12.

Mistake.

Cancellation of deed, see *Equity*, 4, 5.
Reformation of deed, see *Equity*, 3.

MORTGAGES.

See also, *Chattel Mortgages*.

Foreclosure, chancery jurisdiction, see *Courts*, 1.

Real estate of religious society, see *Religious Societies*, 4.

Deed absolute.

1. Defendant agreed to loan plaintiff's grantor \$450, and take a mortgage on land worth \$1,100. Afterwards plaintiff's grantor executed a deed absolute for the land for the expressed consideration of \$450, which sum was received by him, and gave his note, payable to bearer, for \$450 and interest and attorney's fees. *Held*, that the deed was a mortgage, and that its character could not be varied by verbal agreements at the time of its execution.—*Hart v. Eppstein*, (Tex.) 86.*

Lien.

2. After the levy of an execution on land, but before sale, the debtor gave a mortgage to indemnify C. and R., his sureties, for another debt. When the land was sold under execution, it was bid off by C., who paid for it with money furnished by the debtor, and at the request of the latter caused the sheriff to convey the land to his wife. No consideration was paid by the wife, nor did it appear that she knew of the conveyance. *Held*, that the land was still subject to the mortgage, and

that C. and R. were not estopped to claim under it by causing the land to be conveyed to the wife. — *Corbett's Ex'rs v. Howell's Adm'r*, (Ky.) 658.

8. Members of a partnership purchased land, each taking an undivided interest by separate conveyance, paid for out of his own funds. The property was used for the partnership business, and after it ceased each used and enjoyed his undivided interest for his own benefit, and mortgaged it to secure his individual liabilities. *Held*, that the surviving partner's interest was not impressed with an equitable lien for the balance due the deceased partner, as against a mortgagee of the survivor's interest for the latter's individual debt. — *Wilbrite's Adm'r v. Boulware*, (Ky.) 620.

Rights of mortgagee.

4. A mortgagee who has neither actual nor constructive notice of a prior conveyance of the mortgaged land cannot be prejudiced thereby. — *Keith & Perry Coal Co. v. Birmingham*, (Mo.) 82.

Foreclosure.

5. Under Missouri acts 1845 and 1855, declaring that, in case of the mortgagor's death before or after action brought, his personal representative shall be defendant, the grantee of the devise of the mortgagor is not a necessary party to a foreclosure instituted after the mortgagor's death, and is not entitled to redeem from the foreclosure because he was not made a party. — *Tierney v. Spiva*, (Mo.) 433.*

6. To a bill to foreclose a mortgage defendant answered that at the time of its execution he was living on one of the tracts of land described therein as his homestead, and that he had refused to sign a mortgage embracing the homestead right; that the plaintiff wrote another mortgage, and handed it to him to sign, stating that it did not embrace the homestead right, which he signed without reading. *Held*, that a demurrer to the answer should have been overruled. — *Evans v. English*, (Ky.) 626.

7. Where a mortgage is given to secure several notes, without any stipulation as to priority, and the notes are assigned to different persons, the assignees are all entitled to share *pro rata* in the proceeds of foreclosure. — *Penzel v. Brookmire*, (Ark.) 15.

8. A deed of trust, after describing the land in the granting clause, added: "Together with the net income realized from said property as the rents thereof." There was no express stipulation that the trustees might take possession on default of interest; and no demand was made for the rents, or for an accounting. *Held*, that the purchaser at a sale under a second deed of trust, who took possession, was not liable to the trustee for the rents accruing while he was in possession, and before the trustee attempted to take possession on default. — *In re Life Association of America*, (Mo.) 69.

Injunction of sale.

9. In a suit to enjoin the sale of land under a trust deed executed by plaintiff's vendor for want of consideration for the note, plain-

tiff's vendor testified that it was given to secure to defendant money to be advanced by him in the purchase of a tract of land for witness, and that defendant bought the land and took the deed to himself. Defendant denied the agreement, and stated that the note, which was for \$2,000, was given for \$1,280 found due him from said vendor on a settlement then made, and the balance for money loaned. He further stated that said vendor had leased land of him, and that, on a settlement of accounts for rent and improvements, the said amount was owing him. Mutual receipts were executed, acknowledging satisfaction of counter-demands, the one given by plaintiff's vendor containing a promise to surrender the lease, which had not expired. Plaintiff's vendor testified that on the settlement \$2,374 was found due him, and that the \$720 was paid on that account, and that he thought the receipt was only an agreement to surrender the lease. No demand was ever made by said vendor for a deed for the land alleged to have been purchased for him, or for the residue of the \$2,374. At the time of this transaction, said vendor was pressed by creditors. Defendant's brother, who obtained possession of the land after the lease expired, signed an agreement to pay for the improvements thereon, if plaintiff's vendor had not already been paid. This agreement stated that the latter had paid \$1,280 to make good his lease. *Held* not sufficient evidence to support a finding for plaintiff. — *Van Meter v. Hamilton*, (Mo.) 71.

Setting aside sale.

10. The mortgagee having become the purchaser at the commissioner's sale, for a price not exceeding a third of its value, and having by demurrer to the answer admitted fraud in obtaining the mortgage, will not be permitted to avail himself of the purchase, though in ordinary cases the sale would not be set aside. — *Evans v. English*, (Ky.) 626.

Redemption.

11. In an action to redeem under an alleged agreement by defendant to purchase and hold the land for plaintiff, the only evidence of the agreement was that of plaintiff's father, who testified that he acted for his son in the matter and made the agreement, and that of defendant, who testified that the proposition was made to him, but, after being advised by counsel that the transaction would be but a mortgage, he declined it, and bought on his own account. Defendant's attorney, after testifying, on cross-examination by plaintiff, that defendant on the day of sale asked him what effect certain things, if done, would have, to which he replied that they would amount to a mortgage, was asked by defendant, "What did defendant then say?" It appeared that the witness would have answered that defendant said "he would have nothing to do with it." *Held* that, as the witness' proposed answer tended to corroborate defendant, its exclusion was error. — *Dupree v. Estelle*, (Tex.) 666.

12. Notwithstanding Gen. St. Ky. c. 68, art. 8, § 3, provides that sales under judgment of foreclosure shall be "null and void" from the time of redemption, the lien of a mortgage

is extinguished by sale under the judgment, and the mortgagee cannot have a resale after redemption, to recover the balance of the judgment not satisfied by the first sale. The sale is declared a nullity from the time of redemption, so far as it affects the title of the redemptioner, but the mortgage lien is not revived.—*Makibben v. Arndt*, (Ky.) 642.

MUNICIPAL CORPORATIONS.

See, also, *Counties; Highways; Schools and School Districts.*

City courts, see *Courts*, 7.

Taxation for public improvements, see *Constitutional Law*, 8.

Incorporation.

1. Non-user, or failure to elect officers for a series of years, does not work a dissolution of a municipal corporation created by act of legislature.—*Buford v. State*, (Tex.) 401.

2. Act Tex. Feb. 12, 1852, which incorporated the town of Henderson, with limits one mile square, the court-house being in the center, was impliedly repealed by act May 16, 1871, incorporating the same town, with limits extending "one-half mile in every direction from the court-house."—*Id.*

Ordinances.

3. Neither under its authority to regulate the use of streets, nor section 26, art. 3, of its charter, empowering the mayor and assembly "to license, tax, and regulate" various professions and businesses, nor the general welfare clause, permitting the passage of all such ordinances, not inconsistent with the provisions of the charter or the laws of the state, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce, and manufacture, can the city of St. Louis regulate by ordinance the tariff of charges of a telephone company.—*City of St. Louis v. Bell Tel. Co.*, (Mo.) 197.

Control of streets.

4. A provision of a city charter that council shall have "exclusive control of the streets, sidewalks, lanes, alleys, market-places, and other public grounds within the corporate limits, and shall cause the same to be kept clean and in repair," does not confer upon the council power to grant to a railroad the right of way over and along its public streets, as that would be an appropriation or use of the streets for a purpose not contemplated when the charter was granted.—*Ruttles v. City of Covington*, (Ky.) 644.

Public improvements.

5. Act Ky. March 6, 1876, authorizes the city of C. to assess a special tax on lots abutting on property purchased or condemned for opening, extending, or widening a street, "said tax to be used to pay the cost and expense of such purchase or condemnation," is not unconstitutional, where the owners of the abutting lots on which the tax is assessed also own the lots taken for the street. But the compensation for the lots taken, & c., their full value, must be paid in money before the improvement is made, notwithstanding the as-

essment may equal such value.—*City of Covington v. Worthington*, (Ky.) 790.

6. Property owners in an incorporated municipality may constitutionally be required to pay taxes for the improvement of streets in the municipality, and also to pay the general county road tax. The former are for special privileges, not equally enjoyed by other residents of the county.—*Wolf v. McHargue*, (Ky.) 809.

7. The charter and ordinances of the city of St. Louis, relating to opening, etc., streets, provide for notice to the property owners of the time and place of making an assessment for benefits by the commissioners, and gives them the right to a hearing before the commissioners, and before the circuit court, on exceptions. *Held*, that in a suit on a tax-bill for the amount of an assessment for benefits derived from widening a street, the report of the commissioners is conclusive on the question of whether the property assessed is benefited, and as to the extent of such benefit. Following *City of St. Louis v. Rankin*, 9 S.W. Rep. 910. RAY, C. J., dissenting.—*City of St. Louis v. Excelsior Brewing Co.*, (Mo.) 477.

8. Instructions given at the request of the city, based on the erroneous supposition that the jury can fix and assess the benefits, do not, as against the city, cure the error in an instruction to disregard the report. RAY, C. J., dissenting.—*Id.*

Taxation.

9. Under act Ky. Feb. 17, 1874, § 7, amending the charter of the city of Newport, and conferring power upon the city "to cause to be annually levied, collected, and paid into the city treasury an *ad valorem* tax on the real, personal, and mixed estate within the limits of said city subject to taxation by the city under the laws of the state," the city may assess and collect taxes on choses in action on non-residents, and stock in corporations existing elsewhere, the title to which is in a resident of the city.—*City of Newport v. Ringo's Ex'x*, (Ky.) 2.

10. Under section 18 of the city charter of Frankfort, authorizing the councilmen to tax certain property, "and any capital or other property belonging to any other corporation or citizen of any other place, employed in said city," distillers may be taxed on whisky stored in their warehouses, and owned by them, though they have paid a tax on the business of wholesale liquor merchants, carried on by them separately from the distillery; it not appearing that the whisky used in that business was removed from their warehouse, or manufactured at their distillery.—*City of Frankfort v. Gaines*, (Ky.) 123.

11. The distillers cannot be taxed on whisky which has been sold by them, though it is still in their warehouses.—*Id.*

Murder.

See *Homicide*, 1-8.

NAVIGABLE WATERS.

Obstruction.

1. The state of Kentucky improved the Green and Barren rivers by means of locks

and dams, but by act March 9, 1868, the legislature incorporated the G. & B. R. N. Co., and leased to it the G. and B. "river line of navigation," together with the grounds, tools, machinery, etc., appurtenant thereto, requiring it to keep "said line of navigation in good repair," and to permit boats to navigate the rivers on payment of a certain toll. *Held*, that the locks, dams, and other improvements constituted the line of navigation, and that the grant of a license to a railroad company to build bridges so as not unreasonably to obstruct navigation, does not impair the rights of the navigation company under the lease.—*Green & B. R. Nav. Co. v. Chesapeake, O. & S. W. R. Co.*, (Ky.) 6.

2. The railroad company gave notice to the navigation company that it would between certain dates repair its bridge. The season was one in which the river was sometimes obstructed by ice, and the work was done without delay. *Held* that, though the obstruction might have been entirely avoided by an unusual and expensive course, there was no unreasonable obstruction to navigation, and that the harm suffered by the navigation company was *damnum absque injuria*.—*Id.*

NEGLIGENCE.

Contributory, of passenger, see *Carriers*, 10-13.

—servant, see *Master and Servant*, 20-22.

Defective roads, see *Highways* 2; *Turnpikes and Toll-Roads*, 2.

Delay in transmitting telegrams, see *Telegraph Companies*, 1-7.

Of railroad companies, see *Railroad Companies*, 14-26.

Injuries to passengers, see *Carriers*, 5-13.

—servants, see *Master and Servant*, 7-10.

Dangerous premises.

1. Defendant's servants were making up a train of empty cars. In doing this they first threw in on one of the tracks seven of these cars, and left them standing, with their doors open. Plaintiff, a lad 10 years old, with several other boys, got into one of them, and, while there, several other cars were coupled on to the standing cars, and the train thus made up started off. The boys were pushing one another around in the car, and plaintiff was pushed off by one of the boys, and fell under the wheels of the moving train. *Held*, that a demurrer to this evidence should have been sustained.—*Curley v. Missouri Pac. Ry. Co.*, (Mo.) 593.

Contributory negligence.

2. Plaintiff and his wife were keeping a boarding car in connection with a construction train, and, just as the car was about to be moved, she was standing with the conductor near the door, to see where it would be placed. The car started with a jerk and she was thrown upon the track. *Held* proper to charge that defendant was liable if the injury was caused by the negligence of its servants, although there may have been negligence on the part of plaintiff's wife, unless she could, by the exercise of ordinary care, have avoided

the consequence of defendant's negligence.—*Brown v. Sullivan*, (Tex.) 288.

3. It was not error to refuse to charge that there could be no recovery if plaintiff's wife was standing in the door, and knew the car was about to start, and in consequence of her standing up the jerk of the car threw her out, since the question of negligence was for the jury.—*Id.**

4. The verdict will not be set aside on the ground that it was negligence in plaintiff's wife to be standing near the door, knowing that the car was about to start, where the evidence shows that she was standing three feet from the door.—*Id.*

Pleading.

5. Where the petition states a cause of action, and does not show a case from which it appears that the injury was caused by contributory negligence, defendant, in order to rely on such defense, must allege it.—*Missouri Pac. Ry. Co. v. Watson*, (Tex.) 781.*

NEGOTIABLE INSTRUMENTS.

Accommodation indorsers, right to set aside fraudulent conveyance of maker, see *Fraudulent Conveyances*, 9.

Payment by maker's bank, see *Banks and Banking*, 1-3.

Indorsement and transfer.

1. One who takes a note in part satisfaction of a larger debt, and releases valuable liens, is a holder for value.—*Fitzgerald v. Barker*, (Mo.) 45.

2. Where a grantee assumes in the deed the payment of notes of the grantor, the grantor's fraudulent misrepresentations as to the non-existence of liens are no defense to an action against the grantee by a holder of the notes for value before maturity, the latter not being implicated in the fraud; and the holder cannot be prejudiced by knowledge subsequently acquired.—*Id.*

Actions on.

3. A note by which "the directors of the J. & S. Turnpike Road promise to pay," etc., and signed with the names of the directors, without any official designation attached, does not on its face show any liability of the turnpike corporation; and, in an action on such note to recover a personal judgment against the signers, an objection that such writing is the obligation of the corporation must be raised by answer, and not by demurrer.—*McKenssey v. Edwards*, (Ky.) 815.

4. Defendant having paid one of several notes assumed by him, cannot in an action on the others, testify to "the circumstances concerning the payment."—*Fitzgerald v. Barker*, (Mo.) 45.

NEW TRIAL.

Absence of witness, see *Criminal Law*, 87.

Application—Procedure.

1. Where the relief asked in the petition for new trial, after default, is only for permis-

sion to file an answer, it is error to pass on the merits on proofs submitted by defendant alone, when there is no suggestion that such a course would then be pursued.—*Reinke v. Morse*, (Ky.) 468.

2. Where a cause is transferred from the county to the district court because the county judge was counsel in another suit growing out of the same cause of action, an unsworn statement by the county judge, offered in support of a motion for a new trial in the district court on the ground that the county judge was not in fact disqualified, but forming no part of the proceedings or of record, need not be considered.—*Kahanek v. Galveston, H. & S. A. Ry. Co.*, (Tex.) 570.

Objections to verdict.

3. Affidavits of jurors are not admissible to show their understanding of the facts, and the grounds on which their verdict was rendered.—*Wills Point Bank v. Bates*, (Tex.) 848.

Right to third trial.

4. Under Rev. St. Tex. art. 1370, permitting only two new trials on the motion of one party, unless for misconduct or error in law of the jury, a third new trial may be granted for insufficiency of the evidence to support the verdict, though the record does not show that the former verdicts were set aside for such misconduct or error.—*Collins v. Ballow*, (Tex.) 248.

Surprise, accident, etc.

5. A new trial should not be granted on account of the absence at the trial of a defendant, who does not reside in the county, though the importance of his testimony, and the fact that his absence was due to mistake as to the date set for trial, sufficiently appear; as defendant, in omitting to give his deposition, assumed the risk of losing the benefit of his testimony.—*Mayer v. Duke*, (Tex.) 565.

6. In reply to a request by defendant's attorney to see the judge as to the time of trial, plaintiff's attorneys wrote that they were willing, if the judge should permit, to set the case for such time as would suit defendant's counsel; and afterwards wrote that they were willing to let defendant's attorney suggest the day of trial at any time during the first two weeks of court. The day was set by the latter, but the judge, whose consent had not been obtained, set the case five days in advance of the day fixed; and, neither the defendant nor his attorney being present, judgment was rendered for plaintiff. Defendant's attorney did not know of the action of the judge, and the defendant was informed thereof two days before the trial, but was unable to be present on account of sickness. Held that, though the absence of the attorney and defendant was satisfactorily accounted for, a motion for new trial will not be granted where no facts are set out showing a meritorious defense.—*Holliday v. Holliday*, (Tex.) 690.

7. One is not entitled to a new trial because, when testifying, he was so nervous, excited, and embarrassed that he forgot many important facts, and answered in such a manner as to prejudice his case.—*Korte v. Hoffman*, (Mo.) 890.

Nominal Damages.

See *Damages*, 1.

Non Compos Mentis.

See *Insanity*.

Non est Factum.

Verification of plea, see *Pleading*, 3-5.

Notary Public.

Acknowledgment of party's affidavit by his attorney as notary, see *Affidavit*.

Notes.

See *Negotiable Instruments*.

Notice.

Of election to authorize county indebtedness, see *Elections and Voters*, 1.

Nuisance.

Dangerous premises, see *Negligence*, 1.
Excavation on highway, see *Highways*, 2.
Obstruction of private way, see *Easements*, 1, 2.
— navigation, see *Navigable Waters*, 1, 2.

Obstructing Justice.

Resisting officer, killing by officer, see *Homicide*, 15.

Office and Officer.

See *Clerk of Court*; *Justices of the Peace*; *Sheriffs and Constables*; *States and State Officers*.
County officers, see *Counties*, 1-12.

Opinion Evidence.

See *Evidence*, 9, 10.

Ordinances.

See *Municipal Corporations*, 3.

PARDON.

Recommendation to mercy.

Where one indicted jointly with others for murder testifies for the state on the trial of his co-defendants, and afterwards pleads guilty of murder in the second degree, and the trial court is not requested to recommend executive clemency, the supreme court will not make such recommendation, as defendant may have received all the favor to which he was entitled by the reduction of the grade of his offense.—*Chapman v. State*, (Tenn.) 511.

Parol Evidence.

See *Evidence*, 14.

PARTIES.

In action against deceased county treasurer's estate, see *Counties*, 2.
trover, see *Trover and Conversion*.
Joinder, see *Animals*.

Necessary parties.

1. In an action by an assignee of time-checks and due-bills given to laborers employed in the construction of a railroad, against the railroad company and the general contractor, where the petition charges that they were executed by the contractor, and were his obligations, which matters are not denied in the answer, and the contractor made himself primarily liable to the laborers, subcontractors who had given the checks and due-bills were not necessary parties.—*San Antonio & A. P. Ry. Co. v. Cockvill*, (Tex.) 702.

Misjoinder.

2. On the theory that the money sued for was received by one of the defendants as broker from his principal, and remitted to his co-defendant, for payment to plaintiff, a petition against all jointly does not show a misjoinder of parties.—*Floyd v. Patterson*, (Tex.) 526.

PARTITION.

Marshaling assets in discharge of liens, see *Principal and Surety*.
Venue, see *Venue in Civil Cases*, 4.

Property subject to partition.

1. Const. Tex. art. 16, § 52, prohibiting the partition of land used as a homestead among the heirs of deceased, so long as the guardian of his minor children may be permitted, by order of court, to use it, does not prevent the homestead from entering into the partition of the estate, providing the right of the minor children to use it during such permission is not infringed by such partition.—*Hudgins v. Sansom*, (Tex.) 104.

2. A contingent remainder to become vested on the death of certain persons during the life of the life-tenant is, under Missouri statutes, subject to be partitioned during the life of the life-tenant.—*Freston v. Brant*, (Mo.) 78.*

Parties—Infants.

3. Under Code Ky. § 490, providing that land held jointly may be sold on application of plaintiff, though an infant, if division would materially impair the value of the land, or of plaintiff's interest, where a widow, who is the statutory guardian of all her infant children but one, unites them as plaintiffs with her in a petition for the sale of land, the mother suing not only as guardian, but also as next friend, all the parties are before the court, and it appearing that no division could be made without injury to each child's interest, the sale is properly ordered, and the title passed to the purchaser.—*Henning v. Barringer*, (Ky.) 136.

4. Where the mother's right to sue for her children appeared before the purchaser acquired title, the fact that she did not make affidavit of such right, as required by Code

Ky. § 87, to the effect that there is no guardian and no one else to sue, is not such a jurisdictional fact as will render the judgment void.—Id.

Decree.

5. It is not a modification of a judgment, directing the commissioners to proceed generally according to law, to give, in a subsequent order appointing new commissioners, specific instructions following the statute, as every judgment of partition contains the statutory directions by implication, if not expressed.—*Houston v. Blythe*, (Tex.) 520.

Allotment of parcels.

6. Rev. St. Tex. arts. 3475, 3476, provide that commissioners in partition, when necessary, may cause the real estate to be surveyed into several tracts, and shall divide it into as many shares as there are coparceners, each of which shall contain one or more tracts, as the commissioners shall deem proper, so that the shares may be equal in value. *Held*, that a share may consist of tracts not contiguous, and it is not error to direct the partition to be thus made, if the commissioners deem it expedient.—Id.

Improvements.

7. The children of a second marriage are not, after their father's death, entitled to any reimbursement for permanent improvements made by him on land, the separate estate of his first wife, while he was holding it as tenant by the curtesy.—*Clift v. Clift*, (Tex.) 338.

8. The children of such second marriage can have allotted to them their share of the value of the community property of said marriage, used in making the improvement referred to, out of the proceeds of the sale of the property, when found necessary to sell the same for purposes of partition.—Id.

9. Where it appears that the improvement, which was a house, was built eight years after the death of the first wife, and seven years after the second marriage, and paid for partly in goods from decedent's store and partly in money, costing nearly as much as the whole value of his property at the death of his first wife, in the absence of proof that any of the property of the first community went into the improvement, it will be presumed that the improvement was made with community property of the second marriage.—Id.

PARTNERSHIP.

Claims of firm against deceased partner's estate, see *Interest*, 1, 2.

What constitutes.

1. A contract between wholesale and retail dealers, by which the former furnishes stock, and the latter stores, insures, and sells for a share of the profits, does not create a partnership.—*Brown v. Watson*, (Tex.) 395.*

—As to third persons.

2. W. furnished to defendant firm a stock of goods on consignment, the latter to receive for their services in making sales a share of the profits. In other business of the firm W. had no interest whatever. *Held*, that he could

not be made liable as a member of the firm by a creditor who acted solely upon commercial reports, based upon a newspaper statement of which W. was ignorant.—*Cherry v. Owsley*, (Tex.) 519.

3. A wholesale and a retail dealer made a contract by which the former furnished stock, and the latter stored, insured, and sold it for half of the proceeds. It appeared that they had negotiated with a view of partnership, but that, while the retailer had represented that a partnership existed, the wholesale dealer had denied it; that the business of each was carried on as before; that the retailer's circulars showed that he dealt in some goods as agent; that the sales account of goods furnished by the wholesaler was kept separate from other sales; and that the attaching creditors of the retailer gave credit on the basis of commercial reports, and not on that of the stock of goods. *Held*, that the wholesale dealer was not estopped from alleging his individual ownership of the goods, and that they were not liable to attachment for the retailer's debt.—*Brown v. Watson*, (Tex.) 895.

Firm property.

4. The common source of title in ejectment was a conveyance of certain property to three brothers individually. Plaintiff derived title through a sheriff's sale of one undivided third interest, under judgment against one of the brothers for an individual debt. Defendants claimed under a later purchase from the three, made in payment of a debt from them as partners, averring that the land was firm assets, and that the sheriff's sale was void. The partnership was alleged to have been originally formed long before, in Illinois, but in none of their transactions, notes, or deeds was there any firm name used. Before acquiring the land, they, with others, were engaged for several years in Texas, in the cattle business. Upon leaving Texas, they adjusted their respective interests, owing no debts, and removed to Missouri, where they bought the land; their former associates having no interest in it. *Held*, that the evidence did not support the finding that the land belonged to a partnership.—*Allen v. Logan*, (Mo.) 149.

Firm and individual creditors.

5. A., being indebted to plaintiff, formed a partnership, and transferred his stock of goods to the firm, and the latter then bought new stocks, with which the old was intermingled. Plaintiff afterwards attached part of the goods in the hands of A., but there was no evidence that the latter had become the owner thereof, as his individual property, or that the partnership had been dissolved, except that of one witness, who had been clerking for the firm. No notice of such dissolution was given, and goods purchased by the firm continued to be received and mingled with the partnership stock. *Held*, that the goods attached by plaintiff were partnership property, and that plaintiff's claim should be postponed to the claims of subsequently attaching creditors of the firm, the latter having become insolvent.—*First Nat. Bank v. Brenneisen*, (Mo.) 884.

Dissolution and accounting.

6. Under the agreement between partners on dissolution, B. was to pay notes without consultation with A., but accounts were not to be paid until the latter had pronounced them correct. *Held* that, where B. failed to pay certain notes until after judgment by default was entered on them, he could not recover costs incurred, but that where he refused to pay an account in good faith, and suit was brought, he was entitled to reimbursement for costs, unless it appeared that he suffered such suit to be brought contrary to the wishes of A.—*Buford v. Ashcroft*, (Tex.) 346.

7. Since the agreement contemplated that the sum which B. stipulated to pay should be paid at once, he was not entitled to credit for sums paid as interest maturing after the making of the agreement.—*Id.*

8. Plaintiff and defendant were partners dealing in tobacco. Defendant was a member of another firm engaged in the same business, and its tobacco was handled in the market in the name of the former firm. Defendant kept the accounts of the two firms in the same set of books, but the books did not show how much tobacco had been bought by each firm, or the cost of it, though they showed the amount expended by the two firms. In an action to settle the partnership affairs of the parties, the commissioner estimated the amount bought for defendant's firm by adding to the number of pounds that it had sold a proper amount as shrinkage, the cost of which he found from the average price paid. He deducted this sum from the amount paid by both firms for tobacco, in order to fix the cost of what had been bought for plaintiff's firm. The selling price and expenses being known, the profits of plaintiff's firm were estimated, and defendant's liability to plaintiff fixed. *Held* a proper settlement.—*Hume v. McNees*, (Ky.) 884.

Passengers.

See *Carriers*, 2-15.

PAYMENT.

Presumption—Lapse of time.

1. In an action on a purchase-money note, 14 years after it was given, it appeared that the vendor owned one-third of the land sold, but the evidence was conflicting as to whether he owned the residue. The vendee took possession, and paid one-third of the note. The court held that the payment was in full of the vendor's demand, and ordered the note canceled. *Held*, that such ruling would not be disturbed.—*Wilson v. Suggett's Ex'rs*, (Ky.) 382.

Evidence.

2. Defendant claimed title to land under a sale on foreclosure of a vendor's lien. The original vendee testified that after an appeal had been taken in the proceedings to foreclose the lien he paid the judgment to an attorney, who had since died; that the attorney's partners were absent; that he had lost his receipt; and that of the other three persons present two were dead. The payment was alleged to

have been made about 25 years ago; and the third person alleged to have been present, a man 77 years old, testified that he had no recollection of any such occurrence. *Held*, that testimony of the attorney's partner relative to the attorney's mode of doing business, showing that the payment was improbable, and also that, after the reversal of the case, the attorney had filed an amended petition, and had been engaged in this suit, but had never mentioned the payment, was admissible, as also evidence of an admission made by the vendee to a subsequent owner of the premises that the lien was still in force.—*Dwyer v. Rippetoe*, (Tex.) 668.

Application.

8. When a note is given by plaintiffs to defendants, for money loaned in the course of their mutual dealings, the note enters into the mutual account, and the items of the account which are demands in favor of plaintiffs against defendant should be applied to the payment of the interest and principal of the note, after first extinguishing the earlier demands of defendant against plaintiff, as in ordinary cases of partial payments under the statute. *Manif. Dig. § 4755*.—*Rogers v. Yarnell*, (Ark.) 632.

4. A firm executed a mortgage to secure a partnership debt to a bank, and at the same time another of the bank's debtors executed to it a mortgage to secure notes on which the partners were sureties, and the amount of such notes was not included in the estimate of the debt for which the firm mortgage was given. *Held*, that a payment by the firm should be applied first on their own debt, and that the bank should rely on the mortgage securing the notes before attempting to collect from the sureties.—*Lazarus v. Henrietta Nat. Bank*, (Tex.) 253.

5. The president and cashier borrowed of their bank a sum which they loaned to a failing debtor of the bank and of the president. The debtor gave a mortgage on goods and land, and delivered the property to the mortgagees, with authority to sell and appropriate the proceeds to the mortgage debt, after applying enough of the goods to pay for another tract of land, which was accordingly paid for, and conveyed by the debtor's vendor to the mortgagees. It did not appear that anything more was realized from the goods. The president promised that the debt to the bank would thus be paid, and, relying thereon, the directors made no effort to collect it otherwise. *Held*, that the president, who controlled the property and received the proceeds, was entitled to have the proceeds of both parcels of land applied first to the payment of the loan to him and the cashier, and that the balance should be applied to the debts due to the bank and the president.—*Apperson's Ex'r v. Exchange Bank*, (Ky.) 801.

PERJURY.

Indictment.

1. An assignment of perjury in an indictment for falsely making an affidavit to a claim presented to the county court, stating that the truth was that defendant did not furnish "a

suit of clothing and underclothing of the value of \$18, and one coffin of the value of \$10, as sworn to," puts in issue nothing but the value of the articles, and admits that they were furnished.—*Thomas v. State*, (Ark.) 198.

2. In such case, proof by one witness that the coffin was worth \$7, by another that defendant arranged to pay 65 cents for the labor in making it, and by another that a coat and vest similar to the one used could be bought at a place other than that at which those furnished were procured for \$3.50 or \$4, and by a third that defendant sent him for the clothing, giving him money to pay for it, the exact amount of which witness did not remember, but which might be more than \$6, and that it was not sufficient, but that the merchant allowed him to take them, will not sustain a verdict of guilty.—*Id.*

Instructions.

8. Under Code Crim. Proc. Tex. art. 677, requiring the court to set forth distinctly the law applicable, whether asked or not, the provision of article 748, that no person shall be convicted of perjury, except on testimony of two credible witnesses, or of one strongly corroborated, must be stated in the instructions.—*Wilson v. State*, (Tex.) 749.

4. A "credible witness," within the meaning of the statute, is one who, being competent to give evidence, is worthy of belief.—*Id.*

5. The materiality of a false statement, charged as perjury, is a question for the court, and a special instruction submitting the question to the jury is properly refused.—*Smith v. State*, (Tex.) 751.

PLEADING.

See, also, *Damages*, 20, 21; *Death by Wrongful Act*, 1, 2; *Negligence*, 5; *Trespass*, 1; *Trespass to Try Title*, 4, 5.

Action on note, see *Negotiable Instruments*, 8.—on sheriff's indemnifying bond, see *Sheriffs and Constables*.

—to set aside fraudulent conveyance, see *Fraudulent Conveyances*, 13, 14.

Amendment, limitation, see *Limitation of Actions*, 5-8.

General denial, see *Ejectment*, 9.

Petition to condemn land, see *Eminent Domain*, 2-4.

Remedy at law to oust equity jurisdiction, see *Equity*, 2.

Tender, see *Tender*.

Complaint.

1. A petition is not multifarious for alleging that one defendant was either an agent or partner with the others in the alternative, where the liability would be the same in either case.—*Floyd v. Patterson*, (Tex.) 526.

2. Where a petition, in an action against a railroad company for injuries received while riding on its train, fails to state whether the injured person was a passenger at the time of the injury, the defect is waived if defendant, by answer, puts that question directly in issue, without any objection to the petition on that ground. *Rax, C. J.*, and *SHERRWOOD, J.*, dissenting.—*Wagner v. Missouri Pac. Ry. Co.*, (Mo.) 486; *Zuendt v. Same*, (Mo.) 491.

Plea of non est factum.

8. A petition alleging a contract of service, but stating no definite term, will control the right of recovery, though the evidence shows that a term was agreed upon.—*East Line & R. R. Co. v. Scott*, (Tex.) 99.

4. In an action for personal injuries, it is immaterial that it was alleged in the petition that the injury was received at Provencal, La., while the proof showed that it was received at Robeline, La., the defendant not having been misled thereby.—*Brown v. Sullivan*, (Tex.) 238.

5. In an action by the assignee of time-checks and due-bills, the fact that the petition describes the time-checks as having no indorsement or assignment on them, while those introduced in evidence have indorsements in writing across their backs, is not such a variance as to make them inadmissible in evidence.—*San Antonio & A. P. Ry. Co. v. Cookville*, (Tex.) 702.

Reply.

6. In an action to set aside a conveyance to a wife of land by her husband, as made with intent to defraud creditors, an answer to the petition, alleging that the land was purchased with the separate estate of the wife, amounts only to a denial of the petition in that particular, and needs no replication.—*Jordan v. Buschmeyer*, (Mo.) 616.

Pleading and proof—Variance.

7. Under Rev. St. Tex. art. 1265, § 8, providing that an answer denying the execution of a written instrument on which a pleading is founded shall be verified by affidavit, where the mortgagor pleads a general denial, not verified by oath, no proof of the execution of the mortgage is necessary as to him.—*Chaytor v. Brunswick-Balke-Collender Co.*, (Tex.) 250.

8. Rev. St. Tex. art. 2263, provides that when a pleading shall be founded on an instrument in writing charged to have been executed by the other party or by his authority, and not alleged to be lost or destroyed, such instrument shall be received as evidence without the necessity of proving its execution, unless the other party shall file his written affidavit denying execution. A petition alleged that the drafts sued on, which were drawn on and accepted by "J., Agent," were accepted by defendant's authority, and neither the execution of the acceptances nor the authority of the agent was denied on oath. Held, that they were admissible without proof of those facts, and were a sufficient basis for a judgment.—*San Antonio & A. P. Ry. Co. v. Harrison*, (Tex.) 556.

Police Courts.

See *Courts*, 7.

Pooling Combinations.

Between railroad companies, see *Railroad Companies*, 8, 4.

POWERS.**Of attorney.**

Where a deed is executed by an attorney in fact, who is so constituted by two different instruments, one of which is valid and the other invalid, the deed passes title, though it purports to have been executed under the latter instrument, and the valid power, though not referred to in the deed, may be received in evidence to support it.—*Link v. Page*, (Tex.) 699.

PRACTICE IN CIVIL CASES.

See, also, *Abatement and Revival; Appeal; Attachment; Continuance; Costs; Courts; Deposition; Equity; Error, Writ of; Exceptions; Bill of; Execution; Judgment; Jury; New Trial; Parties; Pleading; Prohibition, Writ of; Report and Case Made; Tender; Trial; Venue in Civil Cases; Witness.*

Order of trials.

1. Though under Rev. St. Tex. arts. 1181, 1182, 1287, 3070, causes should be placed on the general and jury dockets and tried in the order in which the petitions are filed, unless for good cause shown the court otherwise directs, yet the placing of a cause on the jury docket, and trying it in advance of a cause previously filed and preceding it on the general docket, are not reversible error, unless it is shown that injury resulted therefrom.—*Missouri Pac. Ry. Co. v. Shuford*, (Tex.) 408.

2. A judgment will not be reversed for trying a cause in advance of its regular order, where the action was brought January 21st, and interrogatories to witnesses in another county were filed February 15th, and commissions were issued February 22d, and the cause was called for trial February 23d, when a continuance for want of their testimony was asked, and there was no application for a postponement to a later day in the term, and it does not appear that the evidence would have been obtained in time for trial if the cause had been tried in its order.—*Id.*

Prescription.

See *Adverse Possession; Limitation of Actions*

Presumption.

Of payment from lapse of time, see *Payment*, 1.

On appeal, see *Appeal*, 26-51.

PRINCIPAL AND AGENT.

Authority of bank officer, see *Banks and Banking*, 4.

—engineer, to contract for grading, see *Railroad Companies*, 5.

Insurance agents, see *Insurance*, 5.

Ratification.

1. Plaintiff in ejectment claimed under a trust-deed given by defendant to secure two

notes to L., and alleged that the smaller note was given for the fees of plaintiff and another, as defendant's attorneys in a suit by L. against defendant, for the compromise of which the other note was given. The trustee, who was L.'s attorney, and made the compromise, had no authority to do so, and he indorsed the smaller note in L.'s name to plaintiff and the other attorney. *Held*, that plaintiff had the burden of proving ratification by L. of the assignment of the note, though the trust-deed provided that the trustee's statements in relation to non-payment should be evidence, and though the recitals in the deed given by the trustee concerning default, etc., are made evidence by Acts Mo. 1881, p. 171, § 1.—*Minter v. Cupp*, (Mo.) 882.

2. It was not error to refuse plaintiff's request to charge that L.'s collection of the amount of both notes and acknowledgment of satisfaction of the deed of trust were a ratification of the compromise, as defendant alleged that both notes were the consideration of the compromise, while plaintiff alleged that the consideration was the larger one only.—*Id.*

PRINCIPAL AND SURETY.

See, also, *Bonds*.

Relief of surety against principal.

Judgment was obtained against M. as principal and his father as surety, and execution was levied on the latter's realty. During the existence of the execution lien the father died, and his estate was partitioned between M. (then insolvent) and other heirs, the lien covering all the land so partitioned. *Held*, that a bill in equity by the other heirs against M. would lie to have M.'s portion first sold to satisfy the lien. The right in favor of a surety to sue to compel the principal to discharge the debt is expressly given by Code Ky. § 661, and it extends to the surety's heirs.—*Meador v. Meador*, (Ky.) 651.

Privileged Communications.

See *Libel and Slander*, 1, 2; *Witness*, 3.

Probate.

Of wills, see *Wills*, 5-8.

PROHIBITION, WRIT OF.

When allowed.

1. The trial court dismissed a petition for an injunction to restrain the operation of a ferry between a city in Missouri and one in Illinois, and an appeal was taken and perfected to the St. Louis court of appeals, where the judgment of the lower court was reversed, and an injunction granted against the operation of defendant's ferry, and also an attachment issued against defendants for contempt in violating the temporary injunction after the appeal had been perfected. *Held*, that the St. Louis court of appeals had no jurisdiction of the appeal, and as the attachment had not

been executed, and as the threatened judgment had been stayed only by rule from this court, defendants were entitled to a writ of prohibition.—*State v. St. Louis Court of Appeals*, (Mo.) 874.

2. In such a case, as incident to the general command, a clause will be inserted in the writ, requiring the St. Louis court of appeals to transfer the case to the supreme court, as required by Acts 1885, p. 121, providing that when an appeal is taken to that court, when it should have been allowed to the supreme court, the court of appeals must transfer the cause to the supreme court.—*Id.*

Promissory Notes.

See *Negotiable Instruments*.

Public Improvements.

See *Municipal Corporations*, 5-8.

PUBLIC LANDS.

In Kentucky.

1. Code Civil Proc. Ky. § 478, providing that, if any person obtains a survey of land to which another claims a better right, such other may enter a *caveat* to prevent the issuing of a grant until the right be determined, and that the *caveat* shall show plaintiff's claim, be verified by affidavit, and state that it is entered in good faith, for plaintiff's benefit, applies only to vacant or unappropriated land, and plaintiffs have no right to a *caveat* where they rely on a patent theretofore issued to the persons under whom plaintiffs claim.—*Alexander v. Noland*, (Ky.) 423.

2. In a proceeding by *caveat* under Code Civil Proc. Ky. § 478, to prevent the issue of a patent to public lands, where the *caveat* contained a misdescription of the land, and the instructions required the jury to believe that the land in controversy was described in the *caveat*, a judgment against plaintiff will be reversed and the case dismissed without prejudice, though the trial court had no jurisdiction of the case.—*Id.*

3. A patent issued in the name of a deceased person, on a survey made after his death, is valid, under Gen. St. Ky. art. 1, c. 50, providing that, when a patent is issued to a person who is dead at the time, the heirs of the patentee shall hold as if the patent had been issued to them.—*Cox v. Frewitt*, (Ky.) 432.

In Texas.

4. Adverse possession by the wife, after the death of her husband, of an unlocated Texas head-right land certificate issued to him, will not pass title to the land located or to be located under it, as against the heirs of the husband and of a former wife, to whom he was married when the certificate issued.—*Harvey v. Carroll*, (Tex.) 334.

5. Under Rev. St. Tex. art. 3903, providing that all lands located by entry or application shall be surveyed within 12 months from the date of entry, or the same shall be null and void, and the lands be subject to relocation and survey, but not by the same certificate,

one who has failed to have his survey made within 12 months, and then relocates the land, has no such equitable title as to prevent another from locating the land.—*Garza v. Casin*, (Tex.) 539.

6. The burden is on one who has forfeited his location by failure to return the field-notes within 12 months from date of survey to show, as against a subsequent locator, that the 90-days notice of forfeiture required by act. Tex. Feb. 11, 1881, amending Rev St. art. 3312, was not given, or that, if it were given, he completed his relocation within the 90 days.—*Id.*

7. To make valid a purchase of public school land, under act Tex. April 12, 1883, § 7, there must be a classification of the land, and the filing of a tabulated statement in the office of the surveyor of the county where the land is situated.—*Martin v. McCarty*, (Tex.) 221.

8. Under section 8 of said act, the land must be sold at public outcry in the county where situated.—*Id.*

9. In an action by a purchaser of public school land sold under act Tex. April 12, 1883, § 7, the evidence of defendant, which merely shows that he settled upon and had possession of the land, and erected valuable improvements thereon, is not sufficient to establish the fact that he was an "actual settler in good faith," so as to give him a preferred right of purchase under section 5 of said act, which provides that "any actual settler in good faith, upon any land included in this act, who is now and was an actual settler in good faith on the 1st day of January, 1883, shall have the right," etc.—*Id.*

10. Although the land board has no authority to increase the minimum price per acre prescribed by act Tex. April 12, 1883, relating to renting public school lands, (*Smitten v. State*, 9 S. W. Rep. 112,) yet it may make a regulation reserving the right to reject any or all bids, in order to secure fair competition; and when a bid has accordingly been rejected, although it was for the statutory minimum price, the bidder has no rights under it.—*Coleman v. Lord*, (Tex.) 91.

Missouri school lands.

11. Act Cong. June 18, 1812, § 1, confirmed, to the inhabitants of St. Louis and other towns, town lots, common fields, etc., which had been inhabited, cultivated, or possessed prior to December 20, 1803, and required a survey of the out-boundary line so as to include common-field lots, etc., as soon as might be. Section 2 reserved for the support of schools, among other lands, all common-field lots, etc., included in such survey, not rightfully claimed by individuals, provided that the quantity reserved should not exceed one-twentieth of the land in the general survey of the town. *Held*, that all the unclaimed common-field lots were reserved from sale during the time the portion going to the schools was not set off to them.—*Cummings v. Powell*, (Mo.) 819.

12. Though the out-boundary survey was not made until 1840, and, as then made, excluded the unclaimed "five Grand Prairie common-field lots," an intermediate location and survey under a New Madrid certificate, under the act of February 17, 1815, authoriz-

ing the owners of lands in New Madrid county, injured by an earthquake, to locate a like quantity on any public lands the sale of which was authorized, did not become valid, no patent having been issued. The lots having been previously defined and located on the ground, and surveyors having been required to be guided by them, a survey was not necessary to make the reservation effectual.—*Id.*

13. Such location is not made valid by act Cong. June 30, 1864, relinquishing the title of the United States to the land in such location; the act of June 15, 1864, having granted to the state, for the support of schools, all the interest of the United States to the land in the Grand Prairie common field. Such field and lots having had a prior existence, it was not necessary that the latter act should require a survey of them.—*Id.*

Public Roads.

See *Highways*.

RAILROAD COMPANIES.

See, also, *Carriers*.

Condemnation of right of way, see *Eminent Domain*.

Grant of right of way on street, see *Municipal Corporations*, 4.

Negligence, injuries to servants, see *Master and Servant*.

Charter and franchises.

1. Though the legislature may authorize the construction and operation of a railroad through a city or town, and upon its streets, even without the consent of the municipality, a provision in the company's charter authorizing it to construct its road from any point on its road to the cities named, and from any point on its road to a certain other road, does not confer upon it such authority, as the legislative authority must be conferred by express enactment, or in such language that it can be necessarily implied.—*Ruttles v. City of Covington*, (Ky.) 644.

2. A conveyance by a railroad company of "all and singular the chartered rights, privileges, and franchises of every kind" belonging to, or which should thereafter belong to it, does not include land grants which are not directly connected with the operation of the road.—*Shirley v. Waco Tap R. Co.*, (Tex.) 543.

Pooling combinations.

3. Under Const. Tex. art. 10, § 5, prohibiting railroad corporations from controlling competing or parallel lines, an agreement forming a traffic association between a number of such corporations for the purpose of "preventing sudden and extreme changes in Texas rates," by which a managing committee is authorized to fix freight rates, no member being allowed to reduce them, is illegal, though a unanimous vote is required to establish the rates, which may be reduced as provided by the agreement, and though punishment is provided for violating the agreement, and any member is at liberty to withdraw upon notice.—*Gulf, C. & S. F. Ry. Co. v. State*, (Tex.) 81.

4. A petition alleging the authority under

which the defendants' charters were granted, defining the lines operated by them, averring that the lines so owned and operated are the main trunk lines and leading railways, and so traverse the state and touch her commercial centers that they are lawful competitors for the traffic of said business centers; that each is a competing line for Texas traffic; and that they have by agreement formed a consolidation of competing and parallel lines,—sufficiently alleges an unlawful combination of parallel lines under the constitution, and is good on demurrer.—Id.

Contract to grade road.

5. In an action for clearing and preparing the defendant's right of way for grading, and for changing the location of the grade, defendant denied the authority of its engineers who employed plaintiffs. The citizens had agreed to furnish the right of way graded, and plaintiff contracted with them to grade parts of the line. There was evidence that such a contract did not include clearing. The citizens denied their liability to do the work, and one of the subordinate engineers at first refused to make a contract with plaintiffs until he could consult the chief, who had authority to make such contracts, and, after having an opportunity to consult him, employed plaintiffs, promising them that defendant would pay them. Whether the chief heard this arrangement made was uncertain, but officials, having authority to make such contracts, knew that plaintiffs were doing the work, expecting to be paid by defendant. Only one of defendant's engineers testified in the case, and his evidence was in conflict with that of plaintiffs. *Held*, that a verdict for plaintiffs was supported by the evidence.—*St. Louis, A. & T. Ry. Co. v. Dutton*, (Tex.) 291.

Bridges.

6. A railroad company, with power to bridge navigable streams, was also given the powers conferred on a certain bridge company, and permitted to erect a railroad bridge to accommodate also vehicles and foot-passengers, and to collect toll. Other railroad companies were given the right to use the bridge on terms to be agreed on or fixed by the governor. *Held*, that a bridge thus built and used was a railroad bridge, and not a toll-bridge.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 436.

Taxation.

7. Act 1885, (Laws Mo. 1885, p. 230,) amending Rev. St. § 6880, and providing that the average rate of taxation for the erection of school buildings in the county shall be levied on the apportioned valuation of the road-beds and rolling stock of railroad companies, and that the tax shall be apportioned among the several districts levying the tax, thereby authorizing a tax in districts through which the railroad does not run to be taken into consideration, is not invalid, under Const. art. 10, § 11, providing that for the purpose of erecting school buildings the rates of taxation therein limited may be increased by vote, and section 5, authorizing the taxation of railroad companies for school purposes.—*Chicago & A. R. Co. v. Lamkin*, (Mo.) 200.

8. Though an act authorizing a tax in excess of the rate fixed by Const. Mo. art. 10, § 11, would be invalid, yet when the rate has been increased by vote of the district, as therein authorized, such increased rate becomes the constitutional limit.—Id.

9. Under Rev. St. Mo. § 6879, requiring the county court to levy taxes on railroad property within the county, a railroad tax-book, extended by the clerk, without any levy having been made by the court, by means of the rates and *data* obtained from an order of the court levying taxes on the general property of the county, is void.—*St. Louis & S. F. Ry. Co. v. Epperson*, (Mo.) 478.

10. Rev. St. Mo. 1879, § 6901, provides for the assessment of bridges of joint-stock companies and bridges for crossing which a toll is charged. Sections 6866, 6876, provide for the assessment of all property of railroad companies, the road and rolling stock to be assessed as a whole. *Held*, that a railroad bridge must be assessed with the railroad, though it is used also for the passage of carriages and foot-passengers, for which tolls are charged.—*State v. Hannibal & St. J. R. Co.*, (Mo.) 436.

11. Though the state board is empowered to assess toll-bridges, its determination that a bridge is a toll-bridge is not conclusive.—Id.

12. Since Rev. St. Mo. 1879, §§ 6798, 6901, empowering the circuit court to direct a levy, are prospective only, such court cannot authorize the county court to levy a tax against a railroad company for prior years, though section 6879, in relation to taxes against railroad companies, provides that, in case of failure of the county court to levy a tax, or in case of an illegal or erroneous levy, such tax shall be levied in addition to the regular levy. That section does not apply where there was no authority for levying the tax.—*State v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 434.

13. Act Ky. Feb. 22, 1871, incorporating the K. C. R. Co., and investing it with "all the powers, privileges, rights, immunities, and franchises" of the C. & L. R. Co., whose road it had bought at judicial sale, did not grant it the commutation of taxation conferred by act March 8, 1851, on the C. & L. R. Co., nor was that right transferred by the judicial sale. The road, therefore, is subject to taxation under the general railroad tax act approved April 8, 1878.—*Kentucky Cent. R. Co. v. Commonwealth*, (Ky.) 266.

Negligence.

14. Plaintiff, a boy of 14, was sent to the depot with a lady passenger, and while there, by reason of the defective condition of the platform, fell under the wheels of the train. In an action against the company for the injuries, *held*, that evidence that he had been in the habit of jumping on the cars when they stopped, and had been warned of the danger, is inadmissible.—*Louisville & N. R. Co. v. Berry*, (Ky.) 472.

15. In an action for an injury occasioned by the moving of trains in a yard used by defendant railroad company exclusively for the storage of cars and making up trains, allegations in the petition of non-compliance with municipal ordinances regulating the speed of trains and the exhibition of signals should be

struck out; such ordinances not being applicable to railroad yards.—*Grube v. Missouri Pac. Ry. Co., (Mo.) 188.*

Negligence—Accidents to trains.

16. In an action for personal injuries occasioned by the overturning of a car, plaintiff's evidence being very strong to show that the condition of the track was bad, the rails being badly worn and ends of sleepers rotten, and that its condition had not materially changed for several months, and defendant's witnesses virtually admitting that the condition of the track was bad, but endeavoring to account for it by the prevalence of bad weather, the admission, for the purpose of showing knowledge on the part of the company, of evidence of the reputation as to condition of the track in the community along the line, and of a letter written to a local treasurer, for the production of which no notice was given, is harmless error.—*Missouri Pac. R. Co. v. Johnson, (Tex.) 838.*

17. An instruction that defendant is not liable, if the accident was directly caused by unprecedentedly bad weather, as sudden freezes and thaws, and this weather could not have been guarded against by human foresight, skill, and judgment, is sufficiently favorable to defendant.—*Id.*

18. Where the evidence tended to show that the accident was caused by a broken rail, defendant alleged that the condition of its track was due to unprecedented rain, cold, and snow, and it was shown that there had been much and continuous rain and snow prior to the accident. *Held*, that a charge that defendant would not be liable if the defect that caused the accident was brought about by weather unusual and unprecedented, against which the company could not have guarded by the use of proper care and skill, was proper.—*Missouri Pac. Ry. Co. v. Mitchell, (Tex.) 411.*

19. In an action against a railroad for causing the death of an engineer, when the defense is that the washout was caused by an extraordinary rain-storm, and two of defendant's witnesses testify that the railroad was in all respects properly and skillfully constructed, it is not a reversible error to exclude defendant's offer to prove by the same witnesses that the person under whose supervision the railroad was constructed was a competent and skillful engineer.—*McPherson v. St. Louis, I. M. & S. Ry. Co., (Mo.) 846.*

20. There was evidence for plaintiff that the rain was not an unusual one, and that the culvert was insufficient to carry off the waters of ordinary heavy rains. Defendant had pleaded that the engineer was guilty of negligence. *Held*, that an instruction that if the engineer's death was caused directly and solely by defendant's failure to keep its track in a reasonably safe condition for the passage of trains at the point where the accident occurred, in failing to provide a reasonably suitable culvert to discharge the waters of all ordinary rain-storms, or in failing to maintain the culvert in a reasonably fit condition to discharge such waters, and if the engineer himself was exercising ordinary care to avoid danger, the verdict should be for plaintiff,

was proper under the issues; other instructions being given as to the defense that the accident was the result of an extraordinary rain-storm.—*Id.*

Accidents at crossings.

21. In an action for injuries sustained by plaintiff through alleged negligence in running over him while driving across the track, plaintiff testified that he first saw the train when he was in the center of the track; that it was then about 390 feet away, and going at the rate of 40 miles an hour. *Held*, that he must have been guilty of contributory negligence in failing to cross the road before the train struck him.—*Galveston, H. & S. A. Ry. Co. v. Porfert, (Tex.) 207.**

22. The court properly refused to charge that if plaintiff could have heard the approaching train by stopping his wagon to listen, then his failure to do so was contributory negligence. Whether or not it was negligence was a question for the jury.—*Id.**

Injuries to persons on track.

23. While defendant's train was running down grade, in the country, at a considerable distance from any road crossing, it broke in two, and the engineer, to avoid a collision between the two sections of the train, increased his speed, making a considerable gap between them. Plaintiff's decedent, who was an old lady, went upon the track between the two sections, and was killed. The brakeman upon the rear of the rear of the train testified that he saw the decedent "standing on the left of the track;" but there was no evidence that any person connected with the train knew she was on the track, or in any peril. *Held*, that there was no evidence to warrant a recovery against defendant.—*John's Adm'r v. Louisville & N. R. Co., (Ky.) 417.*

24. In such case, an instruction as to the duty of "those in charge of the train" is not erroneous as precluding the jury from considering any negligence on the part of the brakeman or flagman on the rear section.—*Id.*

25. A company is liable for injuries to one crossing the track, occasioned by sending cars in swift motion, with no one at the brakes, upon a switch track where persons commonly pass, without objection from the company, though not a public crossing.—*St. Louis, A. & T. Ry. Co. v. Croenoa, (Tex.) 342.**

26. It cannot be said that persons crossing a switch track at a point commonly used by the public are not entitled to any care for their safety from the employees of the train, unless their danger be seen.—*Id.*

RAPE.

Assault with intent to rape.

1. Under an indictment for rape, a conviction may be had of assault with intent to commit rape, under Mansf. Dig. Ark. § 2238, providing that, under an indictment for an offense consisting of different degrees, defendant may be convicted of any degree not higher than that charged, and of any offense included in it.—*Pratt v. State, (Ark.) 283.*

2. Where it is conceded that the evidence is

sufficient to sustain a verdict for rape, its sufficiency to convict of an assault with intent to rape cannot be questioned.—*Id.*

Instructions.

8. Where it is conceded that the evidence is sufficient to convict of rape, the refusal to charge that, if prosecutrix made the charge under the threats of her husband, the jury must acquit, is not reversible error.—*Id.*

Rebuttal Evidence.

See *Evidence*, 19.

RECEIVERS.

Appointment.

1. In an action to enforce liens against land, where it appears from affidavits that, owing to defendant's mismanagement, the land is deteriorating, and the fences becoming destroyed, and these statements are not directly controverted, a receiver should be appointed.—*Bailey v. Bailey*, (Ky.) 660.

Duties.

2. A receiver of property of a decedent's estate, which is in litigation, may be required to list and pay the taxes upon it.—*Spalding v. Commonwealth*, (Ky.) 420.

3. The proper procedure would be for the court appointing the receiver to direct him to list the property in the county court, and pay the taxes, but it is not improper for the former court to grant leave to institute a suit in the county court against the receiver, to compel him to list the property; and the county court having ordered the receiver to do so, and its order having been appealed to the court appointing him, and there affirmed, the latter court may be considered as having directed the listing.—*Id.*

Actions against.

4. It is error to make the judgment in an action for personal injuries a lien on the earnings of the railroad in the hands of the receiver. Following *Brown v. Brown*, 9 S. W. Rep. 261.—*Brown v. Sullivan*, (Tex.) 268.

Recording.

Chattel mortgage, see *Chattel Mortgages*, 8, 4.

RECORDS.

Estoppel by record, see *Estoppel*, 3.

On appeal, see *Appeal*, 10, 11.

Restoring lost records.

Gen. St. Ky. c. 72, § 4, provides that where court records or papers are lost or defaced the court shall appoint a commissioner to take in writing evidence relative thereto. Section 5 provides that, unless the person offering testimony as to such records or papers files an affidavit that no verified copy thereof known to him is in existence, such testimony shall not be received. *Held*, that where it does not appear that such affidavit was filed, or the evidence taken in writing, the court cannot

substitute the papers accompanying the commissioner's report for the original.—*Haney v. McClure*, (Ky.) 427.

Redemption.

From execution sale, see *Execution*, 10.
foreclosure, see *Mortgages*, 11, 12.

Reformation.

Of deed, see *Equity*, 2.

RELEASE AND DISCHARGE.

Of taxes, see *Taxation*, 20, 21.

Capacity of releasor.

1. In an action for personal injuries, it appeared that plaintiff had executed a release, but he alleged that he was mentally incapacitated at the time, and that it was done at the importunity of defendant's agent, and against the protest of plaintiff's wife. There were remarks in the charge from which the jury might infer that there were issues to be tried relative to such importunity and protest. *Held*, that it was error to refuse an instruction that the release could only be held void for plaintiff's insanity.—*Missouri Pac. Ry. Co. v. Brazil*, (Tex.) 408.

2. An instruction that the burden of proving, by a preponderance of evidence, that the release was invalid, is on the plaintiff, is correct, and it is not error to refuse to charge that the law presumes the release valid, and that, unless the plaintiff establishes its invalidity, the jury should find for defendant; as sanity is a presumption of fact, and not of law.—*Id.*

8. There being evidence that plaintiff, though impaired mentally after the accident, was at times competent to understand the settlement made, and ratify or disaffirm it, and that he retained the money received, knowing whence it came, an instruction that if plaintiff, though insane when the release was executed, after becoming conscious of what he had done, retained the money or used it, knowing from whom he had received it, without offering to return it, or if, having used it before becoming conscious, he did not in a reasonable time disaffirm the release, the verdict should be for defendant, is correct.—*Id.*

RELIGIOUS SOCIETIES.

Incorporation.

1. Gen. St. Mo. 1865, c. 70, § 5, as amended by Acts 1871, p. 16, provides that "any number of persons, not less than three in number, may become an incorporated church, religious society, or congregation, by complying with the provisions of this chapter;" and section 2: "Any association of persons desirous of becoming incorporated under the provisions of this chapter shall present to the circuit court * * * a copy of their constitution or articles of association, and a list of all their members," etc. *Held*, that this act did not

contravene Const. Mo. 1865, art. 1, § 12, providing that "any church or religious society or congregation may become a body corporate for the sole purpose of acquiring, holding, using, and disposing of so much land as may be required for a house of public worship," etc.—*Keith & Perry Coal Co. v. Bingham*, (Mo.) 33.

2. Const. Mo. 1875, art. 2, § 8, providing that "no religious corporation can be established in this state, except such as may be created under a general law for the purpose only of holding the title to such real estate as may be prescribed by law for church edifices, parsonages, and cemeteries," does not abrogate the act of 1865, so as to render illegal an incorporation thereunder, effected in 1876; it being provided by section 1 of the schedule to such constitution that all laws consistent therewith should remain in force until altered or repealed, and all laws inconsistent therewith should remain in force until July 1, 1877.—*Id.*

3. A decree of court incorporating a religious body passes to the corporation the title to land conveyed to such body before its incorporation, where such court has jurisdiction of the subject-matter and parties, and cannot be collaterally attacked.—*Id.*

Powers—Mortgages.

4. A religious corporation organized under Gen. St. Mo. 1865, c. 70, has power to mortgage its real estate, under Gen. St. Mo. 1865, c. 62, § 1, and Rev. St. Mo. 1879, § 706, providing that "every corporation, as such, has power * * * to hold, purchase, mortgage, or otherwise convey such real and personal estate as the purposes of the corporation may require," etc.—*Id.*

Report.

Of commissioner to sell land, see *Judicial Sales*, 1.
commissioners in condemnation proceed-
ings, see *Eminent Domain*, 7.

REPORT AND CASE MADE.

Disagreement of court.

Section 6 of an amendment to Const. Mo. provides that when any one of certain courts shall "render a decision which any one of the judges therein sitting shall deem contrary to any previous decision * * * of the supreme court," the said court shall certify the cause to the supreme court. *Held* that, where there is no disagreement between the dissenting judge and the majority of the court on the principle in support of which he cites a supreme court decision, and he does not intimate that he deems the application of that principle, made by the majority to the case in hand, in conflict with any supreme court decision, it does not become the court's duty to certify the case to the supreme court.—*State v. Phillips*, (Mo.) 182.

Res Adjudicata.

See *Judgment*, 2-6.

Rescission.

Of contracts, in equity, see *Equity*, 4-10.
— for sale of land, see *Landlord and Tenant*, 1; *Vendor and Vendee*, 2.

Reservation.

In deed, see *Deed*, 4.

Resulting Trusts.

See *Trusts*, 1, 2.

Return.

Of writ of execution, see *Execution*, 8, 9.

Revocation.

Of wills, see *Wills*, 2-4.

Right of Way.

See *Easements*.

Of railroad, see *Eminent Domain*; *Railroad Companies*.

Rivers.

See *Navigable Waters*; *Waters and Water-Courses*.

Roads.

See *Easements*; *Highways*; *Turnpikes and Toll-Roads*.

Streets, see *Municipal Corporations*.

SALE.

Of land, see *Vendor and Vendee*.
Under order of court, see *Judicial Sales*.

Vesting of title.

1. An oral sale of cotton, partly picked and partly in the fields, the seller agreeing to pick the remainder, and deliver the whole at a certain place, from which the purchaser agrees to haul it to market, and to pay the market price for it, applying the proceeds on notes due him by the seller, both parties agreeing that the property is "turned over" to the purchaser, vests title in the latter, as against a subsequent attachment levied on the cotton while in the seller's possession, under the statutes of Texas allowing such sale to rest in parol, and the sale not being attacked as fraudulent, though the attaching creditor did not know of the sale.—*Hopkins v. Partridge*, (Tex.) 214.*

Action for price.

2. In an action on notes given for real and personal property sold together, defendants pleaded failure of consideration in that they were induced to buy through the false representations of plaintiff as to the quantity and value of the property. *Held*, that to charge that if such misrepresentations were made, as alleged, it would be a good defense, but that, if defendants examined the property before purchasing, no reduction for deficiencies

should be made, unless plaintiff by strategem prevented a full investigation, is error, when such strategem is not alleged in the answer, though there is evidence to establish it.—*Merrill v. Taylor*, (Tex.) 532.

3. Where partial failure of consideration is alleged in defense to an action on notes given for the price of property, a charge is erroneous where it directs a deduction for the deficiencies if plaintiff prevented a full and satisfactory examination, as defendant's knowledge of facts acquired by partial investigation would not be obliterated by any hindrance to further inspection interposed by plaintiff.—*Id.*

4. The measure of reduction is such proportion of the agreed price of the entire property as the deficiency bears to the property as represented, and it is error to instruct the jury to deduct the amount of the deficiencies from the notes.—*Id.*

SCHOOLS AND SCHOOL-DISTRICTS.

See, also, *Highways*.

Contracts with teachers.

1. Act Tex. Feb. 4, 1884, provides for two systems of public schools, one known as the "district," the other as the "community," system. In the former the trustees "shall have the power to employ teachers," and the county judge "shall approve all contracts between teachers and trustees," and "shall approve all vouchers against the school funds of his county." In the latter it is provided that the "trustees shall make contracts with teachers," and that "the amount contracted by trustees to be paid to a teacher shall be paid on a check drawn by a majority of the trustees, * * * and approved by the county judge." *Held*, that the omission, in the sections relating to the community system, of the clause empowering the county judge to approve all contracts between teachers and trustees, shows that it was not intended to give him the control of contracts under that system.—*Caviel v. Coleman*, (Tex.) 679.

2. Where the county judge has approved two of three copies of a contract with a teacher unqualifiedly, and retained the third, he cannot justify a refusal to approve vouchers for salary in accordance with the contracts by testimony that he approved the two copies by mistake and oversight, and that he intended to approve them qualifiedly, at a reduced salary, as he had done with the one retained by him.—*Id.*

Secretary of State.

Compensation, see *States and State Officers*, 3.

SEDUCTION.

Evidence.

1. There being conflicting evidence as to the material facts in the case, and no prosecution having been instituted until more than a year after the birth of the child alleged to be

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the result of the connection between the prosecutrix and defendant, during which time the latter married, it is error to refuse to allow the prosecutrix to be asked, on cross-examination, if the idea of prosecuting him did not first present itself to her after his marriage, as that fact might tend to throw light on the *animus* of the prosecutrix.—*State v. Reeves*, (Mo.) 841.

Instructions.

2. Under Rev. St. Mo. §§ 1259, 1912, making it a felony to "seduce and debauch" an unmarried female of good repute, under promise of marriage, and providing that the evidence of the woman "as to such promise must be corroborated to the same extent required of the principal witness in perjury," it is error to instruct that as to the promise of marriage there must be evidence to corroborate that of the woman, which may be supplied from the circumstances of the case, as the degree of proof required by the statute is ignored by such an instruction.—*Id.*

3. The instruction is also faulty for failing to designate the circumstances which would supply the necessary corroboration, and for the omission to define "corroboration."—*Id.*

4. An instruction that if defendant had carnal intercourse with the prosecutrix, and that she submitted to him without promise of marriage, he should be found not guilty, should be given at the instance of defendant, there being evidence tending to establish that state of facts.—*Id.*

5. In such case, an instruction that if the defendant promised the prosecutrix, an unmarried female of good repute, to marry her, on the faith of which she allowed him to have sexual intercourse with her, the defendant should be convicted, is erroneous, for omitting the element of seduction from the essentials of the crime.—*Id.*

Self-Defense.

See *Homicide*, 17-24.

Servant.

See *Master and Servant*.

Servitude.

See *Easements*.

Settlement.

See *Payment; Release and Discharge*.

SHERIFFS AND CONSTABLES.

Sheriff's deed, see *Execution*, 11-14; *Judicial Sales*, 3.

Action on indemnifying bond.

In an action by an assignee on a sheriff's indemnifying bond, to recover the value of property taken from him under an attachment, where the petition sets out the bond and assigns the breach, and there is a trial of the issues upon the answer, the court may, under

Rev. St. Mo. 1879, § 9683, grant any relief consistent with the case made by the plaintiff, although the petition prays for a judgment for damages sustained only, and not for the penalty of the bond. — *State v. Adler*, (Mo.) 824.

Signature.

Of bill of exceptions, see *Exceptions, Bill of*, 1, 2.

Slander.

See *Libel and Slander*.

Slavery.

Cohabitation between slaves, see *Marriage*, 1.

Societies.

See *Religious Societies*.

SPECIFIC PERFORMANCE.

Who may sue.

1. Where a contract for the sale of land is rescinded by the grantor for failure of the grantee to pay the notes given for the purchase price, a purchaser from the grantee, with notice of the rescission, acquires no title to the premises, nor any right to specific performance. — *Kennedy v. Embry*, (Tex.) 88.

Contract—Title of vendor.

2. In an action to enforce a contract for the sale of land, plaintiff alleged that he owned seven-twelfths of the land, and had a life-estate in the remainder, owned by his infant children, who, with the vendee, were made defendants. The record, on appeal from a decree enforcing the sale on plaintiff's statement that it was for the children's benefit, and awarding him nearly all the purchase money, showed that he had no interest in the land except his curtesy, the deed to the entire tract having been made to his wife. *Held*, that the decree should be reversed, and the petition dismissed. — *Atcher v. Smith*, (Ky.) 636.

— Statute of frauds.

3. In Tennessee an oral contract for sale of land is not void, but voidable, and where both parties to a bill for specific performance treat the contract as valid, and differ only as to the amount due, it is error to dismiss the bill on the ground that the contract is oral. — *Brakefield v. Anderson*, (Tenn.) 860.

Spirituous Liquors.

See *Intoxicating Liquors*.

STATES AND STATE OFFICERS.

Action on county treasurer's bonds, obligees not named, see *Bonds*, 1.

Boundaries.

1. Rev. St. Mo. c. 25, giving damages for injuries resulting in death, controls a case

between citizens of Missouri arising from an accident on the Mississippi river, near the Illinois shore, east of the main channel; the act of congress of 1830, authorizing the admission of Missouri, and defining its eastern boundary as the middle of the main channel of the Mississippi river, containing the proviso that "said state shall have concurrent jurisdiction on the river Mississippi * * * so far as the said river shall form a common boundary to the said state and any other state or states * * * bounded by the same, such rivers to be common to both." — *Sanders v. St. Louis & N. O. Anchor Line*, (Mo.) 535.*

Actions by.

2. Under Mansf. Dig. Ark. § 1067, allowing the state to sue for the use of the county where the latter has a demand to be enforced, the state is a proper party plaintiff in an action to compel the treasurer to replace in the county treasury money never legally drawn therefrom. — *State v. Wood*, (Ark.) 624.

Secretary of state—Fees.

3. By Const. Mo. art. 5, § 24, the secretary of state shall receive for his services a salary to be established by law, and shall receive to his own use no fees or other compensation, but such fees shall be paid into the treasury. Article 10, § 18, provides for a state board of equalization, consisting of the governor, secretary of state, and others. *Held*, that the secretary of state is entitled to receive the compensation provided by law for services as a member of the board of equalization. — *State v. Walker*, (Mo.) 473.

STATUTES.

Validity, in general, see *Constitutional Law*.

Enactment.

1. The senate journal showed that a bill was rejected, and that a motion to reconsider was made, but did not show what disposition was made of the motion. It showed, however, that subsequently the speaker of the senate announced, in open session, as required by the constitution on the signing of every bill, that he had signed the bill, and it was approved by the governor, and published with the other acts of the legislature. *Held*, that it would be presumed that the motion to reconsider was disposed of, and the bill passed, and that the silence of the journal in this regard was due to a clerical omission. — *State v. Algood*, (Tenn.) 810.

2. Const. Tenn. art. 2, § 21, provides that the yeas and nays shall be taken in each house upon the final passage of every bill of a general character. *Held*, that act March 19, 1887, changing two counties from the Sixth to the Fifth judicial circuit, and fixing the terms of court in one or two others, is not a law of a "general character." — *Id.*

Stock.

In corporations, see *Corporations*, 9-12.

Street.

See *Municipal Corporations*.

Surprise.

Ground for new trial, see *New Trial*, 5-7.

TAXATION.

By cities, see *Municipal Corporations*, 5-7.
Of druggists selling liquor, see *Constitutional Law*, 4.
property in hands of receiver, see *Receivers*, 2, 3.
railroad companies, see *Railroad Companies*, 7-13.

Taxable property.

1. Land set apart by the state for the contractor, as payment for the construction of the new capitol in Texas, to be conveyed to him from time to time in the progress of the work, is not subject to taxation under Rev. St. Tex. art. 4691, as land "held under a contract for the purchase thereof, belonging to this state."—*Taylor v. Robinson*, (Tex.) 245.

2. Nor did a lease executed after the original contract, under which the contractor took possession of all the land so set apart at a stipulated rent, until the title should vest in him by the completion of the building, give him such a holding as to make the land taxable.—*Id.*

3. Under Gen. Laws Tex. 1874, p. 214, requiring that "wharf privileges," as well as wharves, shall be taxed, such privileges are to be taxed as distinct from the real and personal property with which the business of a wharfinger is conducted.—*Galveston County v. Galveston Wharf Co.*, (Tex.) 537.

Exemptions.

4. Under Rev. St. Tex. art. 4573, § 1, exempting from taxation "all buildings used exclusively and owned by persons or associations of persons for school purposes," it is not necessary that the property, in order to be exempt, shall have been dedicated to school uses. It is sufficient if it is in fact so used.—*Red v. Morris*, (Tex.) 661.

5. The fact that the owners of the school property live on it a portion of each year, for the reason that, as principal, matron, and teacher, their constant presence is necessary to the conduct of the business, does not justify a finding that the property is not used exclusively for school purposes.—*Id.*

6. A tract of six acres of land, part of a larger body purchased by a university, and divided from the residue, on which the main buildings are erected, by streets only, on which two small buildings are erected and used by the primary departments, the residue of which tract is cultivated by the students, who receive pay for their labor in board and tuition, the products being consumed at the university, and on which it is intended, when funds are procured, to erect another large building, is not taxable under Const. Tenn. art. 2, § 28, and Acts Tenn. 1888, c. 105, § 1, 2, exempting from taxation all property belonging to educational institutions, and actually used for educational purposes. *SPONDRAS, J.*, dissenting.—*State v. Fisk University*, (Tenn.) 234.

Assessment.

7. Since, under Gen. Laws Tex. 1879, p. 44, before taxes assessed can become a lien on land, the tax-list must be presented to the board of equalization for approval and for the correction of any errors in the listing of property, an injunction will not be granted before such approval to restrain an assessor of a county from assessing lands alleged to be in another county.—*Chisholm v. Adams*, (Tex.) 336.

8. Gen. Laws Tex. 1879, pp. 24, 28, provide that assessors shall be furnished with a correct abstract of the surveys in their several counties; and that any lands which have been assessed in any county according to the abstract of land titles, and the taxes paid thereon, shall not be afterwards subject to the payment of taxes for the same period in a different county, although a subsequent survey shall show the said land to be in the latter county. *Held*, where one alleging his lands to be in a certain county sought to restrain the assessor of another county from listing them, on the ground that they would thereby be subject to double taxation, that the petition was insufficient which did not aver that the abstract showed the land to be in the former county.—*Id.*

9. Under Gen. St. Ky. c. 92, art. 5, § 25, requiring the sheriff to report persons failing to list their property, to be fined and taxed as delinquents reported by the assessor, it is proper to proceed against the delinquent by summons to show cause why the property should not be listed. The remedy is not confined to a fine and triple tax, for which judgment is required, by section 22, to be entered against a delinquent reported by the assessor. Such summons substantially charges the offense of failure to list as required.—*Spalding v. Commonwealth*, (Ky.) 430.

Levy.

10. Under Rev. St. Mo. 1879, §§ 6798, 6801, authorizing the county court to levy certain taxes without an order of the circuit court, and prohibiting it from levying any other tax except by such order, a tax not of the former class, levied without such order, is void.—*State v. Wabash, St. L. & P. Ry. Co.*, (Mo.) 454.

Remedies for erroneous taxation.

11. Taxes paid under the belief that the assessment and collection were legal, when in fact they were unauthorized by law, may be recovered back.—*City of Newport v. Ringo's Ex'rs*, (Ky.) 2.

12. Where property has been levied on to enforce payment of a void tax, injunction is the proper remedy.—*St. Louis & S. F. Ry. Co. v. Epperson*, (Mo.) 478.

13. The property of a corporation was duly assessed by justices of the peace, the assessment approved by the county commissioners' court, and the tax paid. After that assessment the county assessor made what purported to be a supplemental assessment, under directions from the comptroller, on property not assessed by the justices, but in fact the corporation owned no property which not been so assessed, and the assessor obtained the

amount of his assessment by fixing a value on the same property, and deducting therefrom the justices' valuation. The county commissioners' court approved his assessment. Afterwards the corporation applied to that court to be relieved from the assessment, which was refused, but a reduction was made. The tax on this reduced assessment was levied on the corporation's property, and paid to the collector under protest. *Held*, that whether or not the corporation had notice that the assessor's assessment would be and was made, was immaterial, the assessment being utterly void, and there being no redress from the board of equalization, whose jurisdiction extended only to questions of valuation.—Galveston County v. Galveston Gas Co., (Tex.) 583.

14. The corporation was not required to resort to proceedings, in the commissioners' court, by selection of arbiters to pass on the valuation. The question was not whether the assessor's valuation was too high, but whether the same property could be assessed twice.—*Id*.

15. A statement of the value of the property of a corporation, found on the tax-rolls of the city in which it was located, not made or shown to have been agreed to by the corporation, could not be received in evidence against it in a suit against the county to recover county and state taxes paid under protest.—*Id*.

16. One who pays an illegal tax under protest is entitled to recover from the county interest from date of payment.—*Id*.

Collection.

17. A tax-book not authenticated by the county clerk and the seal of his office, as required by statute, affords the collector no authority or protection for a levy.—St. Louis & S. F. Ry. Co. v. Epperson, (Mo.) 478.

18. Where a tax collector is fully informed, before making a levy, that the tax is void, and that it will not be paid, he cannot rely upon previous statements of the owner's attorney (who was unaware of the illegality of the tax, and was only authorized to pay the legal taxes) in relation thereto as an estoppel.—*Id*.

19. When a county places in the hands of an authorized person process directing him to collect and receive taxes for it, a collection made by such person is received by the county.—Galveston County v. Galveston Gas Co., (Tex.) 583.

Release.

20. Act Tenn. March 9, 1837, releasing druggists of a certain class from liability for taxes under certain revenue laws, is simply an exercise of the state's power to compromise or release its claims against debtors, and therefore it is no objection to the act that no provision is made for refunding the tax of such druggists of that class as had already paid.—Demoval v. Davidson County, (Tenn.) 358.

21. The legislature has the power to release county taxes; and, the release in the act of 1837 being of all liability, it extends to the liability incurred to counties as well as to the state.—*Id*.

Sale for delinquent taxes.

22. Under Rev. St. Mo. 1879, § 6637, declaring that in tax suits against non-resident owners the proceedings shall be as in civil actions affecting real or personal property, and section 8494, providing that in suits for the enforcement of liens, if it is alleged in the petition or affidavit that defendant is a non-resident, an order shall be made, directed to non-residents, etc., an affidavit at the end of the petition in a tax suit that affiant has good reason to believe and does believe that defendant is a non-resident is sufficient for an order for publication.—Allen v. Ray, (Mo.) 153.

23. It is not essential that an order of publication describe the land, and, if it were, a description of it as the "Sht" of a given section is sufficient; Rev. St. Mo. § 6857, providing that in papers in tax proceedings "S." may be used for "south," and that any description by the use of letters and characters as provided in that section, when so made that the land may be identified, is sufficient.—*Id*.

24. Rev. St. Mo. § 8494, provides that in actions against non-residents the court or clerk shall make an order directed to them, notifying them of the commencement of the suit. Section 8499 makes provision for cases where the names of the parties whose interests are sought to be passed upon are unknown. *Held*, that the names must be correctly given, and that a sale of the land of Daniel Troyer for taxes, in a proceeding against and notice to Daniel Tragar, was a nullity, though the latter name was taken from the record of Daniel Troyer's deed.—Troyer v. Wood, (Mo.) 42.

25. Under Rev. St. Mo. § 8494, providing that in proceedings to enforce a lien against the property of a non-resident he must be named in the order of publication, a tax sale of land owned by "M. B. Millen," under a publication of notice to "M. B. Miller," is void, the two names not being *idem sonans*; and it is immaterial, as against a grantee of "Millen," that the name of "Miller" appears on the tract-books of the county as owner of the land. Following Troyer v. Wood, ante, 42.—Chamberlain v. Blodgett, (Mo.) 44.

26. In ejectment against a purchaser at tax sale, the judgment for delinquent taxes is conclusive of the validity of the assessment, and the assessor's books are inadmissible to show its invalidity.—Allen v. Ray, (Mo.) 153.

27. A clerk's statement for delinquent taxes for two years, stating those of each year, and the items of each, separately, is valid, though a portion of the items for one of the years is excessive.—Morrison v. St. Louis, I. M. & S. Ry. Co., (Mo.) 148.

28. A variance between the amount of the judgment and the amount of taxes due as stated in the order for publication, caused by the addition of interest to the latter amount, if error, can be corrected only by motion against the judgment, and is not available collaterally.—Allen v. Ray, (Mo.) 153.

29. A purchaser at tax sale under proceedings against the patentee, whose patent is not of record in the county, and who has parted with his title, takes no title as against one claiming under a recorded conveyance

From the patentee's grantee, though the intermediate conveyance is not recorded.—*Id.*

Tax deed.

80. Although the form prescribed for tax deeds by 2 Wag. St. Mo. 1872, p. 1206, § 217, is prepared for a single tract, it is no objection to the admission of a tax deed in evidence that it contains 10 different tracts, in 10 different sections, in tabulated and abbreviated form, when no recital or statement prescribed by the form is omitted, and the abbreviations used are expressly authorized by statute. *Id.* p. 1212, § 240.—*Allen v. White*, (Mo.) 881.

Action to try tax-title—Limitation.

31. A tax deed was dated and acknowledged December 5, and recorded December 7, 1877, covering land sold October 4, 1875, under a judgment rendered July, 1875, for the taxes of 1874. Defendant purchased from the tax-deed holder in 1881, and his deed was recorded August 27, 1881; and April, 1882, defendant went into possession of the land, which was wild prairie land. Ejectment was brought August 2, 1884. Neither plaintiff, nor any other person except defendant, has been in actual possession. *Held*, that the action, not having been commenced within seven years after the record of the tax deed, was barred by the statute of limitations. 2 Wag. St. Mo. 1872, p. 1207, § 231.—*Id.*

32. The statute excepts from the limitation of three years, contained in 2 Wag. St. 1872, p. 1207, § 231, cases "where the taxes have been paid, or the land was not subject to taxation, or has been redeemed as provided by law." The plaintiff did not offer any evidence to bring himself within the exception, except records showing that the land was again sold, October 3, 1876, for the taxes of 1875, and was again purchased by the same purchaser. *Held* proper to exclude the evidence, as it had no tendency to bring plaintiff within any of the exceptions provided by the statute.—*Id.*

33. The tax law of March 30, 1872, under which the proceedings were had, was amended, and some of the sections repealed, by the revenue acts of April, 1877; but section 221, prescribing a three-years limitation, was neither amended nor repealed by said acts.—*Id.*

Tax-Collector.

See *Counties*, 10-13.

TELEGRAPH COMPANIES.

Delay in transmitting messages.

1. In an action for delay in delivering a telegram, of which the operator knew the importance, sent by a third person in plaintiff's presence, the latter paying the charges, an instruction that, if the telegram was delivered to defendant's agent as alleged, the jury should then find whether the person delivering it was acting for plaintiff and at his request, it was not erroneous, as falling to submit the question whether defendant had notice of the agency, as such question could not affect the rights of the parties, nor influence the conduct of defendant's agents.—*Western Union Tel. Co. v. Broesche*, (Tex.) 734.

2. Gross negligence of defendant is not essential to plaintiff's right of recovery for delay in delivering a telegram.—*Id.*

3. The fact that defendant's office, at the place to which the telegram was to be sent, was closed when the telegram was received for transmission, is no defense.—*Id.*

4. Plaintiffs sued defendant telegraph company for delay in transmitting the message, "You had better come and attend to your claim at once," sent to them by a bank which was holding notes for collection for plaintiffs against a failing debtor. *Held*, that the language of the message was sufficient, of itself, to indicate to the operator the urgency of the message, so as to bring such matter into the contemplation of the parties in sending the message.—*Western Union Tel. Co. v. Sheffield*, (Tex.) 753.

5. The necessity of speed and carefulness was sufficiently shown by the message, without the addition of the names of the debtors, the claims against whom demanded attention.—*Id.*

6. The blank on which was written a telegram received by defendant, addressed to a point on a connecting line, declared defendant to be the sender's agent, without liability to forward any message over the line of another company. In course of transmission over defendant's line, the address was changed from "Sam T." to "Wm. T." The agent of the connecting line at the place of delivery believed the telegram to be intended for Sam T., and, on being erroneously informed that he was then in another town, mailed it, addressed to him, at the latter place. The transmission to the place of destination having been prompt, *held*, that a delay in delivery was not caused by the change in the address, and that defendant was not liable for delay upon the line of the connecting company.—*Western Union Tel. Co. v. Munford*, (Tenn.) 818.

7. In an action by the addressee for delay in delivering the following message: "Willie died yesterday evening at six o'clock; will be buried at M., Sunday evening,"—damages cannot be recovered for injury to fraternal feelings from failure to hear of his brother's death in time to attend the funeral and condole with his sister, as the message contains nothing to put defendant on notice that the deceased was plaintiff's brother.—*Western Union Tel. Co. v. Brown*, (Tex.) 323.*

Limiting liability.

8. A stipulation on a telegraph blank limiting the company's liability, unless the message is repeated, is no defense to an action for delay in delivering an unrepeatable message.—*Western Union Tel. Co. v. Broesche*, (Tex.) 734.*

Damages.

9. The telegram announced the bringing of a corpse. The operator to whom the message was delivered testified that he knew plaintiff's wife was dead, and that the body was to be conveyed to another town, and that unless the message was sent that night the body would reach there first. The court having charged that plaintiff could only recover for the direct and natural result of the failure to transmit

and deliver the message, *held*, that an instruction that he could not recover for his failure to accomplish any purpose not shown by the face of the message, unless defendant had notice of such purpose, was properly refused.—*Id.*

10. Mental anguish and suffering are proper elements of damage for delay in delivering such a telegram.—*Id.**

11. A verdict of \$1,168 in such case will not be disturbed as excessive.—*Id.*

Telephone Companies.

Tariff of rates, regulation by city, see *Municipal Corporations*, 8.

TENANCY IN COMMON AND JOINT TENANCY.

Conveyance by co-tenant.

Where tenants in common of a tract of land have laid it off into town lots, one tenant may convey his interest in a single lot to a stranger.—*Shepherd v. Jernigan*, (Ark.) 785.

Tenant.

See *Landlord and Tenant*.

TENDER.

Sufficiency.

In an action to set aside an execution sale the tender of the purchase money in the pleadings, followed by a payment into court of the money bid at the sale, and paid by the purchaser, is a sufficient tender.—*Weaver v. Nugent*, (Tex.) 458.

Testimony.

See *Deposition; Evidence; Witness*.

Theft.

See *Larceny*.

THREATS AND THREATENING LETTERS.

Evidence of threats, see *Homicide*, 30, 31.

Indictment.

An indictment charging that the accused sent and delivered a letter to one W., threatening to accuse him of a crime, and that he did so send the letter with intent to extort money, but not alleging that he delivered the letter with such intent, does not charge the offense of delivering a letter with such purpose, under Pen. Code Tex. art. 813.—*Landa v. State*, (Tex.) 218.

Time.

Computation, period of limitation, see *Insurance*, 6.

Torts.

See *Death by Wrongful Act; False Imprisonment; Libel and Slander; Negligence; Trespass; Trover and Conversion*.

Measure of damages, see *Damages*, 10-15.

Towns.

See *Highways; Municipal Corporations; Schools and School-Districts*.

TRESPASS.

Injury to trespasser, see *Negligence*, 1.

Pleading.

1. An action cannot be sustained against a corporation on a mere allegation that a trespass was committed on plaintiff's close, and that his property was seized by the corporation, it not appearing how or by whom the trespass was committed.—*Perkins v. Maysville District Camp-Meeting Ass'n*, (Ky.) 659.

Evidence.

2. In an action against execution creditors for trespass in seizing plaintiff's goods under an execution against H. & Co., the defense was that the goods were not, in fact, plaintiff's, but were held by him for H. & Co. Defendants introduced a bill of sale of goods by H. & Co. to plaintiff, with evidence as to the consideration paid by plaintiff; it being contended that at least part of the goods seized were included in the bill of sale. The court charged that, if the goods were delivered pursuant to said bill of sale, it would vest the title in plaintiff, unless it was the intention of the parties that they should merely be put under the cover of a different name while they were to remain the property of H. & Co. *Held*, that the charge was not a charge upon the weight of the evidence.—*Willis v. Hudson*, (Tex.) 713.

3. The execution was issued on a judgment which had been satisfied and released by part payment through an assignee for the benefit of creditors, and was void. There was much evidence as to the judgment, and the debt on which it was founded. *Held*, that an instruction that, if the goods were plaintiff's, though they became so under circumstances rendering their ownership fraudulent as to H. & Co., the execution was no justification for their seizure, was correct, and applicable to the case; as from the evidence the jury might infer that the judgment was still in force, and the execution issued upon it a good defense.—*Id.*

4. Since defendants, after the discharge of their judgment, could not attack a fraudulent transfer of goods by H. & Co., it would be immaterial whether the goods were purchased with the money of H. & Co., if they were intended by the parties to belong to plaintiff.—*Id.*

5. In an action against execution creditors for trespass in seizing plaintiff's goods under an execution against a third person, the burden of proving the ownership, seizure, conversion, and value of the goods is on the plaintiff, as is

also that of proving any circumstances of oppression or malice attending the levy, as a basis for exemplary damages.—*Id.*

TRESPASS TO TRY TITLE.

Title to support.

1. On trial of an action for land patented by certificate issued to S. K., the defense contending, and there being evidence, that plaintiffs are heirs of another S. K., it is error to refuse to charge, for defendant, that the legal title was vested in the person to whom the certificate was in fact granted; that, if there were two of that name, the jury should determine to which one it was granted; and that, if it was to a person other than plaintiffs' ancestor, the legal title was not in them, and the verdict should be for defendant.—*Greening v. Keel*, (Tex.) 255.

2. Plaintiff can only recover on his superior title existing at the institution of the action; and unless a subsequent purchase of defendant's interest be alleged in an amended petition, evidence of it is inadmissible.—*Collins v. Ballow*, (Tex.) 248.

3. The plea of stale demand is not applicable, where plaintiff claims under legal title.—*Bullock v. Smith*, (Tex.) 687.

Pleading.

4. A petition giving the names and residences of the parties, alleging that plaintiff owns in her own and separate right, and was in possession at a date named of certain land, which is described by metes and bounds with sufficient certainty to identify it, and the county of which is given, and that plaintiff was unlawfully dispossessed by defendant, and praying judgment for the land, and for a writ of restoration, and for relief generally, and indorsed as required in trespass to try title, shows a good cause of action on general demurrer.—*Houston v. Calahan*, (Tex.) 87.

5. The defense of estoppel may be raised under a plea of not guilty.—*Dooley v. Montgomery*, (Tex.) 451.

Evidence.

6. Plaintiff, to obviate the apparent bar of the statute of limitations, offered in evidence a marshal's deed to the United States under a void execution, together with a judgment in favor of the United States against plaintiff's ancestor, on which the execution and sale were based, and a deed from the United States to plaintiff, in consideration of the payment of the judgment. *Held*, that its exclusion was not error, as it showed no title in the United States, nor any obstacle to a suit for the recovery of the land by plaintiff or his ancestor.—*Moody's Heirs v. Moeller*, (Tex.) 727.

7. Defendant agreed to waive the filing and notice by plaintiff of certified copies "as a predicate to show a common source of title." Rev. St. Tex. art. 4802, provides that plaintiff in such action may prove a common source of title by certified copies of deeds, etc., without requiring proof of the inability to produce the originals. *Held*, that a certified copy of a recorded patent, offered by plaintiff to show title in himself, there being no evidence of such common source, was not admissible, over

defendant's objection, without accounting for the absence of the original, as provided by Rev. St. art. 2257.—*Rio Grande & E. P. R. Co. v. Milmo Nat. Bank*, (Tex.) 563.

Improvements, etc.

8. One who obtains title under deeds referring to a recorded map is charged with notice of the city's right to streets and alleys marked on said map, and cannot recover for improvements made on said streets and alleys.—*Smith v. City of Navasota*, (Tex.) 414.

9. Defendant cannot assert a claim for improvements made in good faith, on the ground that he supposed the *locus in quo* was a vacancy between his survey and plaintiff's, when his own deed, under which plaintiff claims, calls for joining the two surveys, and the evidence shows that the surveyor intended to leave no vacancy, and where, if he had used reasonable caution, he would have discovered that there was none in fact.—*Brown v. Bedinger*, (Tex.) 90.

10. Evidence of improvements offered by defendant cannot be excluded because his plea does not state the grounds for alleging himself to be a possessor in good faith, such plea being otherwise sufficient, and not having been excepted to, though Rev. St. Tex. art. 4813, requires such grounds to be set out. The objection should be taken by special demurrer.—*Holstein v. Adams*, (Tex.) 560.

11. On the issue of improvements made in good faith, it was not error to permit defendants to show that they were ignorant of plaintiff's existence, and of her claim to the land.—*Polk v. Chaison*, (Tex.) 581.

12. Defendants may show that they paid the taxes on the land, and that plaintiff did not.—*Id.*

TRIAL.

See, also, *Continuance; Evidence; Exceptions, Bill of; Judgment; Jury; New Trial.*

In criminal cases, see *Criminal Law*, 13-17. Of case out of course, see *Practice in Civil Cases*, 1, 2.

Physical examination of plaintiff, see *Damages*, 28.

Conduct of trial.

1. After the jury had retired, the court was notified that the jury were convinced that it would be impossible to agree, and that the jury-room was so damp as to render it unhealthy to remain there. The court sent the sheriff for defendant's attorney, and on his report that he was unable to find him, the jury were brought into court, and, in the presence of an agent of defendant, and without other notice to the latter, were told that, as aids to the court, and to avoid a waste of time, their conference should be in a spirit of fair investigation with a view of reaching a verdict, but that no juror was expected to surrender his honest convictions merely for the sake of reaching an agreement. They were told to retire a short time longer, and it was plainly intimated that if they were then unable to agree, they would be discharged. The extent of the sheriff's search for defendant's counsel did not appear. *Held*, that the

communication to the jury, in the absence of both defendant and its counsel, was not reversible error.—*McPherson v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 846.

Reception of evidence.

2. After a witness had testified at great length, plaintiff offered his deposition, taken many years before in the case, and covering the same ground, together with the deeds offered in connection therewith. The record failed to show what deeds these were, and how they were offered, and how proved. *Held*, that the offer was too general, and was properly excluded.—*Dwyer v. Rippetoe*, (Tex.) 668.

3. The action of counsel in propounding improper questions, and afterwards withdrawing them, stating that he did so, not because he believed the evidence inadmissible, but because he did not wish to afford any ground for exception on review, is not cause for reversal.—*Missouri Pac. Ry. Co. v. Mitchell*, (Tex.) 411.

4. The circuit court in its discretion may allow defendant to give further testimony after the close of plaintiff's testimony in rebuttal.—*Taylor v. Cayce*, (Mo.) 832.

Objections to evidence.

5. When the exhibit or tabulated statement, this being the result of the examination made by the witness, an accountant, from which witness testified as a memorandum, was offered in evidence, it was objected to as incompetent, etc. *Held*, that the objection was worthless, because not specific.—*Masonic Mut. Ben. Soc. v. Lackland*, (Mo.) 895.

6. By putting in his own evidence defendant waives an exception to a refusal of an instruction in the nature of a demurrer to plaintiff's evidence. Following *Bowen v. Railway Co.*, 8 S. W. Rep. 230; *Guenther v. Railway Co.*, Id. 871.—*McPherson v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 846.

Arguments of counsel.

7. While it is the duty of counsel to present the whole case, as he relies upon it, in his opening argument, it is not ground for reversal that the court permitted him in closing to call its attention to, and request an instruction upon, a feature of the case which he had not before discussed.—*Wills Point Bank v. Bates*, (Tex.) 848.

Instructions.

8. An instruction that a sale would be void if the purchaser knew of the fraudulent purpose of the insolvent, etc., is properly refused, as it assumes the existence of a fraudulent intent.—*State v. Mason*, (Mo.) 179.

9. An instruction is not liable to the objection that it assumes the existence of a certain fact, where the court by another instruction states that that fact must be proved.—*La Riviere v. La Riviere*, (Mo.) 840.

10. Under Const. Ark. art. 7, § 28, requiring the judge to reduce his charge to writing at the request of either party, it is error for the court to make verbal explanations of the written charge.—*Mazzia v. State*, (Ark.) 257.

11. Argumentative instructions, enumerat-

ing parts of the evidence, are properly refused, as giving undue prominence to those portions of the evidence.—*Equitable Mortgage Co. v. Norton*, (Tex.) 301.

12. In an action against a railroad company for injuries to an employe alleged to have been caused by a defect in a hand-car and in a rail, a charge that the promise of the section-master to repair the rail some days before, and the fact that he had sent the car to the shop for repairs, and had again put it in use, might be considered on the question of contributory negligence, is not a charge on the weight of evidence, where the uncontradicted evidence shows the facts recited in it.—*Missouri Pac. Ry. Co. v. James*, (Tex.) 332.

13. Where the jury was charged as to the effect of irregularities at an execution sale, but not as to what irregularities are, the charge, while defective for want of fullness, is not reversible error where the attention of the court is not called to the defect.—*Weaver v. Nugent*, (Tex.) 458.

14. The court should charge upon decisive rules of law called to its attention by special charges, though they are not technically correct in every particular.—*Willis v. Smith*, (Tex.) 683.

15. Where the jury are instructed that their verdict, if against some, but not all, of several defendants, should state the defendants against and in favor of whom they find, a verdict stated to be in favor of the plaintiff against a defendant named is sufficient, and upon it the other defendants are properly discharged with their costs.—*Gulf C. & S. F. Ry. Co. v. James*, (Tex.) 744.

Harmless error.

16. An instruction that if the jury, after considering the other instructions given, decide to find for plaintiff, they shall assess the damages, etc., though faulty as omitting to charge them to consider the evidence with the instructions, is not reversible error.—*McPherson v. St. Louis, I. M. & S. Ry. Co.*, (Mo.) 846.

17. Where plaintiff claims under a deed of 200 acres on a certain creek, to include improvements as the purchaser may request, and some words are evidently omitted in the deed, and the evidence shows several improvements on the creek, but does not show that the land intended to be conveyed is embraced in the field-notes of the land claimed in the petition, error in charging that the evidence shows that the land is not included in such field-notes is harmless.—*Bullock v. Smith*, (Tex.) 637.

Directing verdict.

18. Where a verdict is properly directed, a refusal to charge as requested is not error.—*Lewis v. Simon*, (Tex.) 554.

19. In an action against a railway company for negligence, whereby plaintiff's intestate was killed, when contributory negligence is not pleaded, and plaintiff's testimony does not disclose such negligence, but shows that defendant's train was, at the time of the accident, violating an ordinance limiting the rate of speed of trains and requiring signals to be given, the jury should not be instructed peremptorily to find for defendant.—*Schlereth v. Missouri Pac. Ry. Co.*, (Mo.) 66.*

Verdict.

20. In effectment, the jury having rendered a verdict for "the amount or quantity of ground claimed," it is proper to direct plaintiff's attorney to formulate the verdict, setting out the land by metes and bounds; the same being signed by the foreman, read to the jury, and declared by them to be their verdict.—*Goebel v. Pugh*, (Ky.) 1.

Trial by court without jury.

21. It is within the discretion of the court, sitting without a jury, to receive evidence objected to, and observe its ruling on such objection. While a party has a right to an announcement of the ruling before finding on the whole case, he should make known his desire in that regard specifically, and an objection to the reception of evidence subject to objection is not sufficient.—*Taylor v. Cayce*, (Mo.) 882.

22. The admission of merely irrelevant evidence on a trial by the court is not ground for reversal.—*Id.*

23. A bill of exceptions stating that the court heard all the foregoing evidence, both that objected to and that not objected to, postponing a final ruling until the conclusion of the trial, does not show that the action of the court is prejudicial, where the bill also shows specific rulings on the admissibility of testimony objected to, and exceptions at the time.—*Id.*

TROVER AND CONVERSION.**Parties.**

In an action by a chattel mortgagee against one who has converted a portion of the mortgaged property, the mortgagor need not be made a party.—*Boydston v. Morris*, (Tex.) 331.

Trust Companies.

Bond for performance of duties as guardian, see *Guardian and Ward*.

TRUSTS.

Resulting, see, also, *Gifts*, 2; *Marriage*, 1.

Resulting.

1. Where a conveyance of land is made to a wife at the husband's instance, the presumption of a resulting trust in his favor is rebutted, though he furnished the purchase money.—*Gilliland v. Gilliland*, (Mo.) 189.

2. A creditor, on taking a conveyance from his debtor, agreed to reconvey if the debt should be paid, and the debtor having died without payment, conveyed to defendant, who was then the debtor's lessee of the land, for a sum considerably exceeding the amount of the debt, making no mention of his promise to reconvey. Interested witnesses testified that the debtor and defendant stated that the debtor had leased the land to defendant on his promise to pay the debt. Defendant's claim of title, though known to complainants, the debtor's heirs, was unquestioned for 18 years. *Held* not sufficient evidence to estab-

lish a resulting trust.—*Adams v. Burns*, (Mo.) 26.

Constructive.

3. In trespass to try title, defendant claimed under a sale, on foreclosure of a vendor's lien. Plaintiff acquired title by mesne conveyances, pending the foreclosure of the lien, from the original vendee. Defendant acquired title in the same manner, by different conveyances, to another part of the tract included in the original conveyance, and covered by the lien. *Held*, that there was no such relation of trust, in the absence of agreement, existing between plaintiff and defendant, as would prevent defendant from acquiring an interest in the outstanding incumbrance, and enforcing it against plaintiff.—*Dwyer v. Rippetoe*, (Tex.) 668.

4. Plaintiffs, foreign bankers, having in their possession 2,043.95 francs, worth \$389.32, belonging to defendant, sent him, by mistake, a check for \$1,073.06, which he collected, believing the amount to be the American equivalent of the francs, and mingled it with \$375.06 of his own. After spending some portion of his money in traveling, he bought a homestead in Texas, in which he invested \$750 of the remainder, and his wife \$300 of her separate funds. *Held*, that plaintiffs, having failed to show that the money invested in the homestead was the identical money which they had by mistake sent defendant in excess of the sum he was entitled to, were not entitled to a lien for such excess. Reversing, on rehearing, 9 S. W. Rep. 879.—*Zundell v. Gess*, (Tex.) 693.

5. Plaintiff's land being for sale under a deed of trust, he took what money he could raise to defendant, a stranger, and requested him to advance the additional sum necessary and to buy the property for plaintiff. He bought it, but refused to allow plaintiff to redeem. Defendant testified that, learning that the transaction would be a mortgage, he refused to enter into it, whereupon plaintiff asked him to buy it for himself, which he did. On the day following the sale an arrangement was made under which defendant advanced plaintiff money to make his crop with, and he also gave him a receipt showing that the money given him to pay on the property was held as a deposit. He also testified that plaintiff withdrew the identical money shortly afterwards, and produced receipts therefor. Defendant paid a small amount more than the debt for the property, and the excess he asserted was credited to plaintiff, who claimed it. *Held* to justify a finding that defendant held the property as plaintiff's trustee.—*Dupree v. Estelle*, (Tex.) 93.

Sale of trust land.

6. Gen. St. Ky. c. 113, § 23, provides that a purchaser of land sold under a trust is not bound to look to the investment of the purchase money, "unless so expressly required by the conveyance or devise." A testator devised lands to his son for life, remainder to his children, and gave the son power to sell the lands and invest the proceeds in other land, "to pass in the same way," and provided that "the purchaser must see to the investment of the purchase money, or the lands

* * * must be held responsible. *Held*, that where a chancellor, on application by a purchaser of such land from the son, orders a conveyance of the land to the purchaser, and the investment of the proceeds in other lands, he should retain a lien on the land sold, until the investment is made.—*Magowan v. McCormick*, (Ky.) 683.

Compensation of trustee.

7. S. was trustee of a fund of which his daughter and her children were to receive the income, and served from 1874 until 1887, when he died. In 1882 he made his first settlement, and was allowed commissions for investments. From that time he paid the income quarterly, charging his grandchildren for his services, but making no charge against his daughter. He repeatedly stated that he would charge her at some future time, but not while her necessities required the whole income. In 1886 he talked of making a settlement, including such charges, but the absence of her attorney prevented it, and he continued until his death to pay her the income without deductions. The fund, though large, did not require much time or expense. *Held*, that it was the intention of S. to donate his services, and that his administrator could not recover for them.—*Ten Broeck v. Fidelity Trust & Safety Vault Co.*, (Ky.) 738.

Cestui que trust—Creditors.

8. An income, given by the will of the wife to the husband on condition of his executing a release of his estate by the curtesy, which he executes accordingly, is subject to the claims of the husband's creditors, notwithstanding the provisions of the will to the contrary. *Distinguishing Lampert v. Haydel*, 9 S. W. Rep. 780.—*Bank of Commerce v. Chambers*, (Mo.) 88.

TURNPIKES AND TOLL-ROADS.

Liability for repairs.

1. Where part of the road of a turnpike company lies within a town, and it is the duty of the company to keep its road in repair, and the toll it is authorized to collect is fixed in the ratio of the length of the road, and the full amount of the toll authorized by the charter is collected, and the town, in performance of its duty to keep its streets in order, repairs the street upon which the turnpike road is situated, it can recover from the company the amount expended, not in excess of that necessary to put the road in the condition required by the company's charter.—*Versailles & N. Turnpike Co. v. Town of Versailles*, (Ky.) 280.

Defective road—Evidence.

2. In an action for injuries sustained by plaintiff on account of the balking of his horse while driving on defendant's turnpike, where evidence is given that before the accident the horse had been unmanageable or vicious, evidence is also admissible to show such disposition after the accident; any objection to such evidence going merely to its weight.—*Lebanon & S. Turnpike Co. v. Hearn*, (Tenn.) 510.

Undue Influence.

See *Wills*, 1.

United States Circuit Court.

Chancery jurisdiction, see *Courts*, 1.

USE AND OCCUPATION.

Damages.

When one occupies the land of another by mistake, the measure of damages is what the owner could have leased it for had the other not occupied it, and the owner cannot, by notifying the trespasser that he demands a certain rent, and sending him monthly bills at that rate, raise an implied contract on the trespasser's part to pay such rate.—*Galveston Wharf Co. v. Gulf, C. & S. F. Ry. Co.*, (Tex.) 587.

Usury.

See *Building and Loan Associations*.

Variance.

Pleading and proof, see *Pleading*, 7, 8.

VENDOR AND VENDEE.

See, also, *Deed; Frauds, Statute of; Specific Performance*.

Of chattels, see *Sale*.

Rescission of contract, see *Landlord and Tenant*.

The contract—Evidence.

1. Defendant claimed under an oral contract made between his grantor and an agent of the owner, by which defendant's grantor was to have the land by building a shop thereon, and carrying on his trade there for three years. The agent had authority to make contracts subject to the owner's approval. One W. secured an adjacent lot in the same manner, his deed reciting a contract to carry on his trade for five years, though he testified that the contract was for three years. W. and defendant's grantor erected a shop by their joint labor, partly on each lot, W. furnishing the lumber and owning the shop. Defendant's grantor only worked a short time, when he abandoned the lot, and engaged in other business, his reason being that he had learned that he could get a deed only by working at his trade for five years. *Held*, that the evidence was insufficient to support a verdict for defendant.—*Collins v. Ballow*, (Tex.) 248.

—Rescission.

2. Grantor conveyed by warranty deed, receiving the grantee's notes secured by mortgage for the consideration. The deed and mortgage were recorded, but the grantee did not take possession, and paid no taxes, and soon after left the state, and was absent until after the time for payment of the notes had expired. *Held*, that the contract was executory, and could be rescinded by the gran-

tor without notice, on failure to pay the notes. —Kennedy v. Embry, (Tex.) 88.

Action for price—Failure of title.

3. Where a vendee of land, who has since conveyed such title as he received, is sued for damages for failure to deliver goods agreed on as the purchase price, he can defend on the ground of failure of title, if at all, only by showing a complete failure of title in his vendors, or a failure of such title as they represented that they had at the time of sale. —Fisher v. Dow, (Tex.) 455.

Vendor's lien.

4. Plaintiff conveyed land to defendant company for right of way and depot purposes, and took the notes of citizens of the county through which the railroad ran for the purchase price, payable when the right of way and depot grounds should be laid off and established. The right of way and depot were established by defendant, but the purchase price was not paid by the citizens. *Held*, that plaintiff had no lien on the land for the purchase money, as it was intended that the defendant should take the land unincumbered by any lien, and that plaintiff would rely on the notes for the price. —Springfield & M. R. Co. v. Stewart, (Ark.) 767.

5. In an action on a note given for the price of land, the complainant averred that the vendor's lien on a portion of the land had been relinquished, and only asked for a foreclosure of the lien as to the remainder, and there was nothing in the petition to identify the portion upon which foreclosure was sought. *Held*, that it was error to enter judgment for the enforcement of a lien as to the whole or any portion of the land. —Daniel v. Watson, (Tex.) 737.

6. Plaintiff, who owned land on which was a vendor's lien, sold part to defendant, who paid part, and agreed to pay two-thirds of the original price, but failed to meet one of the notes when due, and plaintiff paid it; defendant agreeing to repay his share. By mutual agreement plaintiff's vendor conveyed to each his respective portion, taking from each new notes for the portions of the unpaid price each had agreed to pay. *Held*, that plaintiff had a lien on defendant's tract for the two-thirds of the note so paid. —Henson v. Reed, (Tex.) 522.

7. E. and W., partners, purchased land from the six owners, the deed reciting that no part of the price was paid, and gave their six notes for the price, each secured by a lien upon an undivided sixth. E. gave a mortgage, which purported to "convey" the tract, and which stated that his interest was the undivided half, and that the mortgage was intended only to cover that. E. afterwards purchased W.'s interest. The vendors' liens were afterwards foreclosed upon the undivided five-sixths; the decree reciting that the note for the other sixth had been paid by E., and the vendor's lien thereon discharged. *Held*, that the release of the one-sixth inured to the benefit of the mortgagee, in the absence of evidence that the payment was made before E.'s purchase from W. —Willis v. Smith, (Tex.) 683.

8. The purchaser at execution sale against the executors of E., with notice of the decrees foreclosing the liens and mortgage, acquired

the right to redeem from the decrees, but lost his right by failure to exercise it before the decrees were executed. —Id.

VENUE IN CIVIL CASES.

Action on insurance policy, see *Insurance*, 7.

Actions involving land.

1. Rev. St. Tex. art. 1198, subd. 15, providing that suit to enjoin the execution of a judgment shall be brought in the county in which such judgment was rendered, and article 2580, providing that writs of injunction to stay execution on a judgment shall be returnable to the court where such judgment was rendered, apply to suits going to the validity of the judgment, and not to suits to prevent the sale of property on which the judgment, however valid, is no lien. —Van Ratcliff v. Call, (Tex.) 573.

2. Under Civil Code Ky. § 62, providing that an action for the recovery of realty, or an estate or interest in it, or for its sale under an incumbrance or charge, must be brought in the county in which the subject of the action or some part of it is situated, the circuit court of one county has jurisdiction of an action to subject to the claims of creditors land in that and another county alleged to have been fraudulently conveyed, the legal title to which, in whole or in part, is in the same person. —Treadway v. Turner, (Ky.) 816.

3. Such court is not deprived of jurisdiction as to the land in the other county because it fails to subject the land in its county to the payment of the debt; the reason of the failure being that such land is subject to *bona fide* liens to the extent of its value. —Id.

4. Carroll's Code Ky. § 66, provides that a suit for partition must be instituted in the jurisdiction in which the ancestor lived at his death. Bullitt's Code, § 62, provides that actions concerning real property must be brought in the county in which the subject of the action, or some part thereof, is situated. *Held*, that an action by guardians for sale of land descending to their wards and the widow, for division of the proceeds and reinvestment, is properly brought in the county in which the father, from whom the land descended, died, and in which only a portion of it is situated. —Phalan v. Louisville Safety Vault & Trust Co., (Ky.) 10.

Objections.

5. A plea in abatement, because defendant is not sued in the county in which he resides, cannot be sustained, unless it negatives the existence of any of the exceptions which, under the statute, would authorize jurisdiction where the suit is brought. —San Antonio & A. P. Ry. Co. v. Cockvill, (Tex.) 702.

6. In an action for trespass in seizing plaintiff's goods on execution against a third person, the petition was originally filed against the execution plaintiffs and the sheriff jointly, and alleged that the trespass was committed in the county in which the sheriff resided and the action was brought. *Held*, that an objection by the other defendants that they should have been sued in the county of their resi-

dence is not well taken.—*Willis v. Hudson*, (Tex.) 718.

7. Such an objection, not made until after a plea to the merits, a trial, a judgment, and a reversal thereof in the supreme court, a change of venue, and a dismissal as to the sheriff, comes too late.—*Id.*

Venue in Criminal Cases.

See *Criminal Law*, 6, 7.

Verdict.

See *Trial*, 20.

Verification.

Of plea of *non est factum*, see *Pleading*, 3-5.

Voters.

See *Elections and Voters*.

Warranty.

General, by life-tenant, see *Covenants*.

WATERS AND WATER-COURSES.

See, also, *Navigable Waters*.

License to erect dam, revocation, see *Licenses*.

Water-rights and easements.

A deed to land situated on a creek contained the following clause: "And I hereby convey unto said B., his heirs and assigns, all the rights and privileges of using the waters of said McAnnelly's creek, which I have heretofore possessed, and which, until now, I have reserved in all conveyances of land on said creek, for the purpose of erecting machinery." By a prior conveyance of land on the creek the grantor had reserved the exclusive "control of the water, and the privilege of banking on said land conveyed in said creek;" and by a subsequent conveyance of all his remaining land to a third person, he reserved "the privilege of banking water up the said creek, for the purpose of erecting machinery." *Held*, that the deed first mentioned conveyed the right and privilege of using and controlling the waters of the creek for the purpose of erecting machinery, and also the right to use the waters by erecting a dam across the creek.—*Risien v. Brown*, (Tex.) 661.

WILLS.

See, also, *Executors and Administrators*.

Devise in lieu of dower, see *Dower*, 2-6.

Undue influence.

1. Testatrix devised the bulk of her estate to three of her aunts and uncles, excluding others of the same degree of kindred. There was evidence that she disliked one of the devisees and one of the relatives not provided for. On trial of the issues of mental capacity

and undue influence the court charged that, if testatrix had not sufficient mind when she signed the will, or if her mind was not "in a proper state" to dispose of her estate with reason and according to a settled purpose of her own, she was incompetent. *Held* error, as the phrase "proper state of mind" might, under the facts of the case, mislead the jury into the belief that prejudice towards her relatives was in itself sufficient to invalidate the will.—*Gordon v. Morrow*, (Ky.) 373.

Revocation.

2. A holographic will, revoked under Gen. St. Ky. c. 113, § 9, by the subsequent marriage of testatrix, is not revived by its recognition and preservation by testatrix during coverture, though with her husband's consent, as by section 11 such a will can be revived only by re-execution thereof, which must be in the same manner as is essential to its original execution.—*Stewart v. Mulholland*, (Ky.) 125.

3. Such a will, made two days before the marriage of testatrix, pursuant to an antenuptial contract reserving to her the right of testamentary disposition, and delivered to a third party on the day of the marriage for safe keeping, with the husband's consent, is not revoked by her marriage, though the written contract was not executed until the day of the marriage, as the execution of the will and of the contract is virtually one transaction.—*Id.**

4. Rev. St. Tex. art. 4861, prescribes that a will may be revoked by a subsequent will, codicil, or declaration in writing executed with like formalities, or by the testator destroying, canceling, or obliterating the same, or causing it to be done in his presence. *Held*, that the cancellation of a will expressly revoking all former wills does not revive a former will.—*Hawes v. Nicholas*, (Tex.) 558.

Probate and contest.

5. On the probate of a will the issue was whether it was signed by two witnesses in testator's presence. One witness testified that he wrote the will, saw testator sign it, and signed it himself at testator's request, and in his presence, and informed him that another witness was necessary, and that, when he first saw the will after testator's death, the name of the second witness was not thereon, but was placed there while the will was out of his possession; but this was contradicted by the person who received the will from him. Such witness was shown to have poor memory. The second was out of the jurisdiction. Another person testified that he saw the second subscribing witness sign a paper similar in appearance, which testator said was his will, in the presence and at the request of the latter. *Held* error to refuse probate.—*Hopf v. State*, (Tex.) 589.

6. While the state cannot contest probate because entitled to the property by escheat, it is immaterial that it is allowed to do so without objection. It is unimportant that the facts are elicited by a person not entitled to contest.—*Id.*

7. A will probated in another state, affecting land in Missouri, and not recorded there, as provided by Rev. St. Mo. §§ 3993, 3994, is not constructive notice of its provisions affecting such land.—*Keith v. Johnson*, (Mo.) 597.

8. The probate of a will in one state, devising land in another, is not binding on the courts of the latter state as an adjudication of the validity or effect of such devise, under the federal provisions requiring such faith and credit to be given to the judicial proceedings of the courts of other states as they have in their own state, inasmuch as the court of the former state had no jurisdiction to make such adjudication, if it had attempted to do so.—*Id.*

Construction.

9. A will gave testator's sister a life-estate, and at her death "her daughters who may be unmarried" were to have the land. If there should be no unmarried daughters at her death, then the lands were to be "equally divided between all her daughters." The sister died, leaving three married daughters, and none unmarried. *Held*, that the three married daughters took the land to the exclusion of the heirs of a married daughter who had died before her mother.—*Robertson v. Garrett*, (Tex.) 96.

10. Testator devised land to his wife for life, "and after her death unto the heirs of my daughter, E., and the heirs of my son, H., * * * which said heirs shall take * * * as purchasers from me, and not by inheritance of or descent from my said wife." *Held*, that the heirs of E. and H. took *per stirpes*, and not *per capita*, especially as in other clauses similar devises were made to E. for life, and then to her heirs, and to H. for life, and then to his heirs; thereby showing that the testator used the terms "heirs of E." and "heirs of H.," respectively, as referring to a class.—*Preston v. Brant*, (Mo.) 78.

Nature of estate devised.

11. The estate created in favor of the heirs of E. and H. was a contingent remainder, which became vested upon the death of E. and H. during the life of the life-tenant.—*Id.**

12. Testator directed an annuity of \$500 to be paid to D. until July 1, 1882, and if she should die before that time it should be paid to M., if unmarried, until her marriage. If at that time D. should be living, \$5,000 was to be invested, and the income paid to her during widowhood, but on her marriage the fund was to be retained by the executors until her death, when \$3,000 of it was to be invested in land for M.'s use for life, without power to sell or incumber. At her death it was to descend to her heirs. D. and M., as well as the other principal legatees, were relatives of testator, and under the will July 1, 1882, was fixed for the settlement of the estate, which was all disposed of by the will. M. survived testator, and died before July 1, 1882, leaving a husband and one child. D. also survived testator, and died in 1885. *Held*, that the devise to M. vested in her at the death of testator, though its enjoyment was postponed until the death of D.—*Wedekind v. Hallenberg*, (Ky.) 268.

13. There being nothing in the will indicating that the testator used the word "heirs" in any other sense than as a technical word of inheritance, which view is confirmed by another clause, in which the word "children" was used, M. took an estate in fee, subject only to a restriction for life on her right of

alienation, and on her death it passed to her daughter as heir, and not as devisee, such case not falling within Gen. St. Ky. c. 68, art. 1, § 10, providing that a grant or devise, to a person for life, and after his death to his heirs, shall pass only an estate for life to him, and remainder to his heirs.—*Id.*

14. A testator devised to his daughter A. land in C. and in S., stating: "The said land is allotted to her, and valued at * * *". The said land is willed to my daughter and her bodily heirs," except the tract in S., "which she is to have the right to dispose of as she wishes." By another clause lands were devised to another daughter and "her bodily heirs," except certain tracts, which she was to sell, if she wished. *Held*, that A. took only a life-estate in the land in C.—*Mitchell v. Simpson*, (Ky.) 372.

WITNESS.

Absence, as ground for new trial, see *Criminal Law*, 37; *New Trial*, 5.

—continuance, see *Continuance*, 1-4; *Criminal Law*, 8-10.

Competency of accused on preliminary examination, see *Criminal Law*, 1.

Evidence of deceased witness at former trial, see *Evidence*, 15.

Competency.

1. A principal offender in the same crime with the defendant on trial, although indicted separately, is not a competent witness, unless he has been acquitted. Code Crim. Proc. Tex. art. 731.—*Woods v. State*, (Tex.) 108.

2. Under the Texas statutes, the offense of willfully driving stock from its accustomed range, with intent to defraud, is a felony; and where a defendant is found guilty, and fined for such offense, and takes no appeal, he is a convicted felon, and incompetent, although no formal sentence has been passed upon him. *HUNT, J.*, dissenting.—*Id.*

Privileged communications.

3. A letter by one partner to another regarding the nature and purpose of the firm's purchase from an insolvent is not a privileged communication.—*Wills Point Bank v. Bates*, (Tex.) 343.

Transactions with deceased persons.

4. The president and cashier borrowed money of their bank and loaned the same to a failing debtor of the bank and of the president. The debtor gave a mortgage, the property being delivered to the mortgagees, with authority to sell, etc. The president controlled the property, and the proceeds were applied, first, to the payment of the loan to him and the cashier. *Held*, that Civil Code Ky. § 606, subsec. 2, providing that no person shall testify for himself concerning any verbal statement, etc., of a decedent, did not prohibit the cashier, in an action between the bank and the president's executor, from testifying to an agreement by the president to pay the balance due by the debtor to the bank, where no action has been brought on the cashier's bond for any misconduct in the matter, and he was not shown to be liable to the bank.—*Apperson's Ex'x v. Exchange Bank*, (Ky.) 801.

5. A partnership purchased land, each partner taking an undivided interest, paid for out of his own funds. The property was used for the partnership business, and after it ceased each used his undivided interest for his own benefit, and mortgaged it to secure individual liabilities. In an action by the administrator of the deceased partner to enforce an alleged lien for the balance due a deceased partner against a mortgagee of the survivor's interest for the latter's individual debt, the survivor is a competent witness in reference to the *status* of the real estate, as it is not properly testimony in his own behalf, his personal liability for the balance being neither increased nor diminished thereby; the contest, as to the *status* of the property, being between plaintiff and the survivor's mortgagee.—*Wilhite's Adm'r v. Boulware*, (Ky.) 639.

Impeachment.

6. Where defendant has, on cross-examination of plaintiff, read certain parts of her deposition taken by him, for the purpose of impeachment, plaintiff may read the whole to the jury.—*Korte v. Hoffman*, (Mo.) 390.

7. A witness may be impeached by showing statements made by him out of court, inconsistent with those made in court, after laying the proper foundation therefor.—*Leahey v. Cass Ave. & F. G. Ry. Co.*, (Mo.) 58.

8. On trial of an issue as to the existence of a deed alleged to have been made to a married woman, the inventory of the grantor's estate, filed and sworn to by the grantee and her hus-

band, as administrators of the grantor, is not admissible to impeach the husband's testimony, where he has not been examined on the subject.—*Clapp v. Engledow*, (Tex.) 423.

9. Under *Manuf. Dig. Ark. § 2903*, allowing a witness to be impeached by evidence of his general reputation for truth or immorality, an inquiry as to whether one, from his knowledge of his "reputation for truth and veracity, morality and chastity," would believe him on oath, is not permissible.—*Cline v. State*, (Ark.) 235.

10. A conviction will not be set aside on the ground that evidence was introduced that a state's witness bore a good reputation in the community where he resided 25 or 30 years before the trial, the admission of such testimony being in the discretion of the court.—*Id.*

11. Where the cross-examination of impeaching witnesses shows that they know nothing of the reputation of the witness for truth and veracity in the neighborhood in which he lives, their testimony should be excluded.—*Clapp v. Engledow*, (Tex.) 423.

Words and Phrases.

"Night," see *Burglary*.

Writs.

See *Attachment; Error, Writ of; Execution; Injunction; Mandamus; Prohibition, Writ of.*

TABLES OF SOUTHWESTERN CASES

IN

STATE REPORTS.

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²Opinion filed May 23, 1883, before the publication of the SOUTHWESTERN REPORTER was commenced.

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⁵Opinion filed June 7, 1884, before the publication of the SOUTHWESTERN REPORTER was commenced.

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